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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEVEN TREVINO,
an individual,

NO. CIV. S-07-2106 LKK/DAD

Plaintiff,

v.

O R D E R

LASSEN MUNICIPAL UTILITY
DISTRICT, et al.,

Defendants.

_____ /

Plaintiffs Steven and Amy Trevino have brought suit against Lassen Municipal Utility District ("LMUD"), Steven Trevino's former employer, and the individually named defendants who are employees of LMUD for alleged harms he suffered related to the termination of his employment.

Pending before the court is defendants' motion for summary judgment on plaintiffs' first, second, third, sixth and eighth causes of action. Plaintiffs cross-move for partial summary judgment against LMUD on their first cause of action to the extent that they seek injunctive relief.

1 The court resolves the motion on the papers and after oral
2 argument.

3 **I. FACTS¹**

4
5 ¹ Defendants object to several items of evidence offered by
6 plaintiffs as well as plaintiffs' failure to follow the Local Rules
7 and Rules of Civil Procedure in their motion and opposition to
8 defendants' motion. First, in violation of Local Rule 56-206, the
9 plaintiffs failed to file a Statement of Undisputed Facts with
10 their motion for summary judgment. The Statement of Undisputed
11 Facts was not filed until January 15, 2009. Similarly, plaintiffs'
12 opposition to defendants' motion and supporting documents were not
13 timely filed and served. Although the court could disregard these
14 untimely filings, it is inclined to resolve the motions on the
15 merits. Plaintiffs also failed to file a response to defendants'
16 statement of undisputed facts as required by Local Rule 56-260(b).
17 Plaintiffs' counsel is sanctioned in the sum of \$150 for each of
18 the three violations of the court rules, for a total of \$450. This
19 sum shall be paid to the Clerk of the Court no later than thirty
20 (30) days from the effective date of this order. Counsel shall
21 file an affidavit accompanying the payment of these sanctions which
22 states that it is paid personally by counsel, out of personal
23 funds, and is not and will not be billed, directly or indirectly,
24 to the client or in any way made the responsibility of the client
25 as attorneys' fees or costs.

26 All facts described in this section are undisputed unless
otherwise noted. Due to plaintiffs' failure to timely file a
Statement of Undisputed Facts and to file a response to defendants'
Statement of Undisputed Facts, the court treats as undisputed only
those facts to which neither party has directed the court to
evidence that tends to show a dispute.

Defendants also object to several items of evidence plaintiffs
have tendered. Among them, defendants object to the minutes of the
LMUD Board meeting that plaintiffs have offered. These exhibits
have not been authenticated and their authentication is not
apparent to the court, given that affiant Thomas Beko has not
declared where he obtained the minutes nor established his
knowledge of their accuracy, nor are the documents of the type that
are self-authenticating. See Affidavit of Thomas Beko In Support
of Plaintiffs' Motion for Partial Summary Judgment ¶¶ 16, 18, 19,
26, 28, 29, 37 (Ex. 13, 15, 16, 22, 24, 25, 33). Accordingly, the
court SUSTAINS defendants' objection to these exhibits. Fed. R.
Civ. P. 56(e); Fed. R. Evid. 902. Given, however, that defendants
do not seem to dispute that those meetings did occur, the court
treats that fact as undisputed.

Defendants also object to plaintiffs' filing on January 15,
2009 of twenty-one exhibits offered in opposition to defendants'
motion. Doc. No. 106. This filing was accompanied by an affidavit

1 **A. Incident Giving Rise to Disciplinary Action Against Steven**
2 **Trevino**

3 On March 10, 2007, Steven Trevino was golfing with a friend
4 at the Diamond Mountain Golf Course. Defendant Frank Cady was, at
5 the time, a shareholder in the golf course as well as General
6 Manager of LMUD. Marino Gianotti, a retired Board member of LMUD,
7 acted as the golf course Marshall. During the off-season, the golf
8 course had a policy that golfers paid for their round of golf by
9 depositing ten dollars in an "honor pay" box on the course.

