UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

LARISSA WHITE,

Plaintiff,

v.

DON TAYLOR, City of Turner Police Chief by and through the CITY OF TURNER POLICE DEPARTMENT, a political subdivision of TURNER, OREGON,

Defendants.

Case No. 6:18-cv-00550-MK

FINDINGS AND RECOMMENDATION

KASUBHAI, United States Magistrate Judge:

Plaintiff Larissa White filed this action against Defendants City of Turner Police Chief Don Taylor ("Defendant Taylor") and the City of Turner (the "City"; collectively "Defendants"), alleging claims under 42 U.S.C. § 1983 for violations of Plaintiff's free speech rights under the First and Fourteenth Amendments of the United States Constitution, and under Oregon Revised Statute ("ORS") § 659A.203(1)(b)(A) and (B) for violations of state whistleblower protections.

See Compl., ECF No. 1. Currently before the Court are Defendants' Motions for Summary Judgement as to both of Plaintiff's claims. ECF Nos. 77, 79. For the reasons that follow, the City's motion should be GRANTED in part and DENIED in part; Defendant Taylor's motion should be DENIED.

BACKGROUND

Plaintiff began working as a reservist for the Turner Police Department (the "Department") in 2012. Kramer Decl. Ex. 1 ("White Dep.") 15:17–20, ECF No. 78-1.[1] In October 2015, Plaintiff began working full-time as a police officer. *Id.* at 16:12–20.

Chief of Police Defendant Don Taylor and Plaintiff served as the only two full-time officers within the department. Compl. ¶¶ 15–16, ECF No. 1. Because the department did not pay overtime, officers had a practice of "flexing" their ten-hour shifts. Lenon Decl., Ex. 1 ("Chris White Dep.") 64:8–20, ECF No. 88-1. For example, an employee who stayed two hours late on a shift would come to work two hours late or leave two hours early the following day. *Id.* In other words, if an officer worked twelve hours on Friday, she would work eight hours on Saturday.

On January 28, 2016, Plaintiff emailed City Administrator David Sawyer expressing concern that the Department's entrance doors, which were shared with other City agencies, were left unlocked during the day. Campbell Decl., Ex. 1, ECF No. 80-1. Plaintiff stated that the unlocked doors posed a security threat to the Department and suggested that an electronic entry system would be more secure than the deadbolt lock. *Id.*

[1] Because the motions before the court are Defendants' motions for summary judgment, the Court construes the evidence in the light most favorable to Plaintiff. *JL Beverage Co., LLC v. Jim Bean Brands Co.*, 828 F.3d 1098, 1105 (9th Cir. 2016).

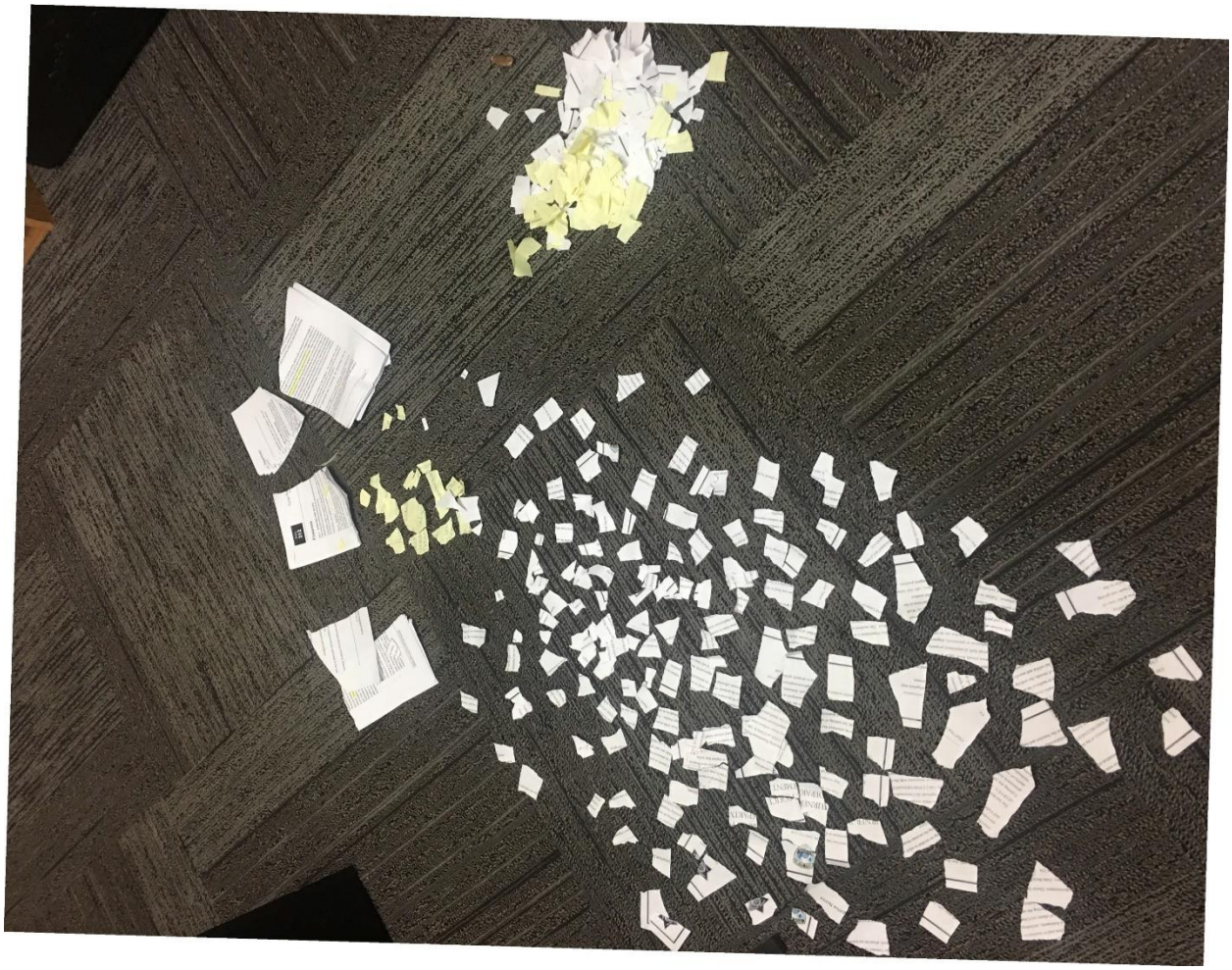
Because the doors to the Department continued to remain unlocked during business hours, Plaintiff sent an e-mail on July 14, 2016, to all other city employees who worked in the building and urged them to lock the deadbolt during the day. Campbell Decl., Ex. 2, ECF No. 80-2. Plaintiff wrote that doing so would protect "confidential files, reports, ammunition, evidence, equipment, and other important documents in our offices" from access "by just anyone coming in through the back door." *Id.* Plaintiff also mentioned her prior request for an electronic entry system. *Id.* Defendant Taylor responded to Plaintiff, informing her that emailing the other city employees was inappropriate and that City Administrator Sawyer was upset by her doing so. *Id.*

On January 16, 2017, Plaintiff emailed Defendant Taylor regarding his police vehicle. Campbell Decl., Ex. 3, ECF No. 80-3. She stated that she spent at least an hour cleaning it and was concerned that it appeared "unprofessional and unsanitary to be working out of that [vehicle]." *Id.* at 4. Plaintiff attached photos of the dirty interior and the soiled cleaning wipes, and she informed Defendant Taylor that the trunk gun rack was not functioning properly. *Id.* at 1–3. Defendant Taylor responded by briefly thanking her for wiping the vehicle down. *Id.* at 1.

