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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Linda Conley, Hereberto	)	
Dominguez, Yoami Dominguez,	)	
Stephen Frakes, James C. Kemp,	)	
Reyna Kemp, Michelle Norris,	)	CIV 11-01637 PHX MEA
William Ponce, Herlan Yeomans,	)	
Eloina Yeomans,	)	ORDER
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
	)	
Town of Quartzsite, Alex Taft,	)	
Jeffrey Gilbert, Albert	)	
Johnson,	)	
	)	
Defendants.	)	
_____	)	

All of the parties in this matter have consented to magistrate judge jurisdiction, including the entry of final judgment. Before the Court are Plaintiffs' motion for judgment as a matter of law with regard to their First Amendment retaliation claim (Count I of the second amended complaint at Doc. 70), and Defendants' motion for judgment as a matter of law in favor of Defendants with regard to all of Plaintiffs' claims (Count II alleges a violation of Arizona's whistleblower statutes and Count III asserts a claim for defamation).<sup>1</sup> In this

<sup>1</sup> All Defendants remain in this matter. The claims brought by Plaintiffs Hereberto and Yoami Dominiguez were dismissed. See Doc. 86 & 109. Ms. Kemp and Ms. Yeomans, although named as parties, may be plaintiffs based solely upon the possibility that Arizona's

1 order the Court decides Plaintiffs' motion for summary judgment  
2 and Defendants' motion for summary judgment insofar as they seek  
3 judgment as a matter of law on Plaintiffs' First Amendment  
4 claims. The Court will resolve Defendants' motion for summary  
5 judgment on Count II and Count III of the second amended  
6 complaint by separate order. Those claims, if any, remaining  
7 after the Court resolves the parties' motions for summary  
8 judgment will be tried to the court as a bench trial.

### 9 **I Procedural background**

10 Plaintiffs filed a complaint in the La Paz County  
11 Superior Court on July 29, 2011, alleging federal and state law-  
12 based claims for relief, and seeking injunctive and monetary  
13 relief and an award of attorneys' fees and costs. See Doc. 1.  
14 Plaintiffs obtained temporary restraining orders from the state  
15 Superior Court on August 1, 2011, and August 3, 2011,  
16 prohibiting Plaintiffs' discharge by the Town of Quartzsite.  
17 Defendants removed the matter to federal court on August 19,  
18 2011. Id. On September 9, 2011, the Court concluded the state  
19 temporary restraining orders had expired. See Doc. 27.  
20 Subsequently, Plaintiffs' employment with the Town of Quartzsite  
21 was terminated. Defendants answered the complaint on or about  
22 September 13, 2011. See Doc. 26. On November 18, 2011,  
23 Plaintiffs filed a motion seeking leave to amend the complaint,  
24 which was granted on January 5, 2012. See Docs. 34 & 38.

25 On February 16, 2012, Defendants filed a motion to  
26 dismiss some counts of the first amended complaint at Doc. 30.

27 \_\_\_\_\_  
28 community property laws are implicated by the execution of judgment  
in this matter, but their exact claims have not been pled.

1 The motion was granted in part and denied in part on May 15,  
2 2012. See Doc. 57. A second amended complaint was docketed on  
3 June 13, 2012, which was answered on July 2, 2012. See Doc. 70  
4 & Doc. 74.

5 The parties have engaged in extensive discovery. On  
6 September 28, 2012, Defendants filed a motion for summary  
7 judgment. See Doc. 90. On September 28, 2012, Plaintiffs filed  
8 a motion for summary judgment. See Doc. 94.<sup>2</sup> The Court heard  
9 oral argument on the motions for summary judgment on May 9,  
10 2013, and took the motions under advisement pending a decision  
11 by the en banc panel in Dahlia v. Rodriguez, which was issued  
12 August 21, 2013. The Court subsequently ordered briefing on the  
13 impact of the en banc opinion on the issues presented in this  
14 matter, which was completed on September 6, 2013. See Doc. 115  
15 & Doc. 116.

## 16 **II Standard for determining motions for summary** 17 **judgment**

18 Rule 56 of the Federal Rules of Civil Procedure  
19 provides that judgment shall be entered if the pleadings,  
20 depositions, affidavits, answers to interrogatories, and  
21 admissions on file show that there is no genuine dispute  
22 regarding the material facts of the case and the moving party is  
23 entitled to a judgment as a matter of law. See Anderson v.  
24 Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10  
25 (1986); Giles v. General Motors Acceptance Corp., 494 F.3d 865,  
26 872 (9th Cir. 2007).

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27  
28 <sup>2</sup> On June 18, 2012, the Court granted Defendants' motion to  
strike Plaintiffs' request for a trial by jury. See Doc. 71.

1 For purposes of deciding a motion for summary  
2 judgment, "genuine" means that the evidence  
3 about the fact is such that a reasonable jury  
4 could resolve the point in favor of the  
non-moving party, and "material" means that  
the fact is one that might affect the outcome  
of the suit under the governing law.

5 United States v. One Parcel of Real Prop., 960 F.2d 200, 204  
6 (1st Cir. 1992). See also Guidroz-Brault v. Missouri Pac. R.R.  
7 Co., 254 F.3d 825, 829 (9th Cir. 2001).

8 The party seeking summary judgment bears the initial  
9 burden of informing the Court of the basis for its motion, and  
10 identifying those portions of the pleadings, depositions,  
11 answers to interrogatories, and admissions on file, together  
12 with the affidavits, if any, which it believes demonstrate the  
13 absence of any genuine issue of material fact. See Celotex  
14 Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553  
15 (1986).

16 When a party moving for summary judgment has carried  
17 its burden under Rule 56, "its opponent must do more than simply  
18 show that there is some metaphysical doubt as to the material  
19 facts." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S.  
20 574, 586, 587, 106 S. Ct. 1348, 1356 (1986). The party opposing  
21 the motion may not rest upon the mere allegations or denials of  
22 his pleadings, but instead must produce some significant,  
23 probative evidence tending to contradict the moving party's  
24 allegations, thereby creating a genuine question of fact for  
25 resolution at trial. Anderson, 477 U.S. at 248, 256-57; 106 S.  
26 Ct. at 2510, 2513-14 (holding the plaintiff must present  
27 affirmative evidence in order to defeat a properly supported  
28 motion for summary judgment).

1           A principal purpose of summary judgment is "to isolate  
2 and dispose of factually unsupported claims." Celotex, 477 U.S.  
3 at 323-24, 106 S. Ct. at 2553. Summary judgment is appropriate  
4 against a party who "fails to make a showing sufficient to  
5 establish the existence of an element essential to that party's  
6 case, and on which that party will bear the burden of proof at  
7 trial." Id., 477 U.S. at 322, 106 S. Ct. at 2552; see also  
8 Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir.  
9 1994). Because plaintiffs bear the burden of proof at trial, a  
10 defendant has no burden to negate a plaintiff's claims to  
11 prevail on a motion for summary judgment. See Celotex, 477 U.S.  
12 at 323, 106 S. Ct. at 2552-53.

13           Furthermore, the evidence presented in opposition to a  
14 motion for summary judgment must be probative and properly  
15 supported. See Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 883  
16 (9th Cir. 1982). To successfully rebut a properly supported  
17 summary judgment motion, the non-moving party "must point to  
18 some facts in the record that demonstrate a genuine issue of  
19 material fact and, with all reasonable inferences" made in the  
20 nonmoving party's favor, could convince a reasonable jury to  
21 find for that party. Reese v. Jefferson Sch. Dist. No. 14J, 208  
22 F.3d 736, 738 (9th Cir. 2000). See also Bias v. Moynihan, 508  
23 F.3d 1212, 1218 (9th Cir. 2007) (stating the non-moving party  
24 must present evidence that is significant and probative). It  
25 is not the Court's task to scour the record in search of a  
26 genuine issue of triable fact. See Carmen v. San Francisco  
27 Unified Sch. Dist., 237 F.3d 1026, 1028-29 (9th Cir. 2001). The  
28 non-moving party must "identify with reasonable particularity

1 the evidence that precludes summary judgment." Keenan, 91 F.3d  
2 at 1279. See also Simmons v. Navajo County, Ariz., 609 F.3d  
3 1011, 1017 (9th Cir. 2010).

4 On summary judgment, the Court may not make credibility  
5 determinations or weigh conflicting evidence. See Musick v.  
6 Burke, 913 F.2d 1390, 1394 (9th Cir. 1990). The Court must  
7 consider a party's motion for summary judgment construing the  
8 alleged facts with all reasonable inferences favoring the non-  
9 moving party. See, e.g., Genzler v. Longanbach, 410 F.3d 630,  
10 636 (9th Cir. 2005). However, the mere existence of a scintilla  
11 of evidence supporting the non-movant's position is  
12 insufficient; there must be enough evidence from which a trier  
13 of fact could reasonably find for the non-movant. Anderson, 477  
14 U.S. at 251-52 ("[T]he inquiry...is...whether the evidence  
15 presents a sufficient disagreement to require submission to a  
16 jury or whether it is so one-sided that one party must prevail  
17 as a matter of law.").

18 Each party has filed a motion for summary judgment.  
19 The Court must consider each party's motion for summary judgment  
20 construing the alleged facts with all reasonable inferences  
21 favoring the non-moving party. See, e.g., Genzler v.  
22 Longanbach, 410 F.3d 630, 636 (9th Cir. 2005).

### 23 **III Factual background**

24 The record in this matter is voluminous, exhibiting a  
25 pattern of small town politics and perceived loyalties and  
26 disloyalties. The Court's review has been extensive. The  
27 following material facts gleaned from that record are not in  
28 substantial dispute.

1           During the time relevant to this matter, Plaintiffs  
2 Frakes, Kemp, Ponce, Yeomans, and Norris were employed by  
3 Defendant Town of Quartzsite as police officers. Plaintiff  
4 Conley was employed by Defendant Town of Quartzsite as a Police  
5 Assistant Evidence Technician and certified Arizona Criminal  
6 Justice Information System officer, an administrative position.  
7 At all times relevant to the complaint, Defendant Taft was the  
8 Town Manager and Personnel Officer for Defendant Town of  
9 Quartzsite, Defendant Gilbert was Chief of Police for Defendant  
10 Town of Quartzsite, which post he assumed in 2005 or 2006, and  
11 Defendant Johnson was Assistant Town Manager for Defendant Town  
12 of Quartzsite. Defendants Taft, Gilbert, and Johnson are sued  
13 in both their individual and official capacities. The  
14 Quartzsite Police Department employed approximately fourteen  
15 sworn police officers at the time that the Plaintiffs were  
16 terminated from their employment.

17           In May of 2010, at the request of the Mayor of  
18 Quartzsite and a former Quartzsite Town Council member, the  
19 Arizona Department of Public Safety ("DPS") opened an "inquiry"  
20 into criminal allegations<sup>3</sup> that Defendant Gilbert, as the Chief  
21 of Police of the Town of Quartzsite, improperly spent federal  
22 grant money and was "committing fraud by failing to disclose  
23 paid vacation to Town finance director." Doc. 95 (Plaintiffs'  
24 Statement of Facts "PSOF"), Exh. C. See also Doc. 91

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26  
27           <sup>3</sup> Referencing Arizona Revised Statutes § 38-609, which provides:  
28 "A public officer or employee who accepts, retains or diverts for his  
own use or the use of any other person any part of the salary or fees  
allowed by law or usage to his deputy, clerk, other subordinate  
officer or employee, is guilty of a class 5 felony."

1 (Defendants' Statement of Facts "DSOF"), Exh. 22. Part of the  
2 inquiry was predicated on a handwritten, unsigned note stating  
3 that Chief Gilbert used vacation time without reporting the use  
4 of the time. See, e.g., Doc. 95, Exh. C, Attach.<sup>4</sup>

5 A DPS investigator assigned to the matter testified at  
6 his deposition with regard to the scope and the substance of the  
7 DPS investigation into the allegations against Chief Gilbert.  
8 The officer stated that the scope of the investigation into the  
9 Chief's reporting of vacation time was limited because the  
10 officer was not provided with the specific dates or time periods  
11 that Chief Gilbert was alleged to be absent on vacation or sick  
12 time which was allegedly not reported. See PSOF, Exh. D at 17-  
13 19. The DPS officer stated that the majority of the DPS report  
14 was focused on a different allegation, i.e., the alleged misuse  
15 of grant funds, rather than the allegation regarding the failure  
16 to report use of sick leave and vacation time. The officer  
17 stated this was because there was no "true complainant"  
18 regarding the Chief's alleged failure to report his use of sick  
19 leave and vacation time. Id., Exh. D at 18.

20 Plaintiff Ponce was interviewed as part of the DPS  
21 investigation. Id., Exh. D at 14. The DPS investigative  
22 report, at Exhibit C to Doc. 95 (PSOF), states:

23 Henderson spoke with QPD Sergeant William  
24 Ponce by telephone. Ponce denied authoring  
25 a letter stating Gilbert was not reporting  
26 vacations to Quartzsite's finance department  
but was aware of the problem.... Ponce said  
on three or four occasions, Gilbert took paid

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27 <sup>4</sup> One of the investigators stated in her deposition that  
28 Defendant Gilbert believed the note was authored by Bill Moore. See  
DSOF, Exh. 22 at 16.