10 On March 10, 2007, Trevino and his friend began playing golf
11 at the course without having put any money in the honor box.
12 Gianotti approached them about it and Trevino said he would pay
13 Cady directly on Monday. Gianotti left and called Cady, leaving a
14 message for him at home to the effect that Trevino was there and
15 that he refused to pay. Plaintiffs have tendered evidence that, in
16 this message, Gianotti also relayed that Trevino intended to pay
17 Cady directly on Monday. Affidavit of Thomas Beko In Support of

18 _____
19 by Thomas Beko that only provides foundation for one of the
20 exhibits. See Opposition by Steven Trevino to Motion for Summary
21 Adjudication, attached Affidavit of Thomas Beko In Opposition to
22 Motion for Summary Adjudication ¶ 4. Most of these exhibits were
23 properly tendered as exhibits in support of plaintiffs' motion for
24 summary judgment or as exhibits to defendants' motion and, to the
25 extent the court relies on them, it has relied on those instead.
26 It appears that the only exhibit offered in document number 106
that was not authenticated and not otherwise properly tendered by
either party is Exhibit 2. The court SUSTAINS defendants' objection
to this exhibit.

Defendants object to several other items of evidence tendered
by the plaintiffs. Many of these items are irrelevant or
unnecessary to the disposition of the pending motions. To the
extent that the evidence is relevant, defendants' remaining
objections are OVERRULED.

1 Plaintiffs' Motion for Partial Summary Judgment (Doc. No. 96)
2 ("Beko Aff.") ¶ 4, Ex. 2. Some time thereafter, Cady called the
3 police and drove to the golf course.

4 Immediately upon arrival, Cady approached Trevino and told him
5 he was being placed on administrative leave. Trevino has testified
6 that Cady "screamed at [him] that [he] was on administrative leave,
7 to turn in [his] keys and [his] car on Monday." Declaration of
8 Cassandra Ferrannini In Support of Defendants' Motion for Partial
9 Summary Judgment ("Ferrannini Decl.") ¶ 7, Ex. F (Steven Trevino
10 Depo. at 51:22-24). According to Trevino, he then "asked him, 'what
11 does this have to do with work?' And he responded to me, just
12 belligerently, 'That's insubordination, you're f,' and as he was
13 saying fired, he spun around and told me to turn in my shit."
14 Trevino Depo. at 52:1-5. In his deposition, defendant Cady
15 testified that, when he arrived at the golf course, he got out of
16 his vehicle and "just let Steve have a barrage of goddamn, what the
17 hell are you doing" and was "mad and heated and yelling."
18 Ferrannini Decl. ¶ 4 Ex. C (Cady Depo. at 170:7-12). Cady confirmed
19 Trevino's recollection of events, which is that he started to tell
20 Trevino he was fired but stopped and instead said he was on
21 administrative leave. Id. at 170:16-25.

22 After this exchange with Cady, Trevino then said to Gianotti,
23 who was nearby, "Buzz, you're dead. What did you say to Frank?"
24 Gianotti reported this to the police officers who had arrived
25 shortly prior. Neither of the officers who were present heard the
26 threat, Ferrannini Decl. ¶ 8, Ex. G (Holman Depo. at 22:15-18),

1 although Officer Holman confirmed that the apparent "threat" was
2 made after Cady told Trevino he was on administrative leave. Beko
3 Aff. ¶ 6 Ex. 4 (Holman Depo. at 47:5-9). Shortly afterwards,
4 Trevino and his friend and Cady left the course.

5 **B. Events Immediately Following the Incident**

6 Plaintiffs have tendered evidence that later that day, Cady
7 contacted defendant Luhring, LMUD Assistant General Manager and
8 Trevino's direct supervisor, and informed him that Trevino had been
9 placed on administrative leave and asked Luhring to go pick up
10 Trevino's keys. Ferrannini Decl. ¶ 9, Ex. H (Luhring Depo. at
11 60:22-61:15); Trevino Depo. at 16:11-13. Luhring informed Cady that
12 he couldn't do it because he was out of town. Id. at 61:24-25.

13 According to Trevino, later that day LMUD General Counsel
14 Jaimee Jones called him and told him to turn in his company vehicle
15 and his keys. Trevino Depo. at 77:18-79:1. Plaintiffs have tendered
16 evidence that Jones had worked for Cady's law firm as an associate
17 attorney and later a partner until Cady left the firm to be General
18 Manager of LMUD. Cady Depo. at 18:2-22:25. Some time after Cady
19 joined LMUD, Jones was hired as General Counsel. Id. at 23:12-24:2.
20 When he left his firm, Cady sold it to Jones but part of the firm
21 profits continued to be paid into a trust for Cady's children. Id.
22 at 25:6-26:12.