In January 2017, Plaintiff began keeping a written log of policy violations she observed at the Department, which she planned to discuss with City Administrator Sawyer in an exit interview. Lenon Decl., Ex. 2 ("White Dep."), 66:4–9; 69:22–70:12, ECF No. 88-2. The log outlined "various policy and procedure violations that [Plaintiff] had observed of Chief Taylor and the department as a whole[.]" *Id.*; *see also* 69:10–13 (testifying the log "outlined very specific policy violations specific to" Defendant Taylor). Some of the policy violations related to "taking complaints," "report writing," issues with uniforms and vehicles, as well as chewing

tobacco and failing to wear seatbelts on duty. *Id*. 73:4–9. Others concerned a lack of secured evidence, firearms, and ammunition storage. *Id.*

On March 17, 2017, Plaintiff discovered her written log and printed portions of the relevant Department policies in Defendant Taylor's wastebasket. White Dep. 65:5–66:20, ECF No. 88-2. She also found a draft letter of administrative leave, which had her name on it and referenced an attendance policy violation. *Id.* at 66:21–67:2. The documents had been torn and had smokeless tobacco residue on them. *Id.* at 65:5–68:2.



Lenon Decl. Ex. No. 11, 1, ECF No. 88-11.

Four days earlier, on the morning of March 13, 2017, Defendant Taylor observed an unanswered and pending call-for-service placed at 11:57 p.m. the night before, during which Plaintiff was scheduled for a patrol shift. Campbell Decl., Ex. 4 ("Investigative Report"), 1, ECF No. 80-4. Defendant Taylor checked Plaintiff's mobile data terminal ("MDT"), which represents the amount of time an officer is on duty through dispatch. *Id.*; Don Taylor Mot. Summ. J., Ex. 1 ("Taylor Dep."), 67:1-21, ECF 79-1. From the MDT, Defendant Taylor found that Plaintiff had logged on late and logged off early. Investigative Report, 1, ECF No. 80-4. Defendant Taylor reviewed Plaintiff's other recent MDT logs and discovered discrepancies between her timesheets and the MDT logs. *Id.* The discrepancies appeared to show that Plaintiff's timesheets did not correspond with the respective MDT log. *Id.*

At some point between reviewing Plaintiff's time reports and March 17, 2017, Defendant Taylor contacted Chief James Ferraris of the Woodburn Police Department to request a fact-finding investigation regarding Plaintiff's time sheets. Taylor Dep., 101:8–102:8, ECF No. 79-1; Don Taylor Mot. Summ. J., Ex. 2 ("Ferraris Dep."), 19:14–23, ECF No. 79-2. Chief Ferraris declined due to lack of resources and referred Defendant Taylor to the Salem Police Department. Ferraris Dep., 24:23–25, ECF No. 79-2. Defendant Taylor contacted the Salem Police Department with his request for an investigation, and they agreed to conduct such a review. Investigative Report, 2–3, ECF No. 80-4.

On March 17, 2017, Sergeant Stephen Smith was assigned the investigation. *Id*. On March 29, 2017, Smith, Defendant Taylor, and the Turner City Attorney met in Chief Taylor's office. *Id*. Plaintiff was placed on administrative leave, effective the next day, pending the results of the investigation. *Id.* at 3; *see also* Campbell Decl., Ex. 6, ECF No. 80-6.

On April 3, 2017, Defendant Taylor contacted the Marion County District Attorney "to address the *Brady* implications of the investigation." Don Taylor Mot. Summ. J. 6, ECF No. 79 ("Taylor Mot.").

On June 19, 2017, Sergeant Smith completed the investigation and concluded that Plaintiff's attendance and time reports violated several city personnel and departmental policies. Investigative Report, 35–38, ECF No. 80-5. The investigation found that:

> [D]uring the twelve months of records, there are 44 incidents where there are discrepancies between the timesheets and the MDT logs of greater than one hour. Of those incidents, 23 incidents have a discrepancy of 2–6 hours. In addition, there are a total of 24 incidents of one hour or less.

Id. at 36. The City terminated Plaintiff on July 31, 2017. Campbell Decl., Ex. 11, 1, ECF No. 80-11. Plaintiff was ultimately placed on the Marion County *Brady* list. White Dep., 113:1–10, ECF No. 79-3.

Following Plaintiff's formal discharge, her Union filed a grievance pursuant to the collective bargaining agreement between the Union and the City. Kraemer Decl., Ex. 17, ECF No. 78-17 ("Grievance Letter"). In January 2018, the parties finalized a written settlement agreement in which the City agreed to rescind Plaintiff's termination and accept her resignation, retroactively effective August 1, 2017. Kraemer Decl., Ex. 18 ("Settlement Agreement"); ECF No. 78-18.

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, if any, show "that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Substantive law on an issue determines the materiality of a fact. *T.W. Elec. Servs., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Whether the evidence is

such that a reasonable jury could return a verdict for the nonmoving party determines the authenticity of the dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply when evaluating a summary judgment motion: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Elec.*, 809 F.2d at 630.

DISCUSSION

Defendants move for summary judgement on all of Plaintiff's claims. First, they contend that her First Amendment retaliation claim fails as a matter of law because she did not engage in constitutionally protected speech on a matter of public concern; to the extent she did, she spoke as a public employee rather than a private citizen; and she was ultimately fired for nonretaliatory reasons. Second, the City argues Plaintiff's *Monell* claim fails because she cannot establish that there was a municipal policy or custom that deprived her of a right secured to her under the Constitution. Third, Defendants assert that Plaintiff's whistleblower claim fails because she did not make a protected "disclosure" under the relevant statute; and even if she could so establish, her claim fails because she cannot demonstrate a causal link between her protected activity and her discharge. Because Plaintiff spoke on matters of public concern as a private citizen and sufficiently raised genuine issues of material fact as to whether the investigation into her use of "flex-time" was pretextual, the court should deny Defendants' motions as to Plaintiff's First

Amendment retaliation claim. However, because Plaintiff has not established that the City had a custom or practice of retaliating against employees who sought to exercise their First Amendment rights, the Court should grant the City's motion as to Plaintiff's *Monell* claim. Finally, because Plaintiff has presented sufficient evidence to create genuine issues of material fact as to her whistleblower claim, the Court should deny Defendants' motions as to that claim.