1           vacations and never submitted a claim, which  
2           would reduce the amount of vacation time from  
3           Gilbert's earned leave balance.

4           Plaintiff Ponce also told the investigator that, when he had  
5           asked Defendant Gilbert for leave forms after the Chief had  
6           taken a vacation, Defendant Gilbert told Plaintiff Ponce he  
7           would "take care of it." Id., Exh. D at 14.

8           The DPS report states that Plaintiff Kemp called one of  
9           the DPS investigators to report that, although "everyone" in the  
10          Quartzsite Police Department "knew" Chief Gilbert took paid  
11          vacation time without reporting the use of annual leave,  
12          Plaintiff Kemp had no independent recollection of specific dates  
13          that Defendant Gilbert had used vacation time but failed to  
14          report it. Id., Exh. C. Plaintiff Kemp also told the DPS  
15          investigator that he was aware Defendant Taft had opined  
16          Defendant Gilbert did not need to report his use of vacation  
17          time to the Town of Quartzsite payroll department. Id., Exh. C.  
18          The investigator replied that, as Defendant Gilbert's  
19          supervisor, Defendant Taft could approve Defendant Gilbert's use  
20          of vacation time without reporting such to the payroll  
21          department and, accordingly, that Defendant Gilbert would not  
22          have perpetrated "fraud or criminal behavior" by failing to  
23          report the use of vacation time or sick leave. Id., Exh. C.  
24          There is no indication the DPS investigators reviewed Chief  
25          Gilbert's contract or the Town's personnel policies.

26          The DPS issued an investigation report dated June 22,  
27          2010, which contained the following conclusion: "This  
28          investigation did not discover any criminal violations committed  
29          by the Chief of Quartzsite Police Department, Jeff Gilbert."

1 Id., Exh. C & DSOF, Exh. 10. The report concluded that, with  
2 regard to the alleged misuse of federal grant money, no such  
3 misuse had occurred. DPS Officer Henderson testified at his  
4 deposition: "The investigation shows that there was never enough  
5 brought forth to even investigate [the sick and vacation time]  
6 matter fully." PSOF, Exh. D at 19. The other DPS investigating  
7 officer testified that DPS was not able to determine one way or  
8 the other whether Chief Gilbert failed to report his use of sick  
9 leave and vacation time because "We just did not have enough  
10 facts to continue our investigation." Id., Exh. E at 20.

11 In June or July of 2010, at a regular police department  
12 meeting, Defendant Gilbert told those at the meeting that the  
13 DPS had determined that the allegations against him were  
14 unfounded; Plaintiff Ponce testified in his deposition that  
15 Defendant Gilbert said the report had "cleared" him of any  
16 wrong-doing. Id., Exh. G at 42. See also DSOF, Exh. 4 at 35  
17 (deposition of Plaintiff Kemp); Exh. 7 at 42 (deposition of  
18 Plaintiff Ponce). Plaintiffs allege: "Chief Gilbert then  
19 threatened retaliation for any officers involved in the DPS  
20 investigation against him, stating he knew the names" of those  
21 who had "talked against" him and that there would be  
22 "consequences" or "hell to pay." PSOF, Exh. G at 42; DSOF, Exh.  
23 4 at 35-36 & Exh. 7 at 42. It is not clear from the record  
24 whether all of the Plaintiffs were present at this meeting.  
25 See, e.g., DSOF, Exh. 7 at 42. The Plaintiffs present at the  
26 meeting were not provided with a copy of the DPS report.

27 In April of 2011, Plaintiff Kemp attended a program  
28 sponsored by the Arizona Peace Officer Standards and Training

1 Board ("AZPOST"). Id., Exh. 7 at 42. AZPOST is the agency  
2 responsible for certifying sworn police officers in the State of  
3 Arizona. The agency has the authority to revoke an Arizona  
4 police officer's certification. As a result of the AZPOST  
5 training, Plaintiff Kemp concluded that a police officer might  
6 lose their certification for failing to report alleged criminal  
7 conduct by a superior officer. Plaintiff Kemp stated in his  
8 deposition that he became concerned that he could lose his  
9 certification if he did not report what he suspected was  
10 misconduct by Defendant Gilbert. Id., Exh. 4 at 65-72 & 84-85.  
11 Plaintiff Kemp further stated that he was most concerned about  
12 allegations Defendant Gilbert had run NCIC background checks on  
13 "potential candidates for election", because it was "wrong" to  
14 invade someone's privacy based on personal dislike. Id., Exh.  
15 4 at 67.<sup>5</sup>

16 On May 10, 2011, a "majority" of Quartzsite police  
17 officers, compiled a four-page type-written, unsigned, undated  
18 letter, delineating numerous complaints about Chief Gilbert's  
19 conduct. PSOF, Exh. K; DSOF, Exh. 8 at 56-64. The letter was  
20 hand-delivered to AZPOST on May 11, 2011. A second letter  
21 addressed "To whom it may concern" was on the letterhead of the  
22 Quartzsite Police Officers Association, signed by Plaintiffs  
23 Ponce, Yeomans, Kemp, Norris, Conley, and former Plaintiff  
24 Dominguez and three reinstated officers, and further amplified

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26 <sup>5</sup> The Court notes that such actions might constitute violations  
27 of Arizona Revised Statutes § 41-1750(Q)(2) and 18 U.S.C. § 2721(b)(1)  
28 and subject the Town of Quartzsite and the Chief to a variety of  
sanctions pursuant to 28 C.F.R. §§ 20.25 and 20.38, and 18 U.S.C. §  
2724, including criminal charges. See Ariz. Rev. Stat. Ann. § 28-457.

1 the first letter. PSOF, Exh. K; DSOF, Exh. 7 at 53-55, 57-58.

2 The signed letter states that the purpose of the  
3 unsigned letter was to request an investigation of Chief Gilbert  
4 by AZPOST. PSOF, Exh. K.

5 The unsigned letter states:

6 We...write this letter with great hesitation,  
7 and only after much discussion and  
8 contemplation. We hesitate because we  
9 consider ourselves a team of professional,  
10 dedicated, and educated individuals and it  
11 goes against our nature to go against the  
12 Chief of Police. We also hesitate because we  
13 fully believe that if this letter does not  
14 have the desired result, and we continue to  
15 work under the current administration, there  
16 will most certainly be retaliation.

17 Id., Exh. K.

18 The unsigned "AZPOST letter" outlined what Plaintiffs  
19 believed to be improprieties committed by Chief Gilbert in his  
20 capacity as police chief, including claims that he engaged in  
21 selective law enforcement and ran improper license plate checks  
22 and criminal histories on political adversaries, their  
23 associates, or individuals he did not like. Id., Exh. K.  
24 Plaintiffs aver that, "relevant to Plaintiffs' terminations was  
25 the claim that Chief Gilbert did not properly report his use of  
26 sick and vacation time":

27 Chief Gilbert accrues "sick" and "vacation"  
28 time but when he chooses to take time off,  
29 which is a substantial amount of time, he  
30 doesn't report the time. He never uses any of  
31 his "sick" or "vacation" time. He doesn't  
32 even complete a time sheet, if he does  
33 complete one, it has only been recently.

34 Id. at para. 21.

1           The letter states that it was written by a "majority"  
2 of police department employees, and avers that morale at the  
3 department was then very low. Id., Exh. K. The letter states  
4 that the signatories had no confidence in Defendant Gilbert's  
5 abilities as Chief of Police. The signatories "question[ed] the  
6 leadership abilities" of Defendant Gilbert and averred he was  
7 not interested in "day to day" management of the department.  
8 Id., Exh. K. The signatories cited an incident when Defendant  
9 Gilbert objected to a police officer using sick leave rather  
10 than vacation leave upon the birth of a child; allowing the  
11 officers to do this was, the Plaintiffs stated, a department  
12 practice. The letter provided to AZPOST also states Defendant  
13 Gilbert was "fixated" on local politics and alleges that he  
14 acted for personal gain. Id., Exh. K. The letter alleges  
15 Defendant Gilbert improperly ran National Crime Information  
16 Center ("NCIC") reports on candidates for local political  
17 offices if he did not like the candidate. Id., Exh. K (The  
18 letter is also provided at DSOF at Exh. 11).<sup>6</sup>

19           At some time after May 11, 2011, AZPOST referred  
20 Plaintiffs' complaints regarding Defendant Gilbert to the Town  
21 of Quartzite for investigation. See, e.g., DSOF, Exh. 7 at 63-  
22 65.

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23  
24  
25           <sup>6</sup> The Court finds the allegations may be characterized as: 1.  
26 threats against Plaintiffs; 2. claims of a lack of leadership; 3.  
27 claims of abuse of authority; 4. allegations regarding the Chief's  
28 "misuse of sick leave/vacation time"; 5. allegations regarding the  
abuse of access to public records; 6. allegations of selective law  
enforcement; 7. claims of disparate treatment of officers; 8.  
assertions that the Chief harassed police officers and citizens; 9.  
claims that the Chief did not promote employees based on merit.

1 Defendant Gilbert testified at his deposition that the  
2 Quartzsite police department operated "differently" after the  
3 AZPOST letter was written and delivered. DSOF, Exh. 3 at 37-38.  
4 Defendant Gilbert stated that there were "some strains on the  
5 department." Id., Exh. 3 at 38. Defendant Gilbert stated there  
6 was a "strain" between the police officers who had complained to  
7 AZPOST about Defendant Gilbert and the few police officers who  
8 had not complained. Id., Exh. 3 at 38. Defendant Gilbert  
9 stated that, after the AZPOST letter was delivered, he had to be  
10 "very careful" about his conversations with the complaining  
11 officers. Id., Exh. 3 at 38. Defendant Gilbert stated that  
12 raising the complaints "affected" Plaintiffs' work performance,  
13 i.e., that they were doing "their minimum job," and "just doing  
14 what they needed to do to get by." Id., Exh. 3 at 38 & 42.  
15 Defendant Gilbert stated that "people were preoccupied with the  
16 issues that were ongoing with the department." Id., Exh. 3 at  
17 42. Defendant Gilbert did not indicate that there were  
18 significant workplace disruptions or loss of functioning of the  
19 police department caused by Plaintiffs' writing or delivering  
20 the AZPOST letter. See id., Exh. 3 at 47 ("there just certainly  
21 seemed to be friction, you know, I think, on everybody's part").

22 Plaintiffs decided to bring their complaints about  
23 Defendant Gilbert, as contained in the AZPOST letter, to the  
24 attention of the Quartzsite Town Council. Id., Exh. 4 at 101-  
25 03, Exh. 7 at 70-73, 85, Exh. 8 at 43-45. Plaintiff Ponce  
26 distributed copies of the letter provided to AZPOST to the  
27 Quartzsite Town Manager and some members of the Quartzsite Town  
28 Council between May 11, 2011, and June 1, 2011. Id., Exh. 7 at

1 65-85.

2           On May 31, 2011, "members" of the Quartzsite Police  
3 Officers Association, "representing approximately 80% of the  
4 department," composed a letter addressed to the Mayor of  
5 Quartzsite, members of the Quartzsite Town Council, and  
6 "citizens of Quartzsite," enumerating complaints against Chief  
7 Gilbert and accusing Defendant Taft of delaying, stalling, and  
8 obstructing an investigation into their complaints against Chief  
9 Gilbert. PSOF, Exh. L; DSOF, Exh. 4 at 104. This letter does  
10 not mention Chief Gilbert's alleged misuse of leave time.

11           On June 1, 2011, the Mayor of Quartzsite called a  
12 special meeting of the Town Council regarding the complaints  
13 about Defendant Gilbert. See, e.g., DSOF, Exh. 4 at 102, Exh.  
14 7 at 97. If given the opportunity, Plaintiff Ponce planned to  
15 address the Town Council regarding the Plaintiffs' concerns  
16 about Defendant Gilbert at the June 1, 2011 meeting. Id., Exh.  
17 7 at 98-99. Reports of the number of people at the meeting  
18 varied from 70 to approximately 200 people. Id., Exh. 2 at 49-  
19 51, Exh. 7 at 99. Defendant Assistant Town Manager Johnson  
20 stated in his deposition that he was forced to end the meeting  
21 and clear the building because the June 1, 2011 meeting could  
22 not proceed without a quorum. Id., Exh. 2 at 49-51. The Mayor  
23 stated the gathering would then proceed as a "town hall," but  
24 Defendant Johnson ended the meeting after approximately fifteen  
25 minutes. Id., Exh. 2 at 49-52. Plaintiff Ponce and Plaintiff  
26 Kemp stated in their depositions that Defendant Johnson "shut  
27 down" the June 1, 2011 meeting. Id., Exh. 7 at 99-100; Exh. 4  
28 at 108-12. Plaintiff Ponce stated that citizens were unhappy

1 that the meeting did not occur. Id., Exh. 7 at 99-101.