23 Plaintiffs have tendered evidence that two days after this
24 incident, Cady sent an email to Jones, Luhring, and the members of
25 the LMUD Board. Affidavit of Thomas Beko In Support of Plaintiffs'
26 Motion for Partial Summary Judgment (Doc. No. 107) ¶ 4, Ex. 5. In

1 it, he relayed his version of the events that had occurred on the
2 golf course with Trevino. He then stated that "[t]he crimes
3 committed [by Trevino and his friend] under California law include
4 but are not limited to: 1. Defrauding an innkeeper (a misdemeanor).
5 2. Assault. 3. Criminal trespass. 4. Conspiracy. 5. Making a death
6 threat," as well as several violations of LMUD's discipline
7 policies, including acting in a way to cause discredit on LMUD,
8 "discourteous treatment of the public, District Board Members or
9 supervisory personnel," and conviction of a crime of moral
10 turpitude. Id. He also stated that he had informed Trevino at the
11 course that he was being placed on administrative leave and that
12 "[v]arious LMUD personnel were contacted." Id. He concluded the
13 letter stating,

14 This matter will come before you for an update at the
15 Wednesday Board Meeting as a closed session information
16 only item with no particular action requested. At a
17 later time, when the investigation is completed, this
18 matter will be presented to the Board for action and the
19 proper notices, Skelly and otherwise, will be provided
20 to Mr. Trevino as required by law.

21 Id.

22 On March 14, 2007, a closed Board meeting regarding Trevino
23 was held, which Luhring and Cady attended. Luhring Depo. at 76:13-
24 77:11. As a result of the meeting, it was decided that Luhring
25 would act as General Manager in the discipline matter. Id. at
26 70:18-24. It was the perception of Nancy Cardenas, a member of the
LMUD Board of Directors at the time, that Cady "ruled the district
with an iron fist" and that Luhring would not practically be able
to reverse Cady's discipline decision. Ferrannini Decl. ¶ 11, Ex.

1 J (Cardenas Depo. at 28:13-29:5).

2 On March 19, 2007, Luhring sent Trevino a notice that he was
3 placed on administrative leave. Ferrannini Depo. ¶ 7 Ex. F. The
4 next day, Luhring sent Trevino a "Notice of Intent To Terminate
5 Employment." It advised Trevino that the grounds for termination
6 was Trevino's violation of the LMUD rule that prohibited "any
7 willful act of conduct undertaken in bad faith which either during
8 or outside of duty hours is of such a nature that is causes
9 discredit to fall upon the District." As facts supporting the
10 discipline, the letter described the incident on the golf course,
11 with particular emphasis on Trevino's supposed threat against
12 Gianotti. The letter also stated that witness statements and a copy
13 of the LMUD's discipline policy were enclosed with it, although
14 Trevino has testified that they were not. Beko Aff. ¶ 7 Ex. 5
15 (Trevino Depo. 124:5-15). Finally, the letter advised that a "pre-
16 disciplinary (Skelly)" hearing would be held on March 26, 2007. No
17 witnesses could be called but Trevino could explain why he thought
18 termination was not appropriate and could be represented, if he
19 chose. There is evidence that these two letters, although
20 apparently from Luhring and bearing his signature, had been drafted
21 by Jones. Luhring Depo. 87:25-88:10, 100:4-16.

22 **C. LMUD's Discipline Policy**

23 LMUD's discipline policy is described in its "General Manager
24 Administrative Procedure 2006-03." Ferrannini Decl. ¶ 7 Ex. F. It
25 was created and enforced by Cady. See Defs.' SSUF ¶ 25.

26 Among other conduct, it prohibits employees from performing

1 "any willful act of conduct undertaken in bad faith which either
2 during or outside of duty hours is of such a nature that it causes
3 discredit to fall upon the District." It provides for progressive
4 discipline, including suspension and dismissal.

5 In cases where the employee was suspended for more than three
6 working days, demoted, or terminated, the employee may request a
7 Skelly hearing within five days of receipt of the notice of the
8 discipline. The General Manager "shall" hold the Skelly hearing
9 within five working days of the employee's request and shall issue
10 a written opinion five working days thereafter. The employee may
11 appeal an adverse decision within five working days of receiving
12 it. "All efforts shall be made to schedule the hearing within 30
13 days of the Notice of Appeal."

14 The appeal is resolved with an appeal hearing to be conducted
15 by a Standing Hearing Officer or a party neutral to the dispute
16 with legal training sufficient to conduct the hearing. If there is
17 no Standing Hearing Officer, a hearing officer is chosen by the
18 Board at its next scheduled regular meeting. The hearing officer
19 shall receive evidence at the appeal hearing. Upon mutual agreement
20 of the employee and the District, or upon the hearing officer's
21 request, the parties may submit briefs in lieu of the hearing. The
22 hearing officer then recommends whether to affirm, modify, or
23 overturn the disciplinary action, in a written report supported by
24 findings of fact. The report shall be issued "as soon as possible"
25 after the hearing. The Board shall then consider the report at its
26 next regularly scheduled meeting and make a final decision

1 regarding the disciplinary action.