I. Preliminary Matters

A. Evidentiary Objections

The City moves to strike two paragraphs of Plaintiff's declaration, citing Federal Rules of Evidence 401, 402, 701, 801, and 802 as well as Local Rule 56-1(a). City of Turner Police Dept. Reply Mot. Summ. J. 7–10, ECF No. 77 ("City Reply"). The City also objects to certain deposition testimony of Christopher White, and excerpts from a 2017 Marion County Sherriff's Office internal investigation, citing Federal Rules of Evidence 401, 402, 801, and 802. City's Reply 7–10.

The City's arguments fail relating to the Federal Rules of Evidence. The City does not meaningfully argue how this evidence violates the rules cited in its Reply. Moreover, this Court is capable of independently resolving evidentiary conflicts in the record and questions of admissibility. *See Hall v. City of Depoe Bay*, No. 3:17-cv-00479-JR, 2018 WL 4051699, at *4 (D. Or. June 28, 2018), *adopted*, 2018 WL 4658824 (D. Or. Sept. 25, 2018); *see also JL Beverage Co., LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1110 (9th Cir. 2016) (noting "at summary judgment a district court may consider hearsay evidence submitted in an inadmissible form, so long as the underlying evidence could be provided in an admissible form at trial, such as by live testimony"). Accordingly, the Court is not bound by either party's characterization of the

evidence and instead independently reviews the record and only considers evidence properly before it when determining whether summary judgment is appropriate.

As to the City's specific argument that the declaration violates Local Rule 56-1(a), which states a "party's factual positions must be supported by citations, by page and line as appropriate, to the particular parts of the materials in the record," the Court is not persuaded. Plaintiff declared as follows:

> 2. In discovery, Defendants have provided Defendant Taylor's timesheets from January 2016 through March 2017. Defendants also provide Defendant Taylor's MDT logs for the same period. The rationale for punishing Plaintiff was a discrepancy between these two types of records. I examined all of the relevant records for Defendant Taylor and discovered 88 days where Defendant Taylor was paid for at least an hour more than his MDT logs account for. In total, Defendant Taylor was paid for 307 hours which were not accounted for. Attached as Exhibit B are true and accurate copies of Don Taylor's MDT logs. These are documents I examined to make my summary.
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> 3. I compared the total discrepancies from Defendant Taylor's logs to the total discrepancies noted in my logs by Sgt. Smith for the same period of time. Sgt. Smith's discovery showed 44 days with a discrepancy of one hour or more compared to Taylor's 88 days. Sgt. Smith discovered a total of nearly 130 hours of compensated time that exceeded [my] "on-duty" time listed in the MDT logs. This is less than half the number of compensated hours for Defendant Taylor as compared to his MDT logs. Attached as Exhibit C is Sgt. Smith's analysis of my records.

White Decl. ¶¶ 2–3, ECF No. 93. Plaintiff's reference to the specific exhibits upon which she based her summary is sufficient under Local Rule 56-1(a). Although the City offers an alternative interpretation of the exhibits, the Court declines to strike the paragraphs.[2] The City's evidentiary objections are denied.

[2] To the extent the City's Reply could be construed as arguing the paragraphs are improper lay witness testimony under Federal Rule of Evidence 701, the argument fails. The Court finds the paragraphs were based on Plaintiff's personal review of temporally confined timesheets and are

B. Settlement Agreement

Next, the City argues Plaintiff's claims are barred based on the Settlement Agreement that arose following Plaintiff's union grievance. City of Turner Police Dept. Mot. Summ. J., 11–13, ECF No. 77 ("City Mot."). The City's briefing, however, fails to direct the Court to any specific language in the agreement where Plaintiff released legal claims. *See id*. Moreover, an independent review of the agreement compels the opposite conclusion. *See* Lennon Decl. Ex. 7, ECF No. 88-7. In agreeing to withdraw Plaintiff's grievance under the collective bargaining agreement, *Plaintiff's union* agreed "not pursue any legal action or file any claims, except as necessary to enforce the terms of [the] Agreement." *Id*. The next sentence, however, expressly states that "[t]his provision does not prevent [Plaintiff] from pursing any legal claims she may have independently from the Union." *Id*.[3] Accordingly, the Court should find that the settlement agreement's express terms do not bar Plaintiff's claims for purposes of her retaliation claim.

C. Adverse Employment Action

Finally, Defendant Taylor asserts that because Plaintiff voluntarily agreed to resignation, she cannot argue her separation from the City was an adverse employment action. Don Taylor Reply Mot. Summ. J. 8–10, ECF No. 79, ("Taylor Reply"). As Defendant Taylor seemingly acknowledges, however, his decision to open an investigation into Plaintiff's timesheets was sufficient to constitute an adverse employment action if it was done in retaliation of her speech.

"not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

[3] In its Reply, the City cites two non-binding cases in support of its argument that the agreement bars Plaintiff's claims. The Court has carefully reviewed those cases and neither justify barring Plaintiff's claims.

"To constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind. Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden." *Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir. 2003). The relevant inquiry is whether the state had taken "action designed to retaliate against and chill political expression." *Thomas v. Carpenter*, 881 F.2d 828, 829 (9th Cir. 1989). Moreover, the Ninth Circuit has held that "placement on administrative leave can constitute an adverse employment action." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir. 2013). On this record, the Court should find that the decision to place Plaintiff on administrative leave as well as Defendant Taylor's decision to open an investigation were sufficiently adverse employment actions.

II. First Amendment Retaliation Claim

Defendants move for summary judgment on Plaintiff's First Amendment claim. City Mot. 11–23; Taylor Mot. 5–20. The parties agree that the Court's analysis is governed by the Ninth Circuit's framework in *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009), which asks:

> (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 had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Id.; *see also Dahlia*, 735 F.3d at 1066 n.4 (explaining that although all five factors are necessary, courts are not required to "go through the steps in the same order that they are listed"). Where a plaintiff has satisfied the first three steps, the burden shifts to the government at the remaining steps. *Robinson v. York*, 566 F.3d 817, 822 (9th Cir. 2009).

A. Plaintiff's Log

As a threshold issue, the Court must first determine whether Plaintiff's log constitutes speech. The parties did not supply, and the Court has not located, binding authority addressing whether the involuntary disclosure of an employee's private log by her employer constitutes speech that the First Amendment protects. Defendant Taylor asserts that Plaintiff's written log did not constitute speech, arguing that speech requires a volitional act and directs the Court to a Seventh Circuit Court of Appeals decision, which Defendant Taylor then argues is distinguishable. Taylor Mot. 11–15 (citing *Sullivan v. Ramirez*, 360 F.3d 692 (7th Cir. 2004)).