2 Defendant Johnson stated that he and Defendant Taft  
3 determined, after the June 1, 2011 "town hall" meeting, that an  
4 investigation into the allegations against Chief Gilbert should  
5 occur. DSOF, Exh. 2 at 37-42. Defendant Johnson stated he  
6 considered the Chief's use of sick leave and vacation time to be  
7 a personnel issue which should have been resolved "up the chain  
8 of command" and believed this issue had previously been  
9 investigated and resolved via the DPS investigation. Id., Exh.  
10 2 at 32-35. Defendant Johnson considered other claims, such as  
11 the allegations of the Chief's mis-use of the NCIS system, to be  
12 allegations of criminal behavior or ethical misconduct but that  
13 an anonymous letter without evidence of such misconduct did not  
14 warrant investigation. Id., Exh. 2 at 32-35. Defendant Johnson  
15 stated in his deposition that, after determining that an  
16 investigation into Plaintiffs' claims against Chief Gilbert  
17 should be conducted, a decision made in conjunction with  
18 Defendant Taft, the state police (DPS) refused to undertake an  
19 investigation of any of the allegations in the AZPOST letter  
20 except the allegation that the Chief misused the NCIC system,  
21 because they concluded the other allegations were not  
22 allegations of criminal misconduct. Id., Exh. 2 at 40-41.

23 Accordingly, on or about June 2, 2011, the Town of  
24 Quartzsite retained the law firm of Jackson Lewis LLP to conduct  
25 an independent investigation of the issues raised in the AZPOST  
26 letter about Chief Gilbert.<sup>7</sup> DSOF, Exh. 2 at 39-44, Exh. 17

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27  
28 <sup>7</sup> The firm of Jackson Hewitt represents Defendants in this  
matter.

1 (pages 1 and 48-50 of the report). The investigation began on  
2 June 2, 2011, the day after the June 1, 2011 "town hall"  
3 meeting, and encompassed interviews with seventeen witnesses,  
4 including Defendant Gilbert, Defendant Taft, and Defendant  
5 Johnson. The portion of the report provided to the Court  
6 indicates the law firm investigated at least three of the  
7 allegations against Chief Gilbert raised in the AZPOST letter.  
8 Id., Exh. 17.<sup>8</sup>

9 A regular meeting of the Quartzsite Town Council was  
10 held June 14, 2011. See, e.g., DSOF, Exh. 7 at 102. It was  
11 expected that Plaintiffs' complaints about Chief Gilbert would  
12 be aired at this meeting. Id., Exh. 4 at 112. Plaintiffs were  
13 also at the meeting. See id., Exh. 4 at 118; Exh. 7 at 17; Exh.  
14 8 at 88. A representative of "AZ COPS" (the parent organization  
15 of the Quartzsite Police Officers Association), attended the  
16 June 14, 2011 Town Council meeting and spoke in support of  
17 Plaintiffs' complaints against Defendant Gilbert. Id., Exh. 8  
18 at 86-87. Some attendees wore blue shirts to the meeting as a  
19 sign of support for Chief Gilbert and some attendees wore red  
20 shirts as a sign of non-support for Chief Gilbert. Id., Exh. 4  
21 at 112 & Exh. 7 at 114-16 & Exh. 8 at 85-86. Some or all  
22 Plaintiffs wore red shirts to the meeting. Id., Exh. 4 at 112.

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23  
24 <sup>8</sup> The entire report has not been provided to the Court in the  
25 record on the parties' motions for summary judgment. Defendants  
26 attached pages 48-50 of the report and the first page of the cover  
27 letter accompanying the report as Exhibit 17 to their Statement of  
28 Facts at Doc. 91. The pages provided indicate that the firm  
investigated claims, *inter alia*, that Chief Gilbert "Conspired To Get  
Town Prosecutor Fired," a claim regarding "Complaints About The Way  
Chief Gilbert Handles Sick Leave Issues," and "Allegations Regarding  
Improper Use of National Crime Information Center". Doc. 91, Exh. 17.

1 Plaintiff Ponce stated that Chief Gilbert moved over and stood  
2 next to the AZ COPS representative while this individual spoke  
3 on behalf of the officers at the meeting, in an effort to  
4 intimidate the AZ COPS representative. Id., Exh. 7 at 117. The  
5 Court has reviewed the video recording of the meeting and  
6 reached a similar conclusion. There was contention at the June  
7 14, 2011 Quartzsite Town Council meeting. See, e.g., DSOF, Exh.  
8 2 at 66-68, Exh. 25 (Declaration of Defendant Taft) at Exh. D (a  
9 CD video recording of the meeting). According to defendant  
10 Johnson, Plaintiffs did nothing to incite trouble at the Town  
11 meetings. PSOF, Exh. V at 200. In describing the June 14, 2011  
12 meeting, Plaintiff Kemp stated:

13           You could see who supported who based on the  
14           colors they were wearing. And when [Mayor] Ed  
15           Foster opened the call to the public and [the  
16           AZ COPS representative] got up to speak, the  
          rest of the council got up and filed out. At  
          that point, the town people became very  
          angry.

17 Id., Exh. 4 at 118.

18           There is no dispute that local politics in Quartzsite  
19           were contentious and that Town Council meetings were  
20           rambunctious even before Plaintiffs raised issues about  
21           Defendant Gilbert's job performance. Plaintiff Kemp stated in  
22           his deposition that angry citizens and raised voices were normal  
23           at Town Council meetings. Id., Exh. 4 at 108-11. One citizen  
24           who was arrested at the June 14th meeting was known to regularly  
25           "disrupt" council meetings. Id., Exh. 24 at 98. Plaintiff  
26           Yeoman stated in his deposition that citizens were arrested at  
27           meetings for yelling, and that one citizen was arrested for  
28           calling Defendant Johnson a disparaging name and gesturing

1 obscenely in his direction. Id., Exh. 5 at 66-77. Defendant  
2 Johnson referred to these individuals as the "usual suspects".  
3 Id., Exh. 2 at 54-55.

4 Defendants allow that, from 2008 through the time the  
5 Complaint was filed in 2011, there had been six mayors of the  
6 Town of Quartzsite and that Town Council meetings were often  
7 tumultuous. PSOF, Exh. X at 241, 254. Defendant Johnson stated  
8 at his deposition that Mayor Foster, who was the Mayor in May  
9 and June of 2011, had been censured by the Town Council several  
10 times. DSOF, Exh. 2 at 54-55. According to Mayor Foster he had  
11 been arrested or investigated by the Chief eleven times. DSOF,  
12 Exh. 24 at 101. Defendant Johnson stated that certain citizens  
13 regularly disrupted Town Council meetings and that meetings  
14 regularly included verbal assaults on the Town staff. Id., Exh.  
15 2 at 54-55, 60-62. See also id., Exh. 24 at 74. Mayor Foster  
16 stated that Defendant Johnson himself had caused disturbances at  
17 Town Council meetings because he would order people removed from  
18 the meetings. Id., Exh. 24 at 98. Defendant Johnson stated in  
19 his deposition that he had individuals arrested and removed from  
20 the meetings. Id., Exh. 2 at 58.

21 On June 21, 2011, the *Palo Verde Times & Quartzsite*  
22 *Times* reported that: "Hostilities have continued in Quartzsite  
23 since 10 Quartzsite Police Department employees called for the  
24 resignation of Chief Jeff Gilbert and called for an  
25 investigation of his conduct by a law enforcement agency." Id.,  
26 Exh. 26. The article stated: "The crowd often became disruptive  
27 and unruly, with persons shouting insults at council members or  
28 trying to shout down anyone who was speaking." Id., Exh. 26.

1 On July 6, 2011, the *Dessert Messenger* reported that:

2 The three June meetings of Quartzsite Town  
3 Council were full of angry outbursts,  
4 arrests, disrespectful communications, an "us  
5 vs. them" mentality, and even a few  
6 surprises....In a June 12, 2011 press  
7 release, Members of the Quartzsite Police  
8 Officers Association announced 9 officers and  
9 the clerk had expressed a vote of "No  
10 Confidence" in the leadership of Police Chief  
11 Jeff Gilbert, and have requested his  
12 resignation.

13 Id., Exh. 27.

14 On July 7, 2011, the law firm Jackson Lewis LLP issued  
15 a report regarding the results of their investigation into the  
16 allegations against Chief Gilbert. The report included the  
17 following findings:

18 [T]he witnesses contend that, even though the  
19 Chief accrues sick and vacation leave, he has  
20 never submitted paperwork to properly  
21 document the use of leave on occasions when  
22 he took time off for such purposes. These  
23 allegations appear to be without merit....

24 Id., Exh. 17.

25 Defendant Johnson was appointed by Defendant Taft to  
26 conduct "...the Internal Investigation of Police Chief Jeff  
27 Gilbert" on July 19, 2011. Id., Exh. 2 at 14 & Exh. 18.  
28 Defendant Taft's opinion was that, notwithstanding the specific  
language of the authorization, it included authorization to  
conduct an investigation of the police officers' conduct as  
described in the Jackson Lewis report. Id., Exh. 1 at 51-54.  
Defendant Gilbert testified he assisted Defendant Johnson's  
investigation by retrieving information from the Plaintiffs'  
personnel files at the police department. PSOF, Exh. V at 73.

1 Defendant Johnson made the decision to both suspend and to  
2 terminate each Plaintiff's employment with the Town of  
3 Quartzsite. Id., Exh. 2 at 9-12. Defendant Johnson stated that  
4 he was appointed to undertake the investigation because he was  
5 "the most neutral party that the town had." Id., Exh. 2 at 15.

6 Section 1501 of the Town of Quartzsite personnel manual  
7 provides:

8 Disciplinary actions shall be considered as  
9 a constructive means of dealing with an  
10 employee's unacceptable conduct or  
11 performance and should be appropriate to the  
12 seriousness of the infraction or performance  
13 deficiency. Disciplinary actions may take the  
14 form of admonishment, reprimand, suspension,  
15 demotion or dismissal.

16 On July 19, 2011, a notice of intent to dismiss  
17 Plaintiff Conley was issued by Defendant Johnson. PSOF, Exh. Q.  
18 The notice alleged Plaintiff had signed a letter on May 26,  
19 2011, knowing some claims in the letter to be false. The notice  
20 further alleged Plaintiff Conley had answered the police  
21 department's phone and told "the public" the town was under  
22 "Marshall (sic) Law" and that this all brought "discredit" to  
23 the Town in violation of section 1502 of the Town's personnel  
24 manual. The letter set a pre-dismissal meeting the next day,  
25 July 20, 2011, at 1:30 p.m. Although notifying Plaintiff Conley  
26 of her right to a dismissal meeting, it did not notify her of  
27 any administrative rights. On July 20, 2011, an "amended"  
28 notice of intent to discipline was issued advising Plaintiff  
Conley of her administrative rights (to consult an attorney or  
representative and present evidence in her defense) and setting  
a pretermination hearing for the very next day, July 21, 2011,

1 at 3 p.m. Id., Exh. Q; DSOF, Exh. 20 at 9.

2           On July 20, 2011, Defendant Johnson issued a "Notice of  
3 investigation and intent to interview" letter which was  
4 addressed to police officers Dominguez, Frakes, Kemp, Norris,  
5 Ponce, Rodriguez, Yeomans, Ruvalcaba, and Villafana. The letter  
6 stated Defendant Johnson was investigating a violation of the  
7 town's personnel policy, i.e., that Plaintiffs had "discredited"  
8 the community "by recklessly making false accusations" against  
9 the Chief of Police to AZPOST. The notice alleged Plaintiffs  
10 knew the allegations regarding the non-reporting of use of sick  
11 leave and vacation time to be false, because Plaintiffs knew DPS  
12 had investigated these allegations and Plaintiffs had been told  
13 the Chief's status allowed him to use leave time without  
14 reporting the use of vacation or sick leave, at the discretion  
15 of the Town Manager. The letter also notified the officers of  
16 certain administrative rights similar to Plaintiff Conley's  
17 notice, including a right of representation and to present  
18 evidence in their defense. See DSOF, Exh. 19; PSOF, Exh. O  
19 (Ponce Affidavit) at Exh. D.

20           On July 27, 2011, a notice of intent to terminate was  
21 issued to Plaintiff Ponce. The notice indicates Plaintiff Ponce  
22 could have known, at the time of the AZPOST letter, that the  
23 allegation regarding the Chief's mis-use of sick leave and  
24 vacation time was "false" but that Plaintiff went to AZPOST with  
25 this accusation anyway, thereby misleading AZPOST. The notice  
26 also indicates that Plaintiff Ponce, having been "advised" that  
27 the DPS investigation "cleared" the Chief regarding the  
28 accusation regarding vacation and sick leave, still went to

1 members of the town council and Mr. Lizarraga with these  
2 allegations, thereby misleading Mr. Lizarraga. The notice  
3 contends that, by signing the letter addressed to the Mayor,  
4 Town Council, and citizens of Quartzsite, he made a recklessly  
5 false statement regarding the Chief. Plaintiff Ponce's  
6 pretermination hearing was set for August 1, 2011, at 8:30 a.m.  
7 PSOF, Exh. O at Exh. E. Defendant Johnson terminated Plaintiff  
8 Ponce's employment effective August 1, 2011. Id., Exh. O at  
9 Exh. F.

10 As noted previously, on August 1, 2011, and on August  
11 3, 2011, Plaintiffs obtained temporary restraining orders from  
12 the La Paz County Superior Court reinstating the employees and  
13 preventing any further terminations. On September 9, 2011, this  
14 Court determined the temporary restraining orders had expired.