2 **D. Pre-termination Hearing**

3 Trevino's pre-termination hearing was held on March 26, 2007.
4 He was represented by counsel at the time. Counsel had requested
5 a continuance of the hearing because witness statements and copy
6 of the discipline policy had not been provided to Trevino, although
7 they had been purportedly included in his Notice of Intent to
8 Terminate Employment. Counsel also asked for all records upon which
9 the District intended to rely at the hearing and for the hearing
10 to be conducted by a neutral hearing officer, which, according to
11 Trevino's counsel, Luhring was not. Counsel's request for a
12 continuance of the hearing was denied.

13 Plaintiffs' counsel submitted a written response to the Notice
14 of Intent to Terminate Employment on March 24, 2007. It contained
15 a description of the golf course incident and legal argument. This
16 was sent to and apparently received by Luhring.

17 The pre-termination hearing was held on March 26, 2007 with
18 Luhring acting as the hearing officer. Apparently, no live
19 testimony was offered; instead, Trevino offered only the March 24,
20 2007 letter prepared by his counsel. Affidavit of Steven Trevino
21 In Support of Motion for Summary Judgment ("Trevino Aff.") ¶ 15.
22 Luhring has testified that he conducted no independent
23 investigation of the golf course incident and spoke to none of the
24 people who had been present about it, including Cady and Trevino;
25 instead, he relied on written statements by Cady and Gainotti.
26 Luhring Depo. at 70:18-73:15.

1 On May 8, 2007, Luhring issued a written decision to terminate
2 Trevino. Plaintiff has tendered evidence that Luhring knew that the
3 decision was supposed to have issued five days after the hearing.
4 Luhring Depo. at 119:7-120:13. Luhring testified that he did not
5 comply with this deadline because he knew that Trevino was being
6 paid during this time and because he wanted to have enough time to
7 make the right decision. Id. at 119:7-120:3.

8 In the decision, Luhring stated that Trevino was terminated
9 based upon a "review of the information available, the charges
10 contained within the Notice of Intent to Terminate, [Trevino's]
11 written response to those charges, the information presented in at
12 the hearing on March 26, 2007, and all other supporting evidence
13 submitted." Ferrannini Decl. ¶ 7 Ex. F. He concluded that this
14 supported a finding that Trevino had violated LMUD's rules by
15 acting in bad faith so as to discredit the District.

16 The decision also described the process that had been provided
17 Trevino. In describing the March 26, 2007 hearing -- which it
18 identified as a Skelly hearing -- it stated, "At the hearing, you
19 had the opportunity to address the facts upon which the District
20 relied for its intention to terminate you. You chose not to testify
21 or present live testimony from any other witnesses at that hearing
22 despite the opportunity to do so." Id. at 2. Finally, it advised
23 Trevino of his right to appeal pursuant to the General Manager
24 Administrative Procedure 2006-03 ("GMAP 2006-03").

25 Luhring has testified that it was Trevino's "death threat" to
26 Gianotti that warranted his termination. Defs' SSU ¶ 47. He also

1 testified that, in making his termination decision, he did not rely
2 on Trevino's failure to present witnesses at the March 26, 2007
3 hearing. Luhring Depo. 103:20-104:16.

4 Luhring's decision was sent to Trevino on May 10, 2007. On May
5 11, 2007, Trevino filed an appeal.

6 **E. Post-termination Events**

7 On June 1, 2007, Trevino began working as a temporary
8 Electrical Superintendent for the Truckee-Donner Public Utility
9 District. He has testified that he was motivated to do so out of
10 a need for health care benefits for his wife, who was being treated
11 for breast cancer.² Trevino Aff. ¶ 16. He was at some point
12 contacted by "numerous individuals," including local news
13 reporters, about his termination, although he had not previously
14 discussed the matter with them. Id. ¶¶ 11-13.

15 Plaintiff has tendered evidence that on June 4, 2007, he
16 drafted and faxed to defendants' counsel a letter seeking an update
17 on the status of Trevino's appeal, including whether a hearing
18 officer had been appointed. Beko Aff. ¶ 17, Ex. 14.