In *Sullivan*, the Seventh Circuit held that the involuntary disclosure of two employees' private notations in their calendars concerning the tardiness of their coworkers constituted speech. *Id*. at 698–99. The court reasoned that the notations were "known to the office community," including the employees' supervisor who confiscated and "did in fact review the calendars." *Id*. at 698.

Defendant Taylor raises two factual distinctions in support of his argument, neither of which the Court finds persuasive. First, he argues this case is different because Plaintiff's "written log was not issued or owned by her government employer." Taylor Mot. 13–14. Defendant Taylor is correct that in the "Background" section of the opinion the court noted that the plaintiffs made their notations "on state-issued calendars." *Sullivan*, 360 F.3d at 694. That the calendars were state-issued, however, was not relevant to that court's reasoning and offers no guidance here. *See Sullivan*, 360 F.3d 698–99.

Second, Defendant Taylor's assertion that the notes at issue in *Sullivan* "were simply the continuation of oral speech that had already been communicated" overstates the court's holding. Taylor Mot. 14. In holding that the calendar notations constituted speech, the *Sullivan* court did

observe that notations were "known to the office community" and the employees' supervisor, but the court did not hold that they were a continuation of previously communicated speech. *Sullivan*, 360 F.3d 698–99. Moreover, the assertion ignores the *Sullivan* court's reliance on the supervisor's actual review of the calendars after confiscating them. *Id*.

On balance, without clear guidance from the Ninth Circuit, the Court finds that *Sullivan* weighs in favor of finding that the involuntary disclosure of Plaintiff's log to Defendant Taylor constituted speech. Although the contents of the log were not generally "known" to the two-person Department (although they were generally known to at least half of the Department), there is no dispute that Plaintiff's written log was "involuntarily disclosed" to Defendant Taylor. Don Taylor Reply Mot. Summ. J., 11, ECF No. 79 ("Taylor Mot"). That disclosure was sufficient to invoke the First Amendment's protections. *See Sullivan*, 360 F.3d 698–99 ("Furthermore, [the supervisor] did in fact review the calendars."); *see also Connor v. Clinton Cty. Prison*, 963 F. Supp. 442, 446 (M.D. Pa. 1997) ("For present purposes, we think that, once [the warden] found the log and read it, there was communication, albeit not necessarily voluntary."); *cf. McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 704–10 (9th Cir. 2019) (holding involuntarily disclosed journal containing a "hit list" discovered by a third party was speech under the First Amendment subject to regulation).

B. *Eng* Factors

1. Matter of Public Concern

Defendants assert that Plaintiff did not speak on a matter of public concern. City Mot. 14–18; Turner Mot. 15–18. Speech relates to "a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 422 (9th Cir.1995) (quoting *Connick v. Myers*, 461

U.S. 138, 146 (1983)). Speech alleging that public officials are failing to discharge government responsibilities, engaged in wrongdoing, or in breach of the public trust qualifies as a matter of public concern. *Connick*, 461 U.S. at 148. Speech is not a matter of public concern, however, when it addresses "individual personnel disputes and grievances." *Coszalter*, 320 F.3d at 973 (citation omitted). The plaintiff carries the burden of demonstrating that the speech at issue relates to the public concern. *Johnson*, 48 F.3d at 422. Whether the speech is truly a matter of public concern "is purely a question of law." *Eng*, 552 F.3d at 1070 (9th Cir. 2009).

Courts examine the content, form, and context of a given statement in determining whether speech qualifies as a matter of public concern. *Johnson*, 48 F.3d 420, 422 (citing *Connick*, 461 U.S. at 147–48). Among those three factors, content is the most important. *Desrochers v. City of San Bernardino*, 572 F.3d 703, 710 (9th Cir. 2009).

Defendants frame Plaintiff's speech as internal departmental disputes between Defendant Taylor and Plaintiff. City Mot. 17 ("To the extent plaintiff spoke at all, it consisted of her ongoing conversations with Chief Taylor about various internal issues during her employment at TPD."); Taylor Mot. 16 ("The log comprised of Plaintiff's private notes detailing her observations of management issues within Turner PD.").

The Court agrees that some of the policies relating directly to standards and practices within the department itself, such as "taking complaints," "report writing," issues with uniforms and vehicles, as well as chewing tobacco on duty do not necessarily implicate matters of public concern. White Dep. 73:4–9, ECF No. 88-2. Plaintiff testified her log contained other matters, however, such as a lack of security relating to evidence, firearms, and munitions that do touch upon matters of public concern. *Id.*; *see also* Campbell Decl., Ex. 2, ECF No. 80-2 (reporting in

email risks associated with failing to protect "confidential files, reports, ammunition, evidence, equipment, and other important documents in our offices").

For example, a lack of security regarding the chain of custody for evidence has the potential to place criminal convictions in jeopardy. And the failure to properly secure firearms and munitions raises serious public safety concerns. These issues speak directly to the competency of the Turner Police Department. *See Robinson*, 566 F.3d at 822 ("As a matter of law, the competency of the police force is surely a matter of great public concern.") (citation and quotation marks omitted); *see also Nichol v. City of Springfield*, No. 6:14-cv-01983-AA, 2017 WL 6028465, at *12 (D. Or. Dec. 3, 2017) (finding systemic issues such as "allegations of sexual misconduct and favoritism at the highest levels" of a police department "unquestionably relate to matters of public concern").[4]

[4] The Court notes that the City's argument in its Reply that Plaintiff failed to cite to specific evidence in her Opposition and instead relied "on allegations in the complaint for support" is well taken. City Reply 3–4. The "Factual Background" section of Plaintiff's Opposition relies heavily on her Complaint and this Court "need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001). However, district courts retain "discretion in appropriate circumstances to consider other materials" in the record, which the Court elects to exercise here. *See id*. The Court was easily able to locate Plaintiff's testimony regarding the contents of her written log as noted above. The Court additionally notes that the record contains deposition testimony from Plaintiff alleging that Defendant Taylor directed her to not "worry about" an alleged sexual assault she discovered in the course of a different investigation. White Dep. 93:2–25, ECF No. 78-1. There also appears to be evidence in the record that Plaintiff may have been the source for a newspaper article where Plaintiff alleged "that the department failed to investigate DHS reports involving child welfare and vulnerable victims in a timely manner," which would certainly qualify as a matter of public concern. White Dep. 88:9–14, ECF No. 78-1. Such a disclosure to the media, moreover, would also be relevant to the second *Eng* factor discussed *infra*.