15 A notice of intent to terminate Plaintiff Frakes, a  
16 notice of intent to terminate Plaintiff Kemp, a notice of intent  
17 to terminate Plaintiff Norris, and a notice of intent to  
18 terminate Plaintiff Yeomans, were all issued by Defendant  
19 Johnson on September 15, 2011, setting pretermination hearings  
20 for each officer, in mere hours, on September 16, 2011. Id.,  
21 PSOF, Exh. R; DSOF, Exh. 20.

22 In making the termination decisions, Defendant Johnson,  
23 a non lawyer or law enforcement officer, was concerned that the  
24 Plaintiffs had been untruthful and that this could prevent them  
25 from testifying in court when required by their jobs as police  
26 officers. However, this concern originated with a Deputy County  
27 Attorney, not Defendant Johnson. DSOF, Exh. 2 at 150-52 & Exh.  
28 4. Dishonesty is typically considered to be a terminable

1 offense for a police officer as their name might be placed on a  
2 "Brady" list. Id., Exh. 2 & Exh. 4. Defendant Johnson stated  
3 in his deposition that he did not consult Defendant Gilbert  
4 regarding the decision to terminate Plaintiffs. Id., Exh. 2 at  
5 10-13. But Defendant Johnson did state that, prior to his  
6 appointment, he sat in on one or two meetings with Defendants  
7 Taft and Gilbert where the problems with the police department  
8 were discussed. Id., Exh. 2 at 15. Defendant Johnson stated  
9 that, at the time he terminated Plaintiffs, he was aware the  
10 Town could not terminate or retaliate against an employee for  
11 engaging in protected speech but believed the "discredit" the  
12 Plaintiffs brought to the Town outweighed their free speech  
13 rights and justified their termination. Id., Exh. 2 at 163-64.<sup>9</sup>

#### 14 **IV Analysis**

15 Plaintiffs move for summary judgment on their First  
16 Amendment retaliation claim. Defendants have moved the Court  
17 for summary judgment on Plaintiffs' First Amendment claims, and  
18 have also moved for summary judgment on Plaintiffs' remaining  
19 additional claims. Defendants argue they are entitled to  
20 judgment as a matter of law on Plaintiffs' section 1983 First  
21 Amendment retaliation claim because: (1) Plaintiffs did not  
22 engage in protected speech under the First Amendment; (2)  
23 Plaintiffs have failed to proffer any evidence to meet their  
24 burden of establishing municipal liability; and (3) Plaintiffs  
25 cannot meet their burden of showing that the individual

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27 <sup>9</sup> Arizona Revised Statutes § 38-532(A) and section 1507 of the  
28 Town of Quartzsite Personnel Policy specifically prohibit retaliating  
against a municipal employee for engaging in protected speech.

1 Defendants violated Plaintiffs' clearly established  
2 constitutional rights.

3 To establish a prima facie case of First Amendment  
4 retaliation, plaintiffs must prove that (1) they engaged in  
5 constitutionally protected speech; and (2) their protected  
6 speech was a substantial or motivating factor in the defendant's  
7 decision to terminate their employment. See Mt. Healthy City  
8 Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S. Ct.  
9 568 (1977).

10 "The doctrine of qualified immunity protects  
11 government officials 'from liability for  
12 civil damages insofar as their conduct does  
13 not violate clearly established statutory or  
14 constitutional rights of which a reasonable  
15 person would have known.'" Pearson v.  
16 Callahan, 555 U.S. 223, 231, 129 S.Ct. 808,  
17 [(2009)]. A public official is entitled to  
18 qualified immunity unless (1) "the facts  
19 alleged, taken in the light most favorable to  
20 the party asserting the injury, show that the  
21 official's conduct violated a constitutional  
22 right;" and (2) the right at issue "was  
23 clearly established 'in light of the specific  
24 context of the case' at the time of the  
25 alleged misconduct." Clairmont v. Sound  
26 Mental Health, 632 F.3d 1091, 1100 (9th Cir.  
27 2011) (quoting Saucier v. Katz, 533 U.S. 194,  
28 201, 121 S.Ct. 2151 [(2001)]). We exercise  
our discretion to consider prong one of the  
qualified immunity analysis first....

The First Amendment shields public  
employees from employment retaliation for  
their protected speech activities. See  
Garcetti v. Ceballos, 547 U.S. 410, 417, 126  
S.Ct. 1951, [(2006)]; Connick v. Myers, 461  
U.S. 138, 140, 103 S.Ct. 1684, [(1983)]. Out  
of recognition for "the State's interests as  
an employer in regulating the speech of its  
employees," Connick, 461 U.S. at 140, 103  
S.Ct. 1684, however, we must "arrive at a  
balance between the interests of the [public  
employee], as a citizen, in commenting upon  
matters of public concern and the interest of  
the State, as an employer, in promoting the  
efficiency of the public services it performs  
through its employees," Pickering v. Bd. of

1           Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 20  
2           L.Ed.2d 811 (1968).<sup>10</sup> We strike this balance  
3           when evaluating a First Amendment retaliation  
4           claim by asking "a sequential five-step  
5           series of questions." Eng, 552 F.3d at 1070.  
6           First, we consider whether the plaintiff has  
7           engaged in protected speech activities, which  
8           requires the plaintiff to show that the  
9           plaintiff: (1) spoke on a matter of public  
10           concern; and (2) spoke as a private citizen  
11           and not within the scope of her official  
12           duties as a public employee.

13           If the plaintiff makes these two showings,  
14           we ask whether the plaintiff has further  
15           shown that she (3) suffered an adverse  
16           employment action, for which the plaintiff's  
17           protected speech was a substantial or  
18           motivating factor. If the plaintiff meets her  
19           burden on these first three steps, thereby  
20           stating a prima facie claim of First  
21           Amendment retaliation, then the burden shifts  
22           to the government to escape liability by  
23           establishing either that: (4) the state's  
24           legitimate administrative interests outweigh  
25           the employee's First Amendment rights; or (5)  
26           the state would have taken the adverse  
27           employment action even absent the protected  
28           speech. See Robinson v. York, 566 F.3d 817,  
          822 (9th Cir. 2009); Eng, 552 F.3d at 1070;  
          see also Lakeside-Scott v. Multnomah Cnty.,  
          556 F.3d 797, 803 (9th Cir. 2009).

17           Karl v. City of Mountlake Terrace, 678 F.3d 1062, 1068 (9th Cir.  
18           2012) (some internal citations omitted).

19           If all of the undisputed material facts, taken in the  
20           light most favorable to Plaintiffs, fail to establish any one of

---

22           <sup>10</sup> In Pickering, a teacher wrote a letter to a local newspaper  
23           criticizing the school board and the superintendent's handling of past  
24           bond issue proposals, which included both substantially correct and  
25           erroneous statements of fact. See 391 U.S. at 564, 88 S. Ct. at 1733.  
26           The Court held that the teacher's erroneous statements, which were  
27           critical of his employer but did not impede the teacher's performance  
28           or interfere with the school's operation, could not serve as the basis  
          for his dismissal. Id. at 572-75, 88 S. Ct. at 1735-38. The Court  
          explained that, "in a case such as this, absent proof of false  
          statements knowingly or recklessly made by him, a teacher's exercise  
          of his right to speak on issues of public importance may not furnish  
          the basis for his dismissal from public employment." Id. at 574, 88  
          S. Ct. at 1737.

1 the five requirements stated in Robinson, Eng, and Karl,  
2 Plaintiffs' First Amendment claims fail as a matter of law and  
3 the Court need not examine the quantum of evidence on the other  
4 four factors. See Dahlia v. Rodrigues, \_\_\_ F.3d \_\_\_, 2013 WL  
5 4437594 at \*5 n.4 (Aug. 21, 2013)(stating this in an appeal of  
6 a motion to dismiss); Desrochers v. City of San Bernardino, 572  
7 F.3d 703, 708-09 (9th Cir. 2009).

8 **A. Did Plaintiffs engage in speech protected by the**  
9 **First Amendment?**

10 The Court notes the extensive argument that has been  
11 made with regard to establishing whether Defendant Gilbert was  
12 or was not required to report his use of sick leave and vacation  
13 time, whether or not he actually did so, whether or not each  
14 Plaintiff knew or should have known that he was not required to  
15 do so as a result of the DPS investigation or otherwise, and  
16 whether or not an actual violation of policy or law occurred as  
17 a result of his reporting or not reporting his use of vacation  
18 and sick leave time.

19 In Johnson v. Multnomah County, 48 F.3d 420, 424 (9th  
20 Cir. 1995), the Ninth Circuit Court of Appeals held that even  
21 recklessly false statements are not per se unprotected by the  
22 First Amendment when they substantially relate to matters of  
23 public concern. "Instead, the recklessness of the employee and  
24 the falseness of the statements are to be considered in light of  
25 the public employer's showing of actual injury to its legitimate  
26 interests, as part of the Pickering balancing test [the fourth  
27 step of the requisite analysis]." Id. (holding that an  
28 employee's accusations of mismanagement and possible criminal

1 conduct against her immediate supervisor constituted speech of  
2 public concern even though the statements were recklessly  
3 false).<sup>11</sup>

4 The "matter of public concern" test attempts  
5 to identify those cases in which the First  
6 Amendment protection of the speech is so  
7 insubstantial that the employer need show no  
8 countervailing interest at all before the  
9 employer may repress it. The County argues  
10 that recklessly false statements, like speech  
11 regarding the minutiae of internal personnel  
12 disputes, enjoy so little First Amendment  
13 protection that the public employer need show  
14 no injury to its legitimate interests before  
15 taking adverse actions in retaliation.

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11 [W]hile false statements are not deserving,  
12 in themselves, of constitutional protection,  
13 "erroneous statement is inevitable in free  
14 debate, and ... it must be protected if the  
15 freedoms of expression are to have the  
16 breathing space that they need ... to  
17 survive." New York Times Co. v. Sullivan, 376  
18 U.S. 254, 271-72, 84 S. Ct. 710, 721,  
19 [(1964)]. For this reason, constitutional  
20 protection is afforded some false statements.  
21 In determining the level of protection to  
22 such statements, the Supreme Court has  
23 traditionally balanced the interest in  
24 creating a "breathing space" for speech  
25 against the competing governmental interests  
26 associated with preventing injurious false  
27 statements.

20 Johnson, 48 F.3d at 423-24 (some internal quotations and  
21 citations omitted). Accordingly, knowingly false or "recklessly  
22 false" speech receives some First Amendment protection. Id. at  
23 426. See also Thomas v. City of Beaverton, 379 F.3d 802, 809  
24 (9th Cir. 2004) (holding that a statement need not be

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26 <sup>11</sup> The Ninth Circuit reached no conclusion as to whether  
27 statements that had been proven to be knowingly false would be  
28 protected because the parties in Johnson did not assert that the  
plaintiff had made a knowingly false statement. See 48 F.3d at 422  
n.3.

1 objectively and knowingly true to be protected speech).

2           Whether speech is knowingly or recklessly false is a  
3 matter of law properly determined on summary judgment because,  
4 for purposes of qualified immunity, the inquiry is not whether  
5 the terminated employee actually made false statements knowingly  
6 or recklessly, but whether a reasonable municipal official could  
7 believe the employee had knowingly made a false statement or  
8 made the statement with reckless disregard for the truth. See,  
9 e.g., Kodish v. Oakbrook Terrace Fire Prot. Dist., 604 F.3d 490,  
10 504 (7th Cir. 2010) ("Speech of public importance only loses its  
11 First Amendment protection if the public employee knew it was  
12 false or made it in reckless disregard of the truth."); See v.  
13 City of Elyria, 502 F.3d 484, 494-95 (6th Cir. 2007); Stanley v.  
14 City of Dalton, 219 F.3d 1280, 1290 n.18 (11th Cir. 2000).<sup>12</sup>  
15 Accordingly, the burden is not on Plaintiffs to prove that their  
16 speech was objectively true, but on Defendants to provide  
17 evidence not only that the content of Plaintiffs' speech was  
18 false, but that it was made with intentional or reckless  
19 disregard for the truth. See Westmoreland v. Sutherland, 662

20

21 <sup>12</sup>

22 A prosecutor's statement to a magazine about homicide rates  
23 within his jurisdiction is not protected by the First  
24 Amendment when it was admittedly false, admittedly made  
25 without any belief of a basis in fact, and made to promote  
26 sales of the prosecutor's novel. Hustler Magazine v.  
27 Falwell, 485 U.S. 46, 52 [(1988) (noting that speech is  
28 not protected when "made with knowledge that it was false or  
with reckless disregard of whether it was false or  
not")][]. . . . A government employee who purposefully or  
recklessly misinforms the public about a fact specifically  
related to his area of employment responsibility in order  
to profit monetarily should not be rewarded by a money  
judgment from a federal court when he is demoted. . . .  
Reuland v. Hynes, 460 F.3d 409, 421 (2d Cir. 2006) (Winter, J.,  
dissenting).

1 F.3d 714, 718, 722 (6th Cir. 2011). Such matters are properly  
2 decided on summary judgment where there is no disputed fact  
3 regarding whether, at the time of the adverse employment  
4 decision taken in retaliation for the protected speech, the  
5 defendant was aware the plaintiff knew of or was recklessly  
6 indifferent to the accuracy of their speech. Id.