19 According to defendants, the next regularly scheduled Board
20 meeting occurred on July 24, 2007.³ Luhring Depo. 142:12-16. At the

21
22 ²Plaintiffs have tendered evidence that Luhring knew in 2006
23 that Amy Trevino had been diagnosed with breast cancer and that he
spoke to her about it in December, 2006. Luhring Depo. 79:10-80:20.

24 ³Prior to this, the Board had held "special," closed meetings
25 to address pending litigation. Pls.' SSUF ¶ 173. Cady has testified
that he was not present at those meetings. Cady Depo. at 245:11-21.

26 Plaintiffs have also tendered evidence that the Board
typically held regular meetings once a month, but Luhring did not

1 July 24, 2007 meeting and upon Jones' recommendation, the Board
2 appointed Truckee attorney Steven Gross as the hearing officer for
3 Trevino's appeal. Trevino was notified of this by letter on July
4 26, 2007.

5 Trevino contended at the time -- and maintains this position
6 in the instant suit -- that Gross was not impartial and neutral.
7 It is undisputed that in 2005 Gross assisted LMUD in reviewing
8 Cady's employment contract, among other matters. Defs.' SSUF ¶ 61.
9 Plaintiffs have tendered evidence that in 2006, Gross was assisting
10 in the preparation of a new contract to reappoint Cady as General
11 Manager. Cady Depo. 42:10-14. He also represented LMUD in a matter
12 before the Public Employees Relations Board and provided LMUD legal
13 advice in administrative and employment matters in spring and
14 summer of 2007. Id. at 52:5-56:22. Cady spoke with Gross several
15 times during the course of that representation. Id. Plaintiffs have
16 also tendered evidence that Board members knew that Gross had
17 represented LMUD on other matters at the time that it appointed him
18 as hearing officer. Ferrennini Decl. ¶ 5 Ex. D (Nagel Depo. at
19 25:21-26:13), ¶ 12 Ex. K (Langston Depo. at 41:24-42:8).

20 According to Gross, he had never personally represented Cady
21 or Luhring. Ferrannini Decl. ¶ 10, Ex. I (Gross Depo. at 30:10-
22 31:5). Gross also testified that to the best of his recollection,
23 he was not representing LMUD on any other matters at the time he
24 was appointed hearing officer. Id. at 56:3-7.

25 _____
26 know why regular meetings were not held in May or June, 2007.
Luhring Depo. at 142:17-143:7.

1 In any event, Gross stepped down as hearing officer on October
2 23, 2007. Luhring Depo. 154:22-155:18. He did so due to his
3 perceived "conflict of interest in representing the board with Mr.
4 Cady [and] representing the board with Mr. Trevino." Ferrannini
5 Decl. ¶ 11 Ex. J (Cardenas Depo. at 57:13-19). During the time that
6 he was hearing officer, he did not conduct Trevino's appeal
7 hearing, on account of the "press of business." Gross Depo. at
8 53:7-16.

9 On October 23, 2007, the Board charged Jones with selecting
10 a new hearing officer.⁴ She retained attorney Mike Fitzpatrick for
11 this role on October 26, 2007. Trevino's counsel was notified of
12 this by letter, in which defendants' counsel stated the Fitzpatrick
13 was selected in an attempt to accommodate Trevino's request for a
14 neutral hearing officer and his prior objections to Gross. Beko
15 Aff. ¶ 30, Ex. 26. It informed Trevino that Fitzpatrick would be
16 able to conduct Trevino's appeal hearing on November 15, 2007. Id.
17 By letter dated October 29, 2007, Trevino's counsel agreed that
18 Trevino would appear at the November 15, 2007 hearing and requested
19 Trevino's personnel file and that certain LMUD staff be present at
20 the hearing for questioning. Id. ¶ 32, Ex. 28. On November 7, 2007,
21 Trevino's counsel sent a follow-up letter to LMUD's counsel,

22
23 ⁴Plaintiffs have also tendered evidence that at this Board
24 meeting, some Board members resigned their positions out of concern
25 over Cady's behavior and treatment of employees. Cardenas Depo.
26 75:1-76:24; Beko Aff. ¶ 38, Ex. 34 (Sargent Depo. at 30:1-31:19).
At least two Board members have testified that they were not fully
informed about what was occurring in the Trevino disciplinary
matter. Ferrannini Decl. ¶ 5, Ex. D (Nagel Depo. 61:4-24); Sargent
Depo. at 88:24-89:15.

1 seeking confirmation of the November 15 hearing date. Id. ¶ 31, Ex.
2 29.