2. Public Employee vs. Private Citizen

Defendants next assert summary judgement is warranted because Plaintiff spoke only in her capacity as a public employee. City Mot. 18–20; Taylor Mot. 15–18. "A public employee's speech is not protected by the First Amendment when it is made pursuant to the employee's official job responsibilities." *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1071 (9th Cir. 2012) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006)). "Conversely, a public employee's speech on a matter of public concern is protected if the speaker 'had no official duty' to make the questioned statements, . . . or if the speech was not the product of 'performing the tasks the employee was paid to perform.'" *Hagen v. City of Eugene*, 736 F.3d 1251, 1257–58 (9th Cir. 2013) (citing *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 n.2 (9th Cir. 2008)) (alteration and some internal quotation marks omitted). However, statements do not lose First Amendment protection simply because they concern "the subject matter of [the employee's] employment." *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006). "[T]he inquiry into the protected status of speech presents a mixed question of fact and law, and specifically [] the question of the scope and content of a plaintiff's job responsibilities is a question of fact." *Posey*, 546 F.3d at 1130.

Defendants essentially argue that Plaintiff's speech was made in her capacity as a public employee because it was a product of her position as an officer within the Department where she gained knowledge of the Department's deficiencies. City's Mot. 18–20; Taylor Mot. 18–21.

That argument, however, misstates the relevant inquiry. If courts accepted Defendants' framework, a public employee's report of official misconduct would *never* be protected speech so long as the employee learned of the misconduct in the course of doing her job. This is not the law in the Ninth Circuit. *See, e.g., Freitag*, 468 F.3d at 545 (holding prison guard spoke as a

private citizen when she reported sexual abuse she and other female corrections officers suffered at work); *see also Nichol*, 2017 WL 6028465, at *13. The question is not how a plaintiff learns about the subject of the speech, but whether the speech was a required part of a plaintiff's job. *Id.*

Here, Plaintiff's speech was not made in her role as a public employee. Plaintiff's job duties did not require her to keep a log of policy violations she observed in her role as a police officer. Moreover, Plaintiff testified that she intended to discuss the contents of her log in her exit interview. White Dep. 70:1–12, ECF No. 79-3. And Plaintiff was reprimanded for raising some of her concerns to city management in an email from Defendant Taylor. Campbell Decl. Ex. 2 ("I will say that to send this to everyone was not appropriate. Although I agree it's a safety issue . . . .").

The City's reliance on *Hagen* is unconvincing. In *Hagen*, the Ninth Circuit vacated a jury verdict and directed judgment for the defendant employer on a First Amendment retaliation claim. 736 F.3d at 1260. The court found that the plaintiff police officer, who had expressed concerns about officers and training "within the chain of command" and pursuant to his duties under the police department's policy and procedures manual, spoke as a public employee and not as a private citizen. *Id.* at 1259. This case is distinguishable from *Hagen* in at least one critical respect. Plaintiff testified that her intention—before her log was found and destroyed by Defendant Taylor—was to report the violations *outside* the chain of command of the Department to City Administrator Sawyer. White Dep. 70:1–12, ECF No. 79-3.[5] The Court should find that

[5] The Court also finds unpersuasive Defendants' reliance on Plaintiff's duty to report misconduct as a police officer. *See* City Reply 18–20; Turner Reply 16–17. As a factual matter, as discussed above, Plaintiff did report some concerns in an email and was reprimanded subsequently reprimanded by Defendant Taylor. Moreover, the argument was available to Defendants and not raised in their motions for summary judgment. Generally, a "district court need not consider arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). In any event, the Court concludes "that the pleadings and evidence in this case present

Plaintiff spoke as a private citizen and not a public employee. *See Freitag*, 468 F.3d at 545 (observing that the "right to complain [] to an elected public official . . . is guaranteed to any citizen in a democratic society regardless of [their] status as a public employee").

3. Substantial or Motivating Factor

The City next argues that Plaintiff cannot establish that her protected speech was a substantial motivating factor in her termination. City Mot. 20–23. At the third step of a First Amendment retaliation analysis, a plaintiff must prove that her protected speech was a "substantial or motivating" factor in the adverse action taken against him by the defendant. *Eng*, 552 F.3d at 1071. Whether a plaintiff's constitutionally protected speech was a motivating factor in a defendants' adverse employment decision is purely a question of fact. *Id.*

A plaintiff may rely on circumstantial evidence to create a genuine issue of material fact, where the plaintiff provides "evidence that [her] employer knew of [her] speech" and further "produce[s] evidence of at least one of the following three types":

> (1) showing a proximity in time between the protected action and the allegedly retaliatory employment decision such that a jury logically could infer [that the plaintiff] was terminated in retaliation for [their] speech; (2) demonstrating that [their] employer expressed opposition to [their] speech . . . to [them] or to others; or (3) showing that [their] employer's proffered explanations for the adverse employment action were false and pretextual.

Howard v. City of Coos Bay, 871 F.3d 1032, 1045 (9th Cir. 2017) (citing *Keyser v. Sacramento City Unified School Dist.*, 265 F.3d 741 (9th Cir. 2001)) (quotation marks omitted); *see also Swanberg v. Canby*, No. 3:14-cv-00882-HZ, 2015 WL 5254373, at *6 (D. Or. Sept. 9, 2015).

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genuine disputes of material fact regarding the scope and content of [Plaintiff's] job responsibilities." *Posey*, 546 F.3d at 1129.

The City asserts that the fact that Plaintiff was employed with the Department for over a year and half "creates a strong inference that any such alleged speech had no connection to her discharge," and characterizes Plaintiff's log as "simply repeat[ing] and add[ing] to the alleged policy violations they had discussed before." City Mot. 21.

The Court disagrees. Although Plaintiff did raise safety concerns in an email in January 2016, she also testified that her log contained "very specific policy violations specific" to Defendant Taylor which he destroyed. Campbell Decl. Ex. 2, ECF No. 80-2; White Dep. 69:10–12. Plaintiff discovered her torn log along with a draft letter of administrative leave in the wastebasket of Defendant Taylor's office in March 2017, an investigation into Plaintiff's timesheets had begun *at most* a few days earlier, and she was terminated by the City in July 2017 as a result of that investigation. White Dep. 65:5–66:9, ECF No. 88-2; Lennon Decl. Ex. 5, ECF No. 88-5; Lennon Decl. Ex. 11, ECF No. 88-11. Viewing this evidence in the light most favorable to Plaintiff, given the temporal proximity, a factfinder could reasonably infer that Plaintiff was terminated in retaliation for her speech. *See Coszalter*, 320 F.3d at 977 (noting that "[d]epending on the circumstances, three to eight months is easily within a time range that can support an inference of retaliation"); *see also Bell v. Clackamas County*, 341 F.3d 858, 865 (9th Cir. 2003) ("Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases.").

4. Adequate Justification

Because Plaintiff has met her burden of establishing a *prima facie* case, the burden now shifts to Defendants at steps four and five of the *Eng* analysis. At the fourth step, Defendants must show that "under the balancing test established by *Pickering*, the state's legitimate administrative interests outweigh the employee's First Amendment rights." *Eng*, 552 F.3d at

1071 (quoting *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2004) (alterations omitted); *see also Pickering v. Bd. of Ed. of Twp.*, 391 U.S. 563, 572–73 (1968). The *Pickering* balancing test asks "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the public." *Eng*, 552 F.3d at 1071 (quoting *Garcetti*, 547 U.S. at 418).