7 The Court concludes, as explained more fully infra,  
8 that Plaintiffs' statements regarding the Chief's leave  
9 practices could not reasonably be characterized as recklessly  
10 false, let alone intentionally false. Likewise, Defendant Taft's  
11 and Defendant Johnson's actions concluding that Plaintiffs'  
12 statements were recklessly or intentionally false were not  
13 reasonable. The employees were merely expressing their belief  
14 of the facts as they then thought them to be and were requesting  
15 an impartial investigation.

16 **1. Did Plaintiffs speak on a matter of "public**  
17 **concern"?**

18 Whether an employee's speech addresses a  
19 matter of public concern is a pure question  
20 of law that must be determined "by the  
21 content, form, and context of a given  
22 statement, as revealed by the whole record."  
23 Connick, 461 U.S. at 147-48 & n.7, 103 S. Ct.  
24 1684. Of these three factors, the content of  
25 the speech is generally the most important.  
26 Clairmont, 632 F.3d at 1103. "[S]peech that  
27 deals with 'individual personnel disputes and  
28 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.'" Coszalter  
v. City of Salem, 320 F.3d 968, 973 (9th Cir.  
2003) (quoting McKinley v. City of Eloy, 705  
F.2d 1110, 1114 (9th Cir. 1983)). By  
contrast, "[s]peech involves a matter of  
public concern when it can fairly be  
considered to relate to 'any matter of  
political, social, or other concern to the

1 community.'" Johnson v. Multnomah Cnty., 48  
2 F.3d 420, 422 (9th Cir. 1995) (quoting  
3 Connick, 461 U.S. at 146, 103 S.Ct. 1684).

4 Karl, 678 F.3d at 1069 (emphasis added).

5 Plaintiffs contend they spoke on a matter of public  
6 concern, while Defendants argue that Plaintiffs' speech was  
7 primarily concerned with their individual personnel disputes  
8 with Chief Gilbert. Defendants also contend that, because  
9 Plaintiffs' speech regarding Chief Gilbert's use of sick leave  
10 and vacation time was recklessly false in light of the DPS  
11 investigation, the speech was not, as a matter of law, protected  
12 speech.

13 There is no disputed issue of material fact with regard  
14 to this issue of law, i.e., the form, content, and context of  
15 the allegedly protected "speech," as revealed by the entire  
16 record.

17 The "form" of the speech was via an unsigned letter,  
18 which Plaintiffs later acknowledged they had participated in  
19 authoring, which was provided to AZPOST, and a letter signed by  
20 Plaintiffs as affirming their belief in the accusations made  
21 about Chief Gilbert in the AZPOST letter, which letters were  
22 provided to the Quartzsite Town Council and the public via the  
23 local media. The content of the letters involved matters of  
24 "political, social, or other concern to the community," i.e.,  
25 malfeasance by the Chief of Police. The context of the speech  
26 was that employees of the department believed there was  
27 malfeasance by the Chief that Plaintiffs believed needed to be  
28 investigated.

1           Although the parties have focused on the "part" of the  
2 unsigned letter that focused on the Chief's use of sick leave  
3 and vacation time because this was the asserted reason for  
4 Plaintiffs' termination (that this allegation was false), the  
5 other allegations in the unsigned and signed letters are  
6 certainly relevant to establishing the context of the "speech"  
7 for which Plaintiffs were allegedly terminated. The letter  
8 contained allegations which undoubtedly were or should have been  
9 of great concern to the citizens of Quartzsite, such as the  
10 assertions that arrest warrants were not executed and that  
11 legally restricted information was improperly gathered on  
12 citizens. Additionally, although the Chief's reporting of sick  
13 leave or vacation time can be characterized as a "minor"  
14 infraction of city policy and procedures, it is also a matter of  
15 public concern because such reporting affected the amount of the  
16 Chief's ultimate compensation or pension benefits. See Keyser  
17 v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 747 (9th  
18 Cir. 2001).

19           Accordingly, as a matter of law, the Plaintiffs'  
20 "speech" was on matters of public concern. See Huppert v. City  
21 of Pittsburg, 574 F.3d 696, 706 (9th Cir. 2009)("[A]n  
22 investigation into corruption at a public department is most  
23 certainly a matter of public concern. The same is true for  
24 corruption within or concerning the police force.")<sup>13</sup>; McKinley

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25  
26           <sup>13</sup>

27           "When the employee addresses issues about which  
28           information is needed or appropriate to enable the members  
          of society to make informed decisions about the operation  
          of their government, that speech falls squarely within the  
          boundaries of public concern." Id. (internal quotation

1 v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983) ("the  
2 competency of the police force is surely a matter of great  
3 public concern"). Compare Desrochers, 572 F.3d at 712-13.<sup>14</sup>

4 **2. Did Plaintiffs speak as private citizens and not**  
5 **within the scope of their official duties as public employees?**

6 Plaintiffs bear the burden of establishing the relevant  
7 speech was uttered in their capacities as private citizens and  
8 not in their capacities as public employees. See, e.g.,  
9 Garcetti v. Ceballos, 547 U.S. 410, 421-22, 126 S. Ct. 1951,  
10 1959-60 (2006); Eng v. Cooley, 552 F.3d 1062, 1071 (9th Cir.  
11 2009). This is a mixed question of law and fact. See, e.g.,  
12 Gibson v. Office of Att'y Gen., 561 F.3d 920, 925 (9th Cir.  
13 2009). "While the Supreme Court [in Ceballos] did not delineate  
14 a 'comprehensive framework' for determining when speech is  
15 pursuant to an employee's job function, it provided guidance for

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17 marks and citations omitted). We have said that "[u]nlawful  
18 conduct by a government employee or illegal activity within  
19 a government agency is a matter of public concern." Thomas  
20 v. City of Beaverton, 379 F.3d 802, 809 (9th Cir. 2004).  
21 Furthermore, "misuse of public funds, wastefulness, and  
22 inefficiency in managing and operating government entities  
23 are matters of inherent public concern." Johnson v.  
24 Multnomah County, 48 F.3d 420, 425 (9th Cir. 1995). It is  
clear to us that an investigation into corruption and  
misconduct at the local Public Works Department-typically  
a municipal department created to provide multiple public  
services to community members-is a matter of public  
concern. Cf. Robinson, 566 F.3d at 823.  
Huppert, 574 F.3d at 703-04.

25 <sup>14</sup> In Desrochers, the court found:

26 Rather, the sergeants complain about their superiors'-  
27 especially Kimball's - personalities; the grievances amount  
28 to a laundry list of reasons why Desrochers, Lowes, and  
perhaps other SBPD employees found working for Kimball to  
be an unpleasant experience.

In short, they thought their boss was a bully and said so.  
572 F.3d at 713 & n.11.

1 lower courts to follow when making such a decision." Huppert,  
2 574 F.3d at 706. "[S]tatements are made in the speaker's  
3 capacity as citizen if the speaker had no official duty to make  
4 the questioned statements, or if the speech was not the product  
5 of performing the tasks the employee was paid to perform."  
6 Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121,  
7 1127 n.2 (9th Cir. 2008)(internal citations and quotation marks  
8 omitted). Compare Huppert, 574 F.3d at 706.

9 In Freitag v. Ayers, the Ninth Circuit determined that  
10 the plaintiff's reports of sexual harassment, and complaints to  
11 her superiors within the prison system about the harassment,  
12 were examples of unprotected speech. The Ninth Circuit also  
13 found, however, that the plaintiff's communication outside the  
14 prison system, to her state senator and the appointed inspector  
15 general with regard to the failure of the prison system to  
16 address her complaints of sexual harassment, were found to be  
17 communications protected by the First Amendment. The Ninth  
18 Circuit reasoned that "[the plaintiff's] right to complain both  
19 to an elected public official and to an independent state agency  
20 is guaranteed to any citizen in a democratic society regardless  
21 of his status as a public employee." 468 F.3d 528, 546 (9th  
22 Cir. 2006).

23 Defendants contend that Plaintiffs' speech was not that  
24 of a private citizen:

25 Here, the undisputed evidence shows that the  
26 Plaintiffs' speech was animated by a dislike  
27 for the Chief and a desire to protect  
28 themselves and improve their personal work  
environment; matters that do not relate to a  
public concern.

For instance, Kemp, Frakes, Ponce, and

1           Norris testified that they complained to AZ  
2           POST because they were required to do so to  
3           avoid losing their certification as police  
4           officers. [SOF 37-43, 52-57] Kemp was,  
5           perhaps, the most blunt about it, admitting  
6           that he participated in the complaint, "to  
7           cover [his own] ass." Thus, the undisputed  
8           evidence shows that Plaintiffs were acting  
9           within the scope of their duties as police  
10           officers, and for the purpose of preserving  
11           their own jobs - and not as "citizens." For  
12           these reasons alone, the Court should  
13           conclude that their speech was unprotected.  
14           Garcetti v. Ceballos, 547 U.S. 410, 421  
15           (2006) ("We hold that when public employees  
16           make statements pursuant to their official  
17           duties, the employees are not speaking as  
18           citizens for First Amendment purposes, and  
19           the Constitution does not insulate their  
20           communications from employer discipline.").  
21           Moreover, in a particularly candid admission,  
22           one Plaintiff testified that he did not care  
23           about what AZPOST did with his  
24           complaint-hardly the sentiment of someone who  
25           was attempting to raise issues of public  
26           concern.

27           Doc. 90 at 8.

28           In the recent en banc decision in Dahlia v. Rodriguez,  
the Ninth Circuit Court of Appeals restated that the proper  
inquiry as to whether a plaintiff is acting as a private citizen  
or reporting pursuant to official duties "is a practical one,"  
which does not focus on a plaintiff's formal job description as  
a police officer. See \_\_\_ F.3d \_\_\_, 2013 WL 4437594 at \*7 (Aug.  
21, 2013), citing Garcetti, 547 U.S. at 424-25, 126 S. Ct. at  
1961-62. The en banc panel specifically overruled its prior  
decision in Huppert v. City of Pittsburgh, to the extent Huppert  
had "improperly relied on a generic job description and failed  
to conduct the 'practical,' fact specific inquiry required by

1 Garcetti.”<sup>15</sup>

2           The Dahlia en banc panel identified a three-prong  
3 analysis for determining whether a plaintiff speaks as a public  
4 servant or private citizen: The first factor in the analysis is  
5 whether the employee reported their complaints through the chain  
6 of command. In this matter, Plaintiffs reported their complaints  
7 about the Chief outside the chain of command, i.e., to AZPOST,  
8 to the Town Council, and to the public via the media. See  
9 Dahlia, 2013 WL 4437594 at \*10 (“[w]hen a public employee  
10 communicates with individuals or entities outside of his chain  
11 of command it is unlikely that he is speaking pursuant to his  
12 duties.”).

13           The second factor identified by the Dahlia court looks  
14 at the content of the speech, i.e., whether the speech takes the  
15 form of a “routine report” ordinarily prepared by the plaintiff  
16 in the scope of their employment. In this matter, the speech was  
17 not in the form of speech undertaken as part of any plaintiff’s  
18 job duties. Id.

19           The third prong of the analysis evaluates whether the  
20 plaintiff spoke “in direct contravention to his supervisor’s  
21 orders,” in which case it may be concluded that the speech was  
22 not made as part of the plaintiff’s professional duties. Id.,  
23 2013 WL 4437594 at \*11. “Indeed, the fact that an employee is  
24 threatened or harassed by his supervisors for engaging in a  
25 particular type of speech provides strong evidence that the act

26

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27           <sup>15</sup> The decision in Dahlia is specific to a prior holding that  
28 California’s police officers were unique for purposes of First  
Amendment retaliation claims because of specific provisions of  
California state law not relevant to this matter.

1 of speech was not, as practical matter, within the employee's job  
2 duties..." Id. In this matter, the record indicates that Chief  
3 Gilbert in effect told the police officers present at the June  
4 or July 2010 department meeting that they would be retaliated  
5 against for raising issues about his behavior to an outside  
6 investigative agency.

7 The Court concludes that the undisputed material facts  
8 establish that Plaintiffs spoke as private citizens and not as  
9 public employees.<sup>16</sup>

10 **3. Did Plaintiffs suffer an adverse employment action,**  
11 **for which Plaintiffs' protected speech was a substantial or**  
12 **motivating factor?**

13 The parties are in agreement that Plaintiffs were  
14 terminated because of their statements regarding Chief Gilbert's  
15 failure to report his use of sick leave and vacation time, which  
16 Defendants contend they determined was recklessly false because  
17 the DPS investigation into this issue had indicated no evidence  
18 to support a claim of malfeasance by Chief Gilbert.

19 Accordingly, Plaintiffs were all terminated from their  
20 employment based on their protected speech as private citizens,  
21 i.e., Plaintiffs were terminated because of their statement  
22 regarding Chief Gilbert's failure to report his use of sick leave  
23 and vacation time, which the Court has found to be protected

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24  
25 <sup>16</sup> Arizona Revised Statutes Annotated § 41-1828.01(A) states that  
26 a law enforcement agency "may" report to the board any peace officer  
27 misconduct in violation of the rules for retention at any time and  
28 "shall" report the misconduct upon the peace officer's termination,  
resignation or separation from the agency. The statute is silent as  
to any individual officer's duty to report such conduct. The AZPOST  
regulations (R13-4-101 et seq) are also silent as to an individual  
officer's duty to report malfeasance.