3 At some point, the LMUD Board voted to reinstate Trevino to
4 his former position. Ferrannini Decl. ¶ 13, Ex. L (Wood Depo. at
5 78:25-79:2). One Board member has testified that he believed
6 Trevino's conduct was not of the nature that would bring discredit
7 on the District. Sargent Depo. at 40:12-22.

8 On November 9, 2007, defendants' counsel sent a letter to
9 Trevino's counsel, offering to reinstate him and including a check
10 for \$41,118.30 in back pay. A copy of Trevino's personnel file was
11 enclosed. Id. ¶ 32, Ex. 30. Trevino rejected the offer of
12 reinstatement by letter on November 15, 2007, expressing concern
13 about Cady's possible retaliation against him and displeasure with
14 the Board's handling of his disciplinary action. Id. ¶ 33, Ex. 31.
15 He stated that he would not consider returning to LMUD until Cady
16 was no longer in a position of control over him and without
17 assurance by the District that it would comply with LMUD's
18 employment policies.⁵ Id.; see also Trevino Depo. at 178:1-180:3.
19 Trevino cashed the check for back pay. Trevino Depo. at 183:2-17.
20 LMUD has since extended reinstatement offers to Trevino twice.
21 Ferrannini Decl. ¶ 7, Ex. F. The second time, on January 17, 2008,
22 defendants' counsel also informed Trevino's counsel that Cady was
23 no longer employed at LMUD. Id.

24
25 ⁵Defendants also represent that Trevino requested that the
26 Board announce publicly that his termination had been improper, but
cite no evidence substantiating this. See Defs.' SSUF ¶ 81.

1 **F. Procedural History**

2 Plaintiffs filed the instant suit in this court on October 5,
3 2007. On November 10, 2007, the defendants moved to dismiss and
4 strike, which the court granted in part on January 29, 2008, with
5 leave to amend. Plaintiffs have since filed a Third Amended
6 Complaint, which is the operative complaint. In their Third Amended
7 Complaint, plaintiffs allege six causes of action: deprivation of
8 their procedural due process rights, deprivation of their
9 substantive due process rights, conspiracy to deprive plaintiffs
10 of those rights, defamation, infliction of emotional distress, and
11 failure to produce a public record in violation of state law.⁶ They
12 seek declaratory and injunctive relief, damages, and attorneys
13 fees.

14 **II. STANDARD FOR A MOTION FOR SUMMARY JUDGMENT PURSUANT TO**
15 **FEDERAL RULE OF CIVIL PROCEDURE 56**

16 Summary judgment is appropriate when there exists no genuine
17 issue as to any material fact. Such circumstances entitle the
18 moving party to judgment as a matter of law. Fed. R. Civ. P. 56(c);
19 see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970);
20 Secor Ltd. v. Cetus Corp., 51 F.3d 848, 853 (9th Cir. 1995). Under
21 summary judgment practice, the moving party

22 ////

24 ⁶Their stand-alone claim for LMUD's failure to follow its
25 policies in terminating Steven Trevino was dismissed on April 9,
26 2008. Plaintiffs have since dismissed their claims against Marino
Gainnotti, who had been named as a defendant in the Third Amended
Complaint.

1 always bears the initial responsibility of informing the
2 district court of the basis for its motion, and
3 identifying those portions of "the pleadings,
4 depositions, answers to interrogatories, and admissions
on file, together with the affidavits, if any," which it
believes demonstrate the absence of a genuine issue of
material fact.

5 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed.
6 R. Civ. P. 56(c)).

7 If the moving party meets its initial responsibility, the
8 burden then shifts to the opposing party to establish the existence
9 of a genuine issue of material fact. Matsushita Elec. Indus. Co.
10 v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); see also First
11 Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89
12 (1968); Secor Ltd., 51 F.3d at 853. In doing so, the opposing party
13 may not rely upon the denials of its pleadings, but must tender
14 evidence of specific facts in the form of affidavits and/or other
15 admissible materials in support of its contention that the dispute
16 exists. Fed. R. Civ. P. 56(e); see also First Nat'l Bank, 391 U.S.
17 at 289. In evaluating the evidence, the court draws all reasonable
18 inferences from the facts before it in favor of the opposing party.
19 Matsushita, 475 U.S. at 587-88 (citing United States v. Diebold,
20 Inc., 369 U.S. 654, 655 (1962) (per curiam)); County of Tuolumme
21 v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).
22 Nevertheless, it is the opposing party's obligation to produce a
23 factual predicate as a basis for such inferences. See Richards v.
24 Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). The
25 opposing party "must do more than simply show that there is some
26 metaphysical doubt as to the material facts Where the

1 record taken as a whole could not lead a rational trier of fact to
2 find for the nonmoving party, there is no 'genuine issue for
3 trial.'" Matsushita, 475 U.S. at 586-87 (citations omitted).