Legitimate government interests can include "promoting efficiency and integrity in the discharge of official duties and maintaining proper discipline in the public service." *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1106–07 (9th Cir. 2011) (citation omitted). This inquiry is ultimately a legal question, although its resolution may implicate underlying factual disputes. *Eng*, 552 F.3d at 1071. Given the procedural posture of this case, the Court is required to construe any disputed facts in the light most favorable to Plaintiff.

The Court notes that Defendants did not squarely address this *Eng* factor. The City does contend, however, it had a basis for discharge: an outside investigation that determined Plaintiff violated multiple Department and City policies. City Mot. 22–23.

But that argument fails to address the required *Pickering* analysis. Instead, the relevant inquiry is whether Plaintiff's interest in creating a log of policy violations, or sending a city-wide email voicing her concerns, is outweighed by City's interest in avoiding the disruptive effects of Plaintiff's conduct. *See Pickering*, 391 U.S. at 572–73 (weighing a school teacher's interest in sending a letter to a newspaper that criticized the school board against the possibility that the letter itself impeded the teacher's own performance or interfered with the regular operation of the schools); *Moran v. State of Wash.*, 147 F.3d 839, 848 (9th Cir. 1998) ("the *very point* of the *Pickering* balancing test is to weigh the value of the speech that causes the disruption against the harm of the disruption that is caused, either directly or indirectly, by the speech") (emphasis in

original). The Ninth Circuit in *Bauer v. Sampson* listed five factors to guide the *Pickering* balancing analysis:

> (1) whether the employee's speech disrupted harmony among co-workers;
>
> (2) whether the relationship between the employee and the employer was a close working relationship with frequent contact which required trust and respect in order to be successful;
>
> (3) whether the employee's speech interfered with performance of his duties;
>
> (4) whether the employee's speech was directed to the public or the media or to a governmental colleague; and
>
> (5) whether the employee's statements were ultimately determined to be false.

261 F.3d 775, 785 (9th Cir. 2001) (finding public university's interests as an employer did not outweigh the plaintiff-professor's First Amendment rights) *as amended*, (9th Cir. Oct. 15, 2001); *see also Swanberg*, 2015 WL 5254373, at *8 (D. Or. Sept. 9, 2015). As noted, Defendants failed to address the *Pickering* analysis, and thus the Court finds that they have not carried their burden on this issue.

Moreover, Plaintiff has produced sufficient evidence for a reasonable factfinder to conclude that the investigation into her use of flex-time was pretextual. Although disputed by Defendants, there is a question of fact as to the precise timing of Defendant Taylor's initiation of the investigation into Plaintiff's time sheets—*i.e.*, whether the log was discovered and destroyed prior to the initiation of the investigation. *See, e.g.*, White Dep. 65:5–66:9. Further, there is evidence in the record that calls into question the motives and methods of the investigation into Plaintiff's time sheets. For example, the record contains evidence that police officers in the Department regularly submitted time sheets that did not reflect the hours they actually worked.

See, e.g., White Dep. 37:25–38:17, ECF No. 88-2 (explaining that Plaintiff's hours "were flexed throughout [her] shift," meaning that she "could come on late or leave early"); Chris White Dep. 64:8–20, ECF No. 88-1. However, Defendant Taylor neglected to inform Sargent Smith of this practice during his interview:

> Sgt. Steve Smith: Okay. So, can you think of any reason why, based on what you've just told me, can you, think of any reason why, the time recorded on an officer or Officer White's timesheet, would be different than the time her MDT log on, or her MDT log off time? So, for example, she works 10 hours, so the time between log on and log off should be 10 hours, minus a few minutes. Is there any reason that you would think of where that time, and, and let's say minus 15 minutes or so, any time of that, those times should not match?
>
> Chief Don Taylor: There's no good reason.

Lennon Decl. Ex. 12, ECF No. 88-12.

Viewing the facts in the light most favorable to Plaintiff and drawing all reasonable inferences in her favor, a reasonable factfinder could find that Defendant Taylor predicated his investigation on discovering Plaintiff's log, and failed to disclose the Department's flex-time practice, thereby making that investigation pretextual and tainting its results.

Defendants cannot rely on that investigation as evidence of a legally sufficient justification for limiting Plaintiff's speech. *See Robinson*, 566 F.3d at 825 ("Although we have sometimes found a police department's interests in discipline and *esprit de corps* to outweigh First Amendment interests, genuine factual disputes here—including . . . whether the justifications Defendants assert for their actions were pretextual—preclude such a determination at this stage of the litigation.") (citations omitted).

5. Same Decision Without Retaliation

Defendants assert they would have taken the adverse employment action against Plaintiff even absent her protected speech based on the results of the investigation into her timesheets. City Mot. 22–23; Taylor Mot. 21–26. If a defendant fails the *Pickering* balancing test, it can still avoid liability if it can show that it "would have reached the same adverse employment decision even in the absence of the employee's protected conduct." *Eng*, 552 F.3d at 1072 (citing *Thomas*, 379 F.3d at 808). "In other words, it may avoid liability by showing that the employee's protected speech was not a but-for cause of the adverse employment action." *Id.* (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). "The *Mt. Healthy* but-for causation inquiry is, however, purely a question of fact." *Robinson*, 566 F.3d at 825 (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 firing would have occurred without the protected conduct.")).

As noted, Plaintiff has sufficiently established a genuine issue of material fact as to whether the investigation into her timesheets was pretextual. Accordingly, "this factual dispute cannot be resolved on summary judgment." *Id.* ("Although Defendants are free to argue at trial that they would have taken the same adverse employment actions against [the plaintiff] regardless of his speech, [the plaintiff] has adequately alleged that the 'chain of command' policy was used as a pretext and that the adverse actions against him occurred because of the content of his protected speech, not the manner in which he filed his complaints.").

In sum, the Court should find that Plaintiff established a *prima facie* First Amendment retaliation claim and Defendants failed to carry their burden at steps four and five of the *Eng*

analysis. As such, the Court should deny Defendants' motions for summary judgement as to this claim.

III. *Monell* Liability

The City moves for summary judgment on Plaintiff's *Monell* theory arguing that Chief Taylor was not "a final policy maker for the City of Turner and its Police Department." City Mot. 25–26 (quoting Compl. ¶ 51).[6] In certain circumstances, a municipality may be held liable as a "person" under § 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978). However, "a municipality cannot be held liable solely because it employs a tortfeasor or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.*

Liability only attaches where the municipality itself causes the constitutional violation through the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694; *see also Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992) ("[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability") (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988)).