1 speech. Even if Plaintiffs' speech on this issue were not the  
2 sole reason for Plaintiffs' termination, under the "mixed motive"  
3 analysis established by Mt. Healthy, the question is whether the  
4 employer "would have reached the same [adverse employment]  
5 decision even in the absence of the [employee's] protected  
6 conduct." Ulrich v. City & Cnty. of S.F., 308 F.3d 968, 976-77  
7 (9th Cir. 2002), citing Mt. Healthy, 429 U.S. at 287, 97 S. Ct.  
8 at 568; Thomas, 379 F.3d at 808. In their motion for summary  
9 judgment and response to Plaintiffs' motion for summary judgment  
10 Defendants do not urge in any manner that Plaintiffs would have  
11 been terminated absent their involvement in the AZPOST letter.

12 **4. Did Defendant Town of Quartzsite's legitimate**  
13 **administrative interests outweigh Plaintiffs' First Amendment**  
14 **rights?**

15 If a plaintiff meets their burden of establishing that  
16 they engaged in protected speech as a private citizen and that  
17 they suffered an adverse employment action predicated at least  
18 in part by their protected speech, then the burden shifts to the  
19 defendant to escape liability by establishing that the  
20 defendant's legitimate administrative interests outweighed the  
21 plaintiff's First Amendment rights to utter the protected speech.  
22 This portion of the analysis is referred to as the "Pickering"  
23 test.

24 Resolution of the Pickering balancing test is a matter  
25 of law properly decided on summary judgment. See, e.g., Eng, 552  
26 F.3d at 1071. Additionally, because Defendants have asserted  
27 qualified immunity from liability, the Pickering balancing test  
28 is amended: the question becomes whether the outcome of the

1 Pickering test so clearly favors Plaintiffs that it would have  
2 been patently unreasonable for Defendants to conclude that the  
3 First Amendment did not protect Plaintiffs' speech. See, e.g.,  
4 Gilbrook v. City of Westminster, 177 F.3d 839, 867 (9th Cir.  
5 1999).

6 To meet their burden on the Pickering test Defendants  
7 must establish that their "legitimate administrative interests"  
8 outweighed Plaintiffs' First Amendment rights. See Clairmont v.  
9 Sound Mental Health, 632 F.3d 1091, 1106-08 (9th Cir. 2011).  
10 Asserted administrative interests which are "weak and  
11 unsupported" do not outweigh legitimate free speech rights. Id.  
12 at 1106. Additionally, the employer must show "injury to its  
13 *legitimate* interests." Johnson, 48 F.3d at 427 (emphasis added).  
14 A public employer "does not have a legitimate interest in  
15 covering up mismanagement or corruption and cannot justify  
16 retaliation against whistleblowers as a legitimate means of  
17 avoiding the disruption that necessarily accompanies such  
18 exposure." Id.

19 These interests include promoting efficiency  
20 and integrity in the discharge of official  
21 duties and maintaining proper discipline in  
22 the public service. Connick, 461 U.S. at  
23 150-51, 103 S. Ct. 1684.... Cases that  
24 analyze whether the government's  
25 administrative interests outweighed the  
26 plaintiff's right to engage in protected  
27 speech examine *disruption resulting both*  
28 *from the act of speaking and from the*  
*content of the speech.*

Id. (emphasis added).

26 In balancing the competing interests, this  
27 court has considered a host of factors. We  
28 have inquired whether the speech (1)  
impaired discipline or control by superiors;  
(2) disrupted co-worker relations; (3)

1 eroded a close working relationship premised  
2 on personal loyalty and confidentiality; (4)  
3 interfered with the speaker's performance of  
4 his or her duties; or (5) obstructed routine  
5 office operations. See Fazio v. City &  
6 County of San Francisco, 125 F.3d 1328, 1331  
7 n.1 (9th Cir. 1997).... Moreover, this court  
8 has weighed (6) whether the speaker directed  
9 the statement to the public or the media, as  
10 opposed to a governmental colleague, id. at  
11 981; (7) whether the speaker served in a  
12 high-level, policy-making capacity; and (8)  
13 whether the statement was false or made with  
14 reckless disregard of the truth, see Moran  
15 v. Washington, 147 F.3d 839, 849-50 (9th  
16 Cir. 1998) (considering those last two  
17 factors). Because the Pickering balance  
18 necessarily involves a fact-sensitive  
19 inquiry involving the totality of the  
20 circumstances, no single factor is  
21 dispositive.

22 Gilbrook, 177 F.3d at 867-68.

23 When determining whether Plaintiffs' speech disrupted  
24 the workplace, the Court also reviews "the manner, time, and  
25 place in which" the protected speech occurred. Connick v. Myers,  
26 461 U.S. 138, 152-53, 103 S. Ct. 1684, 1693 (1983). In Connick,  
27 the fact that the speech took place at the office was found to  
28 support the determination that the speech disrupted the  
efficiency of the workplace. Id., 461 U.S. at 153, 103 S. Ct.  
at 1093-94. The Supreme Court contrasted the situation in  
Connick with that in Pickering, where the employee's speech  
occurred during their free time away from the workplace.

23 The Court may weigh the level of disruption against the  
24 value of the free speech. A showing of actual disruption will  
25 weigh more heavily against free speech. Additionally, the burden  
26 on the defendants to demonstrate a workplace disruption is  
27 heavier in cases where the speech involved unlawful activities  
28 rather than political or policy differences. See Keyser, 265

1 F.3d at 748-49. To prove that an employee's speech interfered  
2 with working relationships, the defendant must demonstrate  
3 "actual, material and substantial disruption, or reasonable  
4 predictions of disruption in the workplace." Robinson v. York,  
5 566 F.3d 817, 824 (9th Cir. 2009) (internal quotation marks  
6 omitted).

7 In Connick, the Supreme Court characterized the public  
8 employee's speech as "causing a mini-insurrection" and as "an act  
9 of insubordination which interfered with working relationships."  
10 461 U.S. at 151, 103 S. Ct. at 1192. In Robinson the plaintiff  
11 police officer sued for retaliation after he was disciplined for  
12 failing to follow the proper channels of communication in making  
13 complaints about department corruption, discrimination and  
14 misconduct. See 556 F.3d at 822. The court noted that "[e]ven  
15 in a police department, the complained-of disruption must be real  
16 and not imagined." Id. at 824 (citation and quotation marks  
17 omitted). In Robinson the court denied qualified immunity based  
18 on an insufficient showing of "disruption" as well as the clearly  
19 established law that "[a]n employer's written policy requiring  
20 speech to occur through specified 'channels' [is] insufficient  
21 to justify retaliation motivated by protected speech." Id. at  
22 826.

23 The "administrative interest" proffered by Defendants  
24 as outweighing Plaintiffs' free speech rights in calling  
25 attention to what they perceived to be malfeasance by Chief  
26 Gilbert is: maintaining the integrity of the Quartzsite Police  
27 Department by terminating employees who perpetuated a falsehood  
28 with regard to the Chief's use of sick leave and vacation time,

1 resulting in disruption within the police department, the  
2 disruption of Town Council meetings, expense to the Town with  
3 regard to the investigation of the matter by a private law firm  
4 and bringing "discredit" to the Town of Quartzsite.<sup>17</sup>

5 Analyzing the factors stated in Gilbrook, as a result  
6 of Plaintiffs' speech: Chief Gilbert's discipline or control over  
7 Plaintiffs was minimally impaired and co-worker relations were  
8 somewhat disrupted; No "close working relationship premised on  
9 personal loyalty and confidentiality" was eroded because none  
10 existed prior to the speech; The speech did interfere, to a  
11 minimal degree, with Plaintiffs' performance of their duties and  
12 slightly obstructed routine office operations; The statements  
13 were made anonymously to AZPOST and were also made to the Town  
14 Council and to the media, rather than being initiated through the  
15 "chain of command"; Plaintiffs were not high-level, policy-making  
16 employees.

17 As noted supra, whether Plaintiffs' speech involved  
18 knowingly or recklessly false statements is evaluated as part of  
19 the Pickering test and when considering whether Defendants are  
20 entitled to qualified immunity. With regard to the statements  
21 in the AZPOST letter asserting the Chief failed to report the use  
22 of sick leave and vacation time, Plaintiff Ponce stated his  
23 belief that the Chief was obliged to and did not report his use  
24 of leave time came from inquiries Plaintiff Ponce received from  
25 the Town's finance section. Plaintiff Ponce was responsible for  
26

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27 <sup>17</sup> The assertion that firing the officers for dishonesty was  
28 necessary because of Brady concerns is belied by the fact that three  
of the officers were re-hired after the initiation of litigation.

1 obtaining the payroll documents, including leave slips, from  
2 employees in the police department, including the Chief.  
3 Plaintiff Ponce stated he was contacted by the Town of Quartzsite  
4 finance department on at least six occasions when the department  
5 requested the Chief's leave slips. Each time Plaintiff inquired  
6 of the Chief regarding leave slips, Defendant Gilbert said he  
7 would take care of "it", but did not produce the forms.  
8 Defendant Gilbert did not tell Plaintiff Ponce that he was exempt  
9 from submitting leave forms, but he did claim to Plaintiff Kemp  
10 that he was exempt from submitting vacation leave forms.

11 Pursuant to sections 1301-1305 of the Town of  
12 Quartzsite's personnel policy manual, town employees were  
13 guaranteed a variety of holiday, vacation and sick benefits.  
14 Unclassified employees, such as the Chief, could be granted  
15 administrative leave, i.e., "comp time," but only as approved by  
16 the Mayor or Town Manager. Unclassified employees, such as the  
17 Chief, could be awarded annual leave as determined by the Town  
18 Council at the time of their hire. The town's policies provided  
19 a number of financial benefits which, under certain circumstances  
20 and upon an annual basis or at separation or retirement, could  
21 enrich the employee significantly. The value of the benefits was  
22 based upon account balances of unused leave. All employees were  
23 informed of the benefits when starting employment. According to  
24 Dan Field, the Town's former attorney, prosecutor, and Town  
25 Manager, Defendant Gilbert should have been reporting all his  
26 leave time, pursuant to the terms of his contract and the Town's  
27 personnel rules, because when it came time to calculate the  
28 Chief's benefits upon retirement or termination "unused" sick or

1 leave time would increase the amount of benefits due to the  
2 Chief. See PSOF, Exh. Y. Defendants Taft and Johnson have  
3 testified that even after the extensive investigation it is  
4 impossible to determine what leave the Chief actually took. DSOF.  
5 Exh. 1 at 39 and Exh. 2 at 101.

6           According to Defendant Taft, Chief Gilbert was to  
7 submit advance vacation leave forms. DSOF, Exh. 1 at 32.  
8 Defendant Johnson's view was that Chief Gilbert did not need to  
9 report vacation or sick leave at all. Id., Exh. 2 at 103. Yet  
10 Defendant Johnson, also an exempt employee, maintained his own  
11 personal time sheets of leave taken because in the past,  
12 unrelated to the Chief's conduct two Town employees had been  
13 unjustly enriched upon leaving employment by abusing the leave  
14 system. Id., Exh. 2 at 10.

15           At a minimum, the Chief's assertions that the DPS  
16 investigation had exonerated him of all allegations of misconduct  
17 clearly misrepresented the outcome of the DPS investigation to  
18 the Plaintiffs. The Chief's contract itself is but a poorly  
19 drafted form contract which does not resolve the inconsistencies  
20 between section 5(a) of the contract and sections 1301-1305 of  
21 the Town of Quartzsite personnel policy manual which section 5(b)  
22 of the contract mandates be applied to the Chief.

23           Under these circumstances it was reasonable for  
24 Plaintiffs to reject the Chief's statements of self-proclaimed  
25 innocence. Plaintiffs' statement in the AZPOST letter regarding  
26 the Chief's leave practices could not be characterized as  
27 reckless, let alone intentionally false. Accordingly, the claims  
28 were not made with reckless disregard for the truth because

1 Plaintiffs, at the time the statements were made, believed the  
2 Chief had not properly reported his use of sick or vacation time.

3 Defendants contend that the content of Plaintiffs'  
4 speech interfered with the working relationship between the Chief  
5 and his employees. The record on summary judgment is devoid of  
6 evidence of such disruption in the workplace, i.e., the police  
7 department, as a result of Plaintiffs' speech. Chief Gilbert  
8 stated in his deposition that he had to be careful in his  
9 conversation with Plaintiffs and that Plaintiffs did the  
10 "minimum" amount of work possible to get by after making the  
11 complaints to AZPOST, and that there was "tension" between the  
12 complainants and police department officers and staff who had not  
13 complained. Chief Gilbert did not testify that service to the  
14 public was interrupted, that officer safety was compromised, that  
15 arguments or fights occurred in the workplace, or that any other  
16 substantial disruption in the police department occurred.  
17 Defendants have not demonstrated actual, material and substantial  
18 disruption of the workings of the Quartzsite Police Department  
19 which was caused by Plaintiffs' speech. There is insufficient  
20 evidence in the record to conclude that the proper day-to-day  
21 functioning of the police department was jeopardized by the  
22 actions of Plaintiffs. Compare Desrochers, 572 F.3d at 712-13.