4 **III. ANALYSIS**

5 Defendants move for summary judgment on the following causes
6 of action: deprivation of plaintiffs' procedural due process
7 rights, deprivation of their substantive due process rights,
8 conspiracy to deprive plaintiffs of those rights, infliction of
9 emotional distress, and failure to produce a public record in
10 violation of state law.

11 Plaintiffs cross-move for partial summary judgment. Although
12 it is not altogether clear from their motion, plaintiffs appear to
13 seek summary judgment against LMUD on their first cause of action,
14 which allege deprivation of their procedural due process rights,
15 to the extent that they seek injunctive relief. See Pls.' Mot. for
16 Summ. J. at 20:16-18.

17 The court grants each motion in part.

18 **A. Due Process Claims**

19 Defendants move for summary judgment on the plaintiffs' first,
20 second, and third causes of action, which allege violations of
21 plaintiffs' procedural and substantive due process rights and a
22 conspiracy to violate those rights, respectively.⁷ Defendants'
23 motion asserts that defendants Cady and Luhring are protected by
24

25 ⁷Defendants do not seek summary judgment on the third cause
26 of action for any reasons distinct from the reasons for which they
seek summary judgment on the first and second causes of action.

1 qualified immunity and that LMUD is not liable under Monell.
2 Defendants also argue that the evidence does not show that a
3 reasonable jury could find that either plaintiff's rights were
4 violated.

5 Plaintiffs concede that their substantive due process claim
6 is moot but seek attorneys fees for it. Plaintiffs also cross-move
7 for summary judgment against LMUD on their first cause of action,
8 for violation of their procedural due process rights, and ask the
9 court to issue an injunction reinstating Steven Trevino in his
10 former position and requiring that LMUD and its agents comply with
11 LMUD policies should future disciplinary actions be taken against
12 Steven.

13 The court considers each of these arguments in turn, beginning
14 first with the allegation of Steven Trevino and then considering
15 the allegations of Amy Trevino.

16 **1. Violation of Steven Trevino's Procedural Due Process**
17 **Rights**

18 Defendants first dispute that a reasonable jury could find
19 that Steven Trevino's procedural due process rights were violated
20 by the defendants' conduct surrounding Trevino's termination. The
21 court disagrees.

22 In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985),
23 the Supreme Court established the framework for analyzing a
24 procedural due process claim where termination of public employment
25 was at issue. As a threshold matter, a public employee's property
26 interest in his continued employment is defined by state law. Id.

1 at 538-39. For example, if a statute or other independent source
2 provides that the employee will only be terminated for cause, the
3 employee has a property interest in his employment such that he is
4 entitled to some measure of due process in a termination procedure.
5 Id. Here, the parties do not dispute that Steven Trevino could only
6 be terminated for good cause, thus establishing a property interest
7 in his employment so as to implicate his due process rights.⁸

8 The employee's due process interest requires, inter alia, that
9 he not be terminated without notice and an opportunity to be heard.
10 Id. at 542. "Some form of pre-termination hearing" is required. Id.
11 The precise contours of the hearing rely on a balancing of the
12 employee's interests, the government's interest in prompt personnel
13 decisions, and the risk of erroneous termination decisions. Id. at
14 543, 545. Given this, the pre-termination hearing must include, at
15 a minimum, oral or written notice to the employee of the charges
16 against him, explanation of the employer's evidence, and an
17

18 ⁸The Supreme Court has also recognized an employee's liberty
19 interest in his reputation and the due process rights attendant to
20 that interest. See, e.g., Loudermill, 470 U.S. at 547 n. 13.
21 Plaintiff Steven Trevino has not pled this as the basis of his
22 claims; instead, he alleges that he possessed a Constitutionally
23 protected property interest in continued employment. See Third
24 Amended Complaint ¶¶ 45-69. The court disregards the arguments
25 plaintiffs raise in their opposition brief on this issue, as they
26 lie outside the scope of the pleadings. See Pls.' Opp'n to Defs.'
Mot. for Summ. J. at 21. Defendants' references to cases discussing
the due process rights that attach to this liberty interest are
similarly unhelpful to the court's analysis. See, e.g., Codd v.
Velger, 429 U.S. 624, 627 (1977) (per curium); see also Matthews
v. Harney County, Or., Sch. Dist. No. 4, 819 F.2d 889, 894 (9th
Cir. 1987) (the due process requirements attaching to a liberty
interest may be more rigorous than those attaching to only a
property interest).