There are three methods by which a plaintiff may establish municipal liability under *Monell*. First, a local government may be liable where the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflict[s] the injury." *Rodriguez v. City of Los Angeles*, 891 F.3d 776, 802 (9th Cir. 2018) (quoting *Monell*, 436 U.S. at 694). Second, a local government can fail to

[6] At oral argument the City withdrew its motion as to this count on the grounds that Plaintiff named the wrong defendant in the Complaint. Hearing, ECF No. 100.

train employees in a manner that amounts to "deliberate indifference" to a constitutional right, such that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [government entity] can reasonably be said to have been deliberately indifferent to the need." *Id.* (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)). Third, a local government may be held liable if "the individual who committed the constitutional tort was an official with final policy-making authority or such an official ratified a subordinate's unconstitutional decision or action and the basis for it." *Id.* at 802–03 (quoting *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097 (9th Cir. 2013)). In most circumstances, municipal liability "may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

Plaintiff asserts two specific "customs or practices" that give rise to liability under *Monell*. First, the "practice of flexing time while reporting regular 10-hour shifts on a timecard" and that she "was investigated and terminated for following the Chief's established custom." Pl.'s Motion Opp'n Defs.' Mots. Summ. J., 21–22 ECF No. 69 ("Pl.'s Opp'n"). Assuming without deciding that the record would permit a reasonable fact finder to so find, such practices would not give rise to liability under *Monell*.

To establish liability under *Monell*, the relevant inquiry must focus on whether Defendant Turner had a custom or practice of *retaliating against* employees who seek to exercise their first amendment rights. In other words, Plaintiff's theory is essentially a restatement of her argument that the rationale for the investigation into her timesheets was pre-textual and is not appropriately

pursued under *Monell*. Moreover, the Court observes, Plaintiff's flex-time *Monell* theory is entirely absent from her complaint. *See* Compl. ¶¶ 49–53.

Second, Plaintiff asserts the City is liable "because Chief Taylor's widespread custom and practice" of discriminating against employees based on "sexual orientation and religious beliefs was itself, unconstitutional." *Id.* at 22. As the City correctly highlights, however, this theory was not raised in Plaintiff's complaint. *Compare* Pl.'s Opp'n 22, *with* Compl. ¶ 51. A party may not assert a new legal theory in opposition to a motion for summary judgment because the "complaint guides the parties' discovery, putting the defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff's allegations." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292–93 (9th Cir. 2000) (holding the district court did not err in refusing to entertain a new legal theory raised for the first time at the summary judgment stage).[7] As such, the City's motion for summary judgment as to Plaintiff's *Monell* claim should be granted.

IV. Whistleblower Claim

In addition to bringing her claim for First Amendment retaliation, Plaintiff asserts a whistleblower retaliation claim under ORS § 659A.203—Oregon's public employee whistleblower law. That statute, as relevant here, makes it an unlawful employment practice for a public employer to:

> Prohibit any employee from disclosing, or take or threaten to take disciplinary action against an employee for the disclosure of any information that the employee reasonably believes is evidence of:
>
> (A) A violation of any federal or state law, rule or regulation by the state, agency or political subdivision; [or]

[7] For this same reason, the City's argument that Plaintiff improperly asserted "new allegations/theories" in her Opposition is well taken. City Reply 4–5; *Coleman*, 232 F.3d at 1292–93. Accordingly, the Court declines to address Plaintiff's allegations raised for the first time in her Opposition.

> (B) Mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from the action of the state, agency or political subdivision[.]

ORS § 659A.203(b). The statute also makes it unlawful for a public employer to "[d]iscourage, restrain, dissuade, coerce, prevent or otherwise interfere with disclosure or discussions described in this section." ORS § 659A.203(1)(d).

Courts in this district have held that to "establish a *prima facie* case under either statute, "a plaintiff must show that he (1) engaged in a protected activity, (2) suffered an adverse employment decision, and (3) there was a causal link between the protected activity and the adverse employment decision." *Lindsey v. Clatskanie People's Util. Dist.*, 140 F. Supp. 3d 1077, 1091 (D. Or. 2015) (quoting *Neighorn v. Quest Health Care*, 870 F.Supp.2d 1069, 1102 (D. Or. 2012)).

A. Protected Activity

Defendants assert Plaintiff did not engage in "protected activity" because she did not make a "disclosure" within the meaning of the statute. City Mot. 27–30; Taylor Mot. 28–29. Defendants cite, among other non-binding, cases *Lindsey*, 140 F. Supp. 3d at 1092.

The court in *Lindsey* thoroughly examined multiple federal court decisions from this District in assessing whether the plaintiff's reports that certain actions were illegal constituted "disclosures" that could qualify as protected activity under ORS § 659A.203. *Lindsey*, 140 F. Supp. 3d at 1092. Specifically, the plaintiff in *Lindsey* reported to his supervisor that "he believed scrubbing [the supervisor's] computer" after an Equal Employment Opportunity Commission charge had been filed against their employer "would violate the law," and that conducting "a blanket search" of the computer of the employee who filed the complaint "was illegal." *Lindsey*, 140 F. Supp. 3d at 1084, 1094.

The *Lindsey* court also examined the Oregon Court of Appeals decision *Bjurstrom v. Oregon Lottery*, which held that a "disclosure" under the whistleblower protection statute included reports made within an agency or a department. *Lindsey*, 140 F. Supp. 3d at 1092–94 (discussing *Bjurstrom v. Oregon Lottery*, 202 Or.App. 162, 169–70 (2005)). However, the *Lindsey* court observed:

> [T]he *Bjurstrom* court found some limitations on whistleblower protection to be inherent in the text of ORS § 659A.203. Additionally, the *Bjurstrom* court stressed that that the Oregon legislature intended to protect only activity that "rise[s] in magnitude to a level of public concern." 202 Or.App. at 172, 120 P.3d 1235. The common usage of "disclose" suggests that alerting a wrongdoer that his own conduct is unlawful does not fall under the protection of ORS § 659A.203. Nothing in the sparse legislative history of the statute suggests that this definition of "disclose" places activity of public concern beyond protection or that the Oregon legislature intended a different result.

140 F. Supp. 3d at 1093–94 (bracketing in original). Ultimately, *Lindsey* reached the "narrow holding" that the plaintiff's report to his supervisor that the supervisor's "own conduct was unlawful, without threatening to reveal [the supervisor's] conduct to anyone else, [was] not a 'disclosure' under ORS § 659A.203 and thus [could not] be protected activity." *Lindsey*, 140 F. Supp. 3d at 1092–94.