23 Likewise, while the grievances state that  
24 Kimball's actions "made it difficult for [the  
25 sergeants'] teams to function" and impacted  
26 the SBPD "in a negative way," a reader  
27 struggles in vain to discover where or how  
28 the proper functioning of the police  
department was jeopardized by the actions of  
Kimball, Mankin, Billdt, or Boom. Cf., e.g.,  
Gilbrook, 177 F.3d at 866 (involving  
statements which addressed "the fire  
department's ability to respond effectively

1 to life-threatening emergencies"). There are  
2 no accounts of failed law enforcement  
3 efforts, no descriptions of botched  
4 investigations, and no discussion of duties  
5 the SBPD was unable to perform in a competent  
6 fashion due to the actions of the sergeants'  
7 supervisors. Cf., e.g., Hyland v. Wonder, 972  
8 F.2d 1129, 1139 (9th Cir. 1992) (involving  
9 speech on the "inept, inefficient, and  
potentially harmful administration of a  
governmental entity"). Desrochers and Lowes  
do not allege that anyone failed to do his  
job, or even that someone did his job poorly.  
Cf., e.g., Gillette, 886 F.2d at 1197-98  
(involving speech criticizing police officers  
for using excessive force on a particular  
occasion).

10 Id.

11 In this matter, even construing the evidence in favor  
12 of Defendants, it appears the Chief's behavior, including his  
13 response to Plaintiffs' protected speech, caused the breakdown in  
14 the working relationships within the police department.<sup>18</sup>

15 Additionally, although this is not workplace disruption,  
16 it is abundantly clear from the evidence that any "disruption"  
17 with regard to the functioning of the Town of Quartzsite or the  
18 conduct of Town Council meetings, for the most part, existed  
19 prior to Plaintiffs' allegations against the Chief and, indeed,  
20 the Chief's behavior at Town Council meetings itself caused  
21 unwarranted "disruption." The record in this matter is replete  
22 with examples of disruptions at Town Council meetings, including  
23 the regular arrests of the same individuals, Defendant Johnson,

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24  
25 <sup>18</sup> Defendant Gilbert stated in his deposition that after the  
26 letter was submitted to AZPOST there were some strained relationships  
27 within the department but that employees continued to do their jobs.  
28 The Chief stated in his deposition that he could not remember any  
specific problem with regard to the functioning of the department  
after the submission of the letter, although he stated there was some  
public mistrust toward the department after the contents of the letter  
became public. See Doc. 91, Exh. 3 at 52-54.

1 with the concurrence and assistance of the Chief, having people  
2 arrested and removed from the meetings, and regular verbal  
3 assaults by speakers directed at Town of Quartzsite staff.

4 Defendants have not established that any legitimate  
5 administrative interest, i.e., protecting the integrity of its  
6 police officers particularly with regard to their veracity in  
7 testifying in criminal matters, was impacted by the protected  
8 speech. Whether or not the Chief violated the exact terms and  
9 conditions of his employment contract and whether the DPS  
10 investigation "exonerated" the Chief of the allegation of abuse,  
11 there is no indication in the record that any specific  
12 Plaintiff's credibility as a witness was challenged as a result  
13 of making supposedly "false" statements regarding the  
14 administration of the department. Furthermore, with regard to  
15 Plaintiff Conley, her public questioning of the Chief's integrity  
16 could not be said to affect her credibility as a witness in a  
17 criminal proceeding, she being an administrative employee.

18 Defendants have not shown an actual injury to a  
19 legitimate interest in avoiding actual "disruption" in the  
20 workplace caused by Plaintiffs' protected speech. See Johnson,  
21 48 F.3d at 427, quoted in Keyser, 265 F.3d at 748 ("it would be  
22 absurd to hold that the First Amendment generally authorizes  
23 corrupt officials to punish subordinates who blow the whistle  
24 simply because the speech somewhat disrupted the office.").

25 Defendants have not met their burden of establishing a  
26 legitimate administrative interest which outweighed Plaintiffs'  
27 right to bring potential misconduct in the Quartzsite police  
28 department to the public's attention. Defendant Johnson's

1 assertion that the "disrespect" brought upon the Town of  
2 Quartzsite by the plaintiffs' actions outweighed the plaintiffs'  
3 protected speech is not supported factually or legally.

4 **B. Are the individual Defendants entitled to qualified**  
5 **immunity from Plaintiffs' section 1983 claims?**

6 A public official who is a defendant in a section 1983  
7 case is entitled to qualified immunity unless (1) "the facts  
8 alleged, taken in the light most favorable to the party asserting  
9 the injury, show that the official's conduct violated a  
10 constitutional right;" and (2) the right at issue "was clearly  
11 established 'in light of the specific context of the case' at the  
12 time of the alleged misconduct." Clairmont, 632 F.3d at 1100.

13 To determine whether a government official is  
14 entitled to qualified immunity, we ask two  
15 questions: whether the official violated a  
16 statutory or constitutional right, and  
whether that right was clearly established at  
the time of the challenged conduct....

17 For purposes of qualified immunity, we  
18 resolve *all factual disputes in favor of the*  
*party asserting the injury.*

19 Ellins v. City of Sierra Madre, 710 F.3d 1049, 1064 (9th Cir.  
20 2013)(internal citations omitted and emphasis added).

21 "Whether the law was clearly established is  
22 an objective standard; the defendant's  
23 'subjective understanding of the  
24 constitutionality of his or her conduct is  
25 irrelevant.'" Clairmont, 632 F.3d at 1109  
(quoting Fogel v. Collins, 531 F.3d 824, 833  
26 (9th Cir. 2008)). Qualified immunity is  
27 designed "to ensure that before they are  
28 subjected to suit, officers are on notice  
their conduct is unlawful." Saucier, 533 U.S.  
at 206, 121 S.Ct. 2151.

Karl, 678 F.3d at 1073-74. See also Moran v. Washington, 147  
F.3d 839, 845 (9th Cir. 1998)("[T]he inquiry into whether or not

1 a claimed right was clearly established must focus upon the right  
2 not in a general, abstract sense, but rather in a practical,  
3 particularized sense.”).

4           An identical fact-pattern need not have been presented  
5 to a federal court for a municipal actor to have had “fair  
6 warning” that their conduct was unconstitutional. See Bull v.  
7 City & Cnty. of S.F., 595 F.3d 964, 1003 (9th Cir. 2010); White  
8 v. Lee, 227 F.3d 1214, 1238 (9th Cir. 2000) (“Closely analogous  
9 preexisting case law is not required to show that a right was  
10 clearly established.”). The Ninth Circuit has concluded that the  
11 First Amendment right to free speech with regard to matters of  
12 public concern regarding the speaker’s workplace, in that matter  
13 a police department, was clearly established at the time of the  
14 events giving rise to this matter. See Ellins, 710 F.3d at 1064.

15           As stated supra, Defendants may lay claim to qualified  
16 immunity only if a “reasonable” official could have believed  
17 Plaintiffs’ statements were knowingly or recklessly false. See  
18 City of Elyria, 502 F.3d at 495. A municipal official who  
19 reasonably believes that an employee deliberately or recklessly  
20 made false statements unprotected by the First Amendment could  
21 reasonably conclude that the employee could be disciplined for  
22 making the statements without running afoul of the constitution.  
23 See id. at 494-95. The inquiry is not whether the employee  
24 actually made false statements knowingly or recklessly, but  
25 whether a reasonable official could believe, even mistakenly  
26 believe, that the employee had made knowingly or recklessly false  
27 statements. See, e.g., Hunt v. County of Orange, 672 F.3d 606,  
28 615-16 (9th Cir. 2012); Levine v. City of Alameda, 525 F.3d 903,

1 906 (9th Cir. 2008) ("In this case, although defendants violated  
2 [the plaintiff's] due process rights by failing to provide a  
3 hearing, qualified immunity applies because [the defendant]  
4 reasonably believed that his conduct was lawful."); Diaz-Bigio v.  
5 Santini, 652 F.3d 45, 55-56 (1st Cir. 2011); Springer v. Henry,  
6 435 F.3d 268, 280 (3d Cir. 2006); Gustafson v. Jones, 290 F.3d  
7 895, 913 (7th Cir. 2002); Gossman v. Allen, 950 F.2d 338, 342  
8 (6th Cir. 1991).

9 *[W]e need only decide whether a reasonable*  
10 *official could believe that [the plaintiff]*  
11 *knowingly or recklessly made false*  
12 *statements. If an official reasonably*  
13 *believes that an employee made statements*  
14 *with knowledge of, or reckless indifference*  
15 *to, their falsity, the official would*  
16 *conclude that the employee could be fired*  
17 *without offending the First Amendment.*  
18 *Qualified immunity would therefore attach.*

19 Gossman, 950 F.2d at 342 (emphasis added). As the Supreme Court  
20 has noted, "the court should ask whether the [official] acted  
21 reasonably under settled law in the circumstances, not whether  
22 another reasonable, or more reasonable, interpretation of the  
23 events can be constructed five years after the fact." Hunter v.  
24 Bryant, 502 U.S. 224, 228, 112 S. Ct. 534, 537 (1991).

25 At the time of Plaintiffs' termination, Defendant Taft  
26 was the Town Manager and Personnel Manager, and Defendant Johnson  
27 was the Assistant Town Manager. Defendant Johnson, a subordinate,  
28 terminated Plaintiffs' employment, with the assent of Defendant  
Taft, his superior and the town's Personnel Manager-Defendant  
Taft signed Plaintiff Kemp's termination letter after reviewing  
the record. See DSOF, Exh. 1 at 80. Plaintiffs were terminated  
after being "threatened" by Defendant Gilbert that those who

1 spoke out against him would be subject to retaliation.<sup>19</sup>  
2 Defendants Taft and Johnson concurred in the termination of  
3 Plaintiffs. DSOF. Exh. 1 at 80 and Exh. 2 at 9.

4 A municipal officer, such as Defendant Gilbert, who is  
5 not the final decision maker regarding an adverse employment  
6 decision taken in retaliation for the exercise of free speech,  
7 can still be liable if he "'set[s] in motion a series of acts by  
8 others which the actor knows or reasonably should know would  
9 cause others to inflict the constitutional injury.'" Gilbrook,  
10 177 F.3d at 854, quoting Johnson v. Duffy, 588 F.2d 740, 743-44  
11 (9th Cir. 1978). See also Levine, 525 F.3d at 907 (stating this  
12 standard upon review of a motion to dismiss).

13 Defendants argue:

14 As an initial matter, the record is devoid  
15 of any evidence that Town Manager Alex Taft  
16 or Chief Gilbert were involved in the  
17 termination of Plaintiffs' employment.  
18 Instead, the undisputed evidence shows that  
19 Assistant Town Manager Al Johnson was the  
20 sole decision maker, and that Johnson never  
21 consulted Taft or Gilbert on the subject.  
22 [SOF 1, 179-84, 195-98] While Plaintiffs may  
23 contend that Taft and Gilbert must have been  
24 involved in a purported conspiracy to  
25 retaliate against them, it is well-settled  
26 that a party cannot rely on unsupported and  
27 self-serving speculation to defeat summary  
28 judgment. See, e.g., Villiarimo v. Aloha  
Island Air, Inc., 281 F.3d 1054, 1061 (9th  
Cir. 2002) (stating that "this court has  
refused to find a genuine issue where the  
only evidence presented is uncorroborated and  
self-serving testimony") (internal citation  
omitted); Villodas v. Healthsouth Corp., 338

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26 <sup>19</sup> All three individual Defendants are sued in both their  
27 individual and official capacities; a suit against a municipal officer  
28 in their official capacity is, in essence, a suit against the  
municipality. See, e.g., Hafer v. Melo, 502 U.S. 21, 25, 112 S. Ct.  
359, 361-62 (1991); Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S.  
Ct. 3099, 3105 (1985).

1 F. Supp. 2d 1096, 1104-05 (D. Ariz. 2004)  
2 (same).

3 Even if Taft and Gilbert were involved in  
4 the termination decisions (which they were  
5 not) all three individual defendants are  
6 immune from liability as a matter of law. As  
7 public officials, the individual defendants  
8 are entitled to qualified immunity unless  
9 Plaintiffs prove that they violated "clearly  
10 established statutory or constitutional  
11 rights of which a reasonable person should  
12 have known." Harlow v. Fitzgerald, 457 U.S.  
13 800, 818 (1982).

14 Doc. 90 at 17.

15 The record is not devoid of evidence that Defendant  
16 Gilbert or Defendant Taft had any part in the termination of  
17 Plaintiffs. The investigation undertaken by Defendant Johnson  
18 was at the specific request of Defendant Taft. When completed,  
19 Defendant Taft concurred in the findings and the employees'  
20 terminations. Defendant Taft signed Plaintiff Kemp's termination  
21 letter. Defendant Gilbert had publicly complained to all that  
22 Plaintiffs' assertions about him were false and threatened  
23 Plaintiffs with retaliation which ultimately occurred. Defendant  
24 Gilbert attempted to intimidate the AZCOP representative and  
25 interfere with the representative's support of the officers  
26 before the Town council. Defendant Gilbert assisted in the  
27 investigation by retrieving information from the Plaintiffs'  
28 personnel files in the police department. Accordingly, Defendant  
Gilbert, Defendant Taft, and Defendant Johnson are all liable in  
their personal capacities for violation of Plaintiffs' First  
Amendment rights.

1                   **D. Municipal liability**

2                   Defendant Johnson's act of terminating each Plaintiff's  
3 employment was ratified by his superior, Defendant Taft, the Town  
4 Manager and Personnel Officer. Defendant Taft herself terminated  
5 Plaintiff Kemp. Additionally, Defendant Gilbert's act of  
6 threatening Plaintiffs with retaliation if they exercised their  
7 right to free speech was effectively ratified by the acts of  
8 Defendant Taft and Defendant Johnson.

9                   In Monell v. New York City Department of Social  
10 Services, the Supreme Court held that local governments can be  
11 held liable for constitutional torts caused by official policies.  
12 436 U.S. 658, 694, 98 S. Ct. 2018, 2037 (1978). Municipal  
13 liability is limited "to acts that are, properly speaking, acts  
14 of the municipality—that is, acts which the municipality has  
15 officially sanctioned or ordered." Pembaur v. City of  
16 Cincinnati, 475 U.S. 469, 480, 106 S. Ct. 1292, 12098 (1986)  
17 (quotation marks omitted). Accordingly, Plaintiffs can establish  
18 municipal liability for violation of their First Amendment rights  
19 accruing to Defendant Town of Quartzsite by: (1) showing that a  
20 Town of Quartzsite employee committed the alleged constitutional  
21 violation pursuant to a formal town policy or longstanding town  
22 practice; (2) showing that the town official committing the  
23 constitutional tort had final policy-making authority with regard  
24 to the challenged action; or (3) by showing that an official with  
25 final policy-making authority ratified a subordinate's  
26 unconstitutional act and the basis for the act. See Gillette v.  
27 Delmore, 979 F.2d 1342, 1346-47 (9th Cir. 1992).

28                   A municipal policy may be established by even "the

1 single act of a policymaker" if that official has final  
2 policymaking authority. See, e.g., Pembaur v. City of  
3 Cincinnati, 475 U.S. 469, 480, 106 S. Ct. 1292, 1298-99 (1986).  
4 The official must have final policymaking authority to bind the  
5 municipality to his actions. Id., 475 U.S. at 483, 106 S. Ct. at  
6 1300. A policymaker is one who, on the relevant issue, has the  
7 final authority to make a decision from several available  
8 alternatives. Id., 475 U.S. at 483-84, 106 S. Ct. at 1300. A  
9 municipality can be liable for the harm caused by an official  
10 with this authority because the municipal agent's status cloaks  
11 him with the municipality's authority. Id., 475 U.S. at 481, 106  
12 S. Ct. at 1299; City of St. Louis v. Praprotnik, 485 U.S. 112,  
13 122, 108 S. Ct. 915, 923 (1988). Final policymaking authority is  
14 a question "to be resolved by the trial judge before the case is  
15 submitted to the jury." Jett v. Dallas Indep. Sch. Dist., 491  
16 U.S. 701, 737, 109 S. Ct. 2702, 2724 (1989).

17           Whether an official has final policymaking authority to  
18 bind the municipality is a question of state law. See, e.g.,  
19 Praprotnik, 485 U.S. at 123-24, 108 S. Ct. at 924. "When  
20 determining whether an individual has final policymaking  
21 authority, we ask whether he or she has authority 'in a  
22 particular area, or on a particular issue.'" Lytle v. Carl, 382  
23 F.3d 978, 983 (9th Cir. 2004). For example, when the adverse  
24 employment action is a transfer, a court should note whether the  
25 defendant was a "final policymaker" in regard to transfers of  
26 subordinate employees. Id. In making these determinations, the  
27 Court must consider whether the official's discretionary decision  
28 is "constrained by policies not of that official's making" and

1 whether the official's decision is "subject to review by the  
2 municipality's authorized policymakers." Praprotnik, 485 U.S. at  
3 127, 108 S. Ct. at 926. See also Delia v. City of Rialto, 621  
4 F.3d 1069, 1083-85 (9th Cir. 2010). A municipal agent's ability  
5 to make policy must not be confused with the ability to make  
6 decisions. See Praprotnik, 485 U.S. at 126, 108 S. Ct. at 925-26  
7 (cautioning that "[i]f the mere exercise of discretion by an  
8 employee could give rise to a constitutional violation, the  
9 result would be indistinguishable from respondeat superior  
10 liability."); Delia, 621 F.3d at 1083-84.

11 Arizona governmental entities have no inherent power and  
12 possess only those powers delegated to them by law. Braillard v.  
13 Maricopa County, 224 Ariz. 481, 487, 232 P.3d 1263, 1269 (App.  
14 2010). Pursuant to A.R.S. §9-240(B)(12) a town council shall have  
15 the power to hire, regulate and remove police officers. However,  
16 A.R.S. §9-303(B) specifies that the town manager shall have and  
17 exercise those powers and duties as specified. Sections 1501,  
18 1506, 1703 and 1801 of the Town of Quartzsite's personnel policy  
19 vests complete and ultimate authority in the Town Manager to deal  
20 with personnel matters. Section 1801 states:

21 The Town Manager is responsible for  
22 administration of the rules and regulations  
23 set forth in this policy. In order to  
24 establish uniform administration of these  
25 rules, the Town Manager may publish a  
26 comprehensive administration manual which  
27 serves as the official communication for  
28 implementing policy, establishing procedures,  
and issuing regulations, orders and  
announcements.

Section 1603 further indicates the Town Manager's ultimate  
decision is final. Defendant Johnson testified that the Town

1 Council had nothing to do with personnel matters. DOSF, Exh. 2  
2 at 115. It is clear from the above that the Town council has  
3 delegated to the Town Manager all those powers found in A.R.S.  
4 §9-240(B)(12) and all personnel matters.

5           If the Town Council delegated to Defendant Taft only the  
6 discretion to hire and fire employees, then there is no municipal  
7 liability. If the Town Council delegated its power to establish  
8 "final employment policy" to the Town Manager, Defendant Taft's  
9 decisions, and Defendant Johnson's decisions by delegation, would  
10 give rise to municipal liability. See Pembaur, 475 U.S. at 483  
11 n.12, 106 S. Ct. at 483 n.12; Gillette, 979 F.2d at 1236-37;  
12 Fiorenzo v. Nolan, 965 F.2d 348, 351 (7th Cir. 1992) ("[A]  
13 municipality is not liable merely because the official who  
14 inflicted the alleged constitutional injury had the discretion to  
15 act on its behalf; rather, the official in question must possess  
16 final authority to establish municipal policy with respect to the  
17 challenged action.").

18           Defendants assert:

19           In fact, the Town Council exercised its  
20 authority by adopting, through a resolution,  
21 a merit system and a comprehensive Personnel  
22 Policy that sets forth the appropriate  
23 grounds for disciplinary action and states  
24 that employees may only be dismissed "for  
25 cause." [SOF 204-05, 207] Furthermore, the  
26 Personnel Policy expressly states that it may  
27 only be amended by the Town Council. [SOF  
28 206] In other words, Johnson's authority to  
discipline or terminate employees was  
constrained by policies that were implemented  
by the Town Council, thus confirming that he  
does not qualify as a final policymaker. ....

As further evidence that Johnson did not  
have policymaking authority, his decision to  
discharge Plaintiffs was subject to appeal to  
the Town's Personnel Advisory Board (and  
subsequently the Town Manager) for a

1 determination of whether good cause existed  
2 for the terminations under the Town's  
3 policies. [SOF 208]

4 Doc. 90 at 2.

5 Defendants further contend:

6 It is not surprising that Plaintiffs have  
7 chosen to ignore Monell, since they cannot,  
8 as a matter of law, meet the requirements for  
9 municipal liability. As discussed in detail  
10 in Defendants' Motion for Summary Judgment,  
11 there is no evidence whatsoever that the Town  
12 has a longstanding custom or policy of  
13 violating employees' First Amendment rights.  
14 Likewise, the record is devoid of any  
15 evidence that the termination decision was  
16 committed or ratified by an individual with  
17 the authority to create personnel policies  
18 for the Town, as required to satisfy  
19 Plaintiff's burden. Gillette v. City of Eugene,  
20 979 F.2d 1342, 1349 (9th Cir. 1992)  
21 ("Municipal liability does not  
22 attach...unless the decision maker possesses  
23 final authority to establish policy with  
24 respect to the action ordered."). Instead,  
25 the undisputed evidence shows that Assistant  
26 Town Manager Al Johnson made the termination  
27 decision, and that Johnson did not have final  
28 policymaking authority, as defined by the  
Ninth Circuit. Rather, the policymaking  
authority resided exclusively with the Town  
Council.

19 Doc. 98 at 17.

20 In their response to Defendants' motion for summary  
21 judgment, Plaintiffs argue:

22 Defendants acknowledge that Defendant  
23 Johnson ("Johnson") was the decision maker  
24 and that he terminated Plaintiffs, yet they  
25 also allege that the Town is not liable  
26 because Johnson was not a final policymaker.  
27 A determination as to who is the final  
28 policymaker is one that turns on the specific  
action ordered, not general policy. Municipal  
liability exists here for three reasons: (1)  
Johnson's action was taken pursuant to the  
Town's formal personnel policy; (2) Johnson  
was the final policymaker about the  
employment of these Plaintiffs; and (3) Town

1           Manager Taft upheld and ratified Johnson's  
2           decisions.

3           \*\*\*

4           Defendant Taft, as Town Manager, had direct  
5           responsibility and final policymaking  
6           authority for employment-related disciplinary  
7           decisions, CSOF at ¶ 273-275, and the option  
8           of delegating authority over personnel  
9           matters to others, CSOF at ¶ 274. Taft  
10          appointed Johnson, pursuant to her authority,  
11          to investigate and make employment decisions  
12          related to Plaintiffs. CSOF at ¶ 280. Town  
13          Code expressly prohibits the Town Council  
14          from interfering in the Town Manager's  
15          personnel decisions against employees that  
16          are not officers. CSOF at ¶ 275. Johnson was,  
17          therefore, the final policymaker as to  
18          Plaintiffs' employment. Defendants suggest  
19          that Johnson was not the final policymaker  
20          because his authority was constrained by  
21          policies implemented by the Town.

22          This argument completely misses the mark-  
23          Johnson decided to terminate Plaintiffs  
24          because he believed they violated Section  
25          1502(0).

26          Doc. 100 at 2-3.

27                 As Town Manager and Personnel Officer for the Town of  
28                 Quartzsite, Defendant Taft, and Defendant Johnson by delegation,  
had policy-making authority with regard to the termination of  
police department employees who were found to be terminable  
pursuant to the Town personnel policies. Defendant Taft  
terminated Plaintiff Kemp's employment and ratified both  
Defendant Johnson's act in terminating the other Plaintiffs and  
the basis for the act, i.e., the determination that Plaintiffs  
had violated personnel policies by making allegedly untrue  
statements about the Chief of Police which allegedly brought  
disrespect to the community and called into question the  
credibility of the plaintiff police officers as witnesses in  
criminal proceedings.

1 Plaintiffs' employment was terminated by Defendants Taft  
2 and Johnson, citing policy of the Town of Quartzsite, after an  
3 investigation undertaken by the Town at the behest of Defendant  
4 Johnson and Defendant Taft, regarding Plaintiffs' accusations  
5 against Defendant Gilbert. Defendant Johnson was the primary  
6 town official committing the constitutional tort as ratified by  
7 Defendant Taft, an official with final policy-making authority.  
8 Accordingly, Plaintiffs have established the Town of Quartzsite's  
9 liability for the violation of Plaintiffs' constitutional rights.

10 **V Conclusion**

11 Viewing the facts in the light most favorable to  
12 Defendants, Plaintiffs are entitled to judgment as a matter of  
13 law against all Defendants with regard to their claims in Count  
14 I that they were retaliated against for the exercise of their  
15 First Amendment right to freedom of speech.

16 Accordingly,

17 **IT IS ORDERED that** Defendants' motion for summary  
18 judgment (Doc. 90) is **denied** insofar as it seeks judgment in  
19 favor of Defendants with regard to Count I of the complaint at  
20 Doc. 70.

21 **IT IS FURTHER ORDERED that** Plaintiffs' motion for  
22 summary judgment (Doc. 94) is **granted**. Judgment in favor of  
23 Plaintiffs Linda Conley, Stephenn Frakes, James Kemp, Michelle  
24 Norris, William Ponce, and Herland Yeomans, and against all  
25 Defendants shall be entered with regard to Count I of the  
26 complaint at Doc. 70.

27 The Clerk of the Court shall enter separate judgment  
28 with regard to Count I only of the second amended complaint at

1 Doc. 70 accordingly.

2 DATED this 20<sup>th</sup> day of November, 2013.

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6 Mark E. Aspey  
7 United States Magistrate Judge  
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