The Court finds the facts of this case distinguishable from *Lindsey's* admittedly narrow and fact specific holding.[8] Plaintiff disclosed some of her safety concerns in a city-wide email. Campbell Decl. Ex. 2, ECF No. 80-2. Further, Plaintiff testified that she intended to voice her

[8] At least one other court has also called into question the line of cases in this District holding a disclosure to an alleged wrongdoer is not covered by Oregon's whistle blower statute. *Reynolds v. City of Eugene*, 937 F. Supp. 2d 1284, 1296 (D. Or. 2013) ("I am not persuaded that the Oregon courts would adopt the analysis in *Clarke*, as it arguably conflicts with the Oregon Court of Appeals' discussion of the whistleblower statute in *Bjurstrom. Id.* at 169–71, 120 P.3d 1235. Granted, *Bjurstrom* does not explicitly address disclosures to supervisors who are also the alleged wrongdoers.") *aff'd in part, rev'd in part on other grounds*, 599 F. App'x 667 (9th Cir. 2015).

concerns regarding Defendant Taylor in her exit interview to City Administrator Sawyer before Defendant Taylor destroyed the log. White Dep. 70:1–6, ECF No. 79-3. Moreover, the Court also finds unpersuasive Defendants' characterization of the contents of Plaintiff's destroyed—through no fault of her own—log given the procedural posture of this case. The Court should find that Plaintiff has established the first element of her *prima facie* whistleblower claim.

B. Adverse Employment Action and Causal Link

Defendants did not address whether Plaintiff suffered an adverse employment action and have accordingly waived any argument. Instead, they assert that Plaintiff cannot establish a causal link. City Mot. 30–31; Turner Mot. 31–32. "To show a causal link between the adverse employment decision and the protected activity, a plaintiff must show that his protected activity was a substantial motivating factor in the adverse employment decision, and that 'but for' his protected activity, the adverse action would not have been taken." *Biggs v. City of St. Paul*, No. 6:18-cv-506-MK, 2019 WL 4575839, at *12 (D. Or. Mar. 7, 2019) (citing *Sandberg v. City of N. Plains*, No. 10-cv-01273-HZ, 2012 WL 602434, at *7 (D. Or. Feb. 22, 2012)), *adopted*, 2019 WL 4544268 (D. Or. Sept. 18, 2019).

Plaintiff has presented sufficient evidence to create a genuine issue of material fact as to whether a causal link between her protected activity and Defendant Taylor's initiation of an investigation, disclosure to the Marion County District Attorney's Office, Plaintiff's placement on administrative leave, and Plaintiff's ultimate termination existed. *Scruggs v. Josephine Cty. Sheriff's Dep't*, No. 06-cv-06058 CL, 2008 WL 608581, at *12 (D. Or. Mar. 4, 2008) (denying summary judgment on causal link element and noting that "[t]he causal connection is typically based on proximity in time between the protected activity and the employer's action, coupled with attending circumstances that suggest something other than legitimate reasons for the

temporal tie") (quoting *Portland Association of Teachers v. Multnomah School District No. 1,* 171 Or.App. 616, 625 (2000)). Accordingly, the Court should find that Plaintiff has established a *prima facie* case. *See Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) ("The requisite degree of proof necessary to establish a *prima facie* case for Title VII . . . claims on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence."); *Scruggs*, 2008 WL 608581, at *11 (noting that the "Oregon district court has applied the standards for a Title VII retaliation claim to claims under the Oregon Whistle Blower Act").

C. Legitimate non-Retaliatory Reasons and Pretext

Assuming without deciding that Defendants could articulate a legitimate non-retaliatory reason for their adverse employment decision, there is sufficient evidence in the record to create a genuine issue of material fact as to whether the investigation was pretextual.

In establishing pretext, employees may rely on either circumstantial or direct evidence because "[d]efendants who articulate a nondiscriminatory explanation for a challenged employment decision may have been careful to construct an explanation that is not contradicted by known direct evidence." *Davis*, 520 F.3d at 1029; *see also Desert Palace, Inc. v. Costa,* 539 U.S. 90, 99–100 (2003). A plaintiff can make such a showing "either (1) by showing that unlawful discrimination more likely motivated the employer, or (2) by showing that the employer's proffered explanation is unworthy of credence because it is inconsistent or otherwise not believable." *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1037 (9th Cir. 2005) (citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220–22 (9th Cir. 1998)). In contrast to the minimal direct evidence of improper motive that is sufficient to survive summary judgment, circumstantial evidence must be "specific and substantial." *Id.* at 1038.

Defendant Taylor asserts that Plaintiff cannot meet her burden based on her "subjective belief that she was retaliated against because of her written log" because "subjective beliefs alone" are insufficient to defeat summary judgment where a defendant's stated legitimate, non-retaliatory reasons are. Taylor Mot. 34. (citing Compl. ¶ 57; *Ballard v. Portland Gen. Elec.*, No. 05-cv-00054-BR, 2006 WL 19194, at *5–6 (D. Or. Jan. 4, 2006)). The argument is unpersuasive for several reasons. First, the plaintiff in *Ballard* admitted his discrimination claim rested *solely* on his subjective beliefs. *Ballard*, 2006 WL 19194, at *5 ("Here Plaintiff *admits* he relies only on his own belief that he was retaliated against based on his race.") (emphasis added). Second, there is significant, specific, and substantial circumstantial evidence in this record from which a rational finder of fact could reasonably infer pretext. *See supra* § II.B.4. The Court should deny summary judgment as to this claim.

D. Immunity Defenses

Finally, Defendant Taylor asserts that he is immune from whistleblower liability for making *Brady v. Maryland* disclosures to the Marion County District Attorney under the "discretionary function" exception of ORS § 30.265. Taylor Mot. 35–37. He also urges the Court to extend the absolute privilege bar for defamation to Plaintiff's whistleblower claims. *Id*. at 37–39.

The arguments are unpersuasive. Significantly, Defendant Taylor has not directed the Court to any authority that stands for the proposition that those defenses apply to claims brought under ORS § 659A.203. Indeed, Defendant Taylor seemingly acknowledges that these defenses relate to tort claims. *See* Taylor Mot. 36 ("Under ORS § 30.265, a police officer acting within the scope of his employment or duties is immune from liability for any *tort claim* . . . . ") (emphasis added); *id*. at 38 ("Though Plaintiff's claim against Taylor stemming from his *Brady*

communications with the Marion DA *does not rest on a defamation theory* . . . .") (emphasis added). As such, absent authority finding that these defenses apply to claims brought pursuant to Oregon's whistleblower provisions, the Court should deny summary judgment as to Defendant Taylor's immunity defenses.

RECOMMENDATION

For the reasons above, Defendants' motions for summary judgment (ECF Nos. 77 and 79) should be GRANTED in part and DENIED in part. The City's motion should be GRANTED as to Plaintiff's *Monell* claim and DENIED in all other respects as described above. Defendant Taylor's motion should be DENIED.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1) should not be filed until entry of the district court's judgment or appealable order.

The Findings and Recommendation will be referred to a district judge. Objections to this Findings and Recommendation, if any, are due fourteen (14) days from today's date. *See* Fed. R. Civ. P. 72. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 2nd day of July 2020.

s/ Mustafa T. Kasubhai
MUSTAFA T. KASUBHAI
United States Magistrate Judge