1 opportunity for the employee "to present his side of the story."
2 Id. at 546. In Gilbert v. Homar, 520 U.S. 924, 927 (1997), the
3 Court clarified that it envisioned the pre-termination hearing as
4 "very limited," while a post-termination hearing would be "more
5 comprehensive."

6 A post-termination hearing also must occur "at a meaningful
7 time" and "the existence of post-termination procedures is relevant
8 to the necessary scope of pre-termination procedures." Loudermill,
9 470 U.S. at 547 & n. 12. Regarding the timing of the post-
10 termination hearing, the Court cautioned that "at some point, a
11 delay in the post-termination hearing would become a constitutional
12 violation" although the nine-month delay in that case was not a *per*
13 *se* violation. Id. at 547; see also Gilbert, 520 U.S. at 932
14 (suspension without pay implicates plaintiff's due process rights
15 depending in part on the length of the deprivation, so the
16 promptness of a post-suspension hearing is relevant). Whether a
17 delay in a post-termination hearing constitutes a due process
18 violation depends on "the importance of the private interest and
19 the harm to this interest occasioned by delay; the justification
20 offered by the Government for delay and its relation to the
21 underlying governmental interest; and the likelihood that the
22 interim decision may have been mistaken." Federal Deposit Ins.
23 Corp. v. Mallen, 486 U.S. 230, 242 (1988) citing Mathews v.
24 Eldridge, 424 U.S. 319 (1976). The state's interest in the delay
25 must be "substantial" to survive constitutional scrutiny. Id. at
26 243.

1 Courts have also emphasized the importance of the hearing
2 officer's impartiality in the termination process. In Clements v.
3 Airport Authority of Washoe County, 69 F.3d 321, 332 (9th Cir.
4 1995), the court held that plaintiff's allegations that her post-
5 termination hearing was flawed due to administrator's bias "stated
6 a valid due process claim." The court observed that "[a]t a
7 minimum, Due Process requires a hearing before an impartial
8 tribunal." Id. citing Ward v. Village of Monroeville, 409 U.S. 57,
9 59-60 (1972) and Marshall v. Jerrico, 446 U.S. 238, 241-42 (1980).
10 The court clarified, however, that "the decisionmaker in a *pre-*
11 *termination* hearing need not be impartial, so long as an impartial
12 decisionmaker is provided at the post-termination hearing." Id. at
13 332 n. 15 (emphasis in original).

14 The Ninth Circuit has repeatedly emphasized the importance of
15 the decisionmaker's neutrality in the due process context. See,
16 e.g., Walker v. City of Berkeley, 951 F.2d 182, 184 (9th Cir. 1991)
17 (defendant employer failed to provide plaintiff due process at
18 post-termination hearing because same attorney acted as adjudicator
19 and represented the defendant in related civil suit for wrongful
20 termination); Brady v. Gebbie, 859 F.2d 1543 (9th Cir. 1988) (in
21 the context of a reputational injury implicating plaintiff's
22 liberty interest, evidence that hearing officer would have
23 disregarded evidence plaintiff presented indicated that plaintiff
24 was denied due process); see also Vanelli v. Reynolds Sch. Dist.
25 No. 7, 667 F.2d 773, 780 (9th Cir. 1982) (holding that plaintiff
26 had tendered insufficient evidence to show that one of the decision

1 makers in his termination decision was biased against him, such
2 that his due process rights were violated); Coleman v. Dep't of
3 Personnel Admin., 52 Cal. 3d 1102, 1121 (1991) (post-termination
4 hearing must be performed by an "impartial and disinterested
5 decision maker").

6 Here, plaintiffs have tendered sufficient evidence from which
7 a reasonable jury could find that Steven Trevino did not receive
8 the process due in the termination proceedings against him. While
9 it is undisputed that a pre-termination hearing was held for
10 Trevino, at which time he was able to contest the charges against
11 him and for which he received written notice of the alleged
12 violation and its basis, there is also evidence from which a jury
13 could infer that the hearing was constitutionally infirm.

14 First, there is some evidence that Luhring, as Cady's
15 subordinate, would likely not have reversed the discipline decision
16 that Cady had made. See Cardenas Depo. at 28:13-29:5. There is also
17 evidence that the Board members understood this at the time Luhring
18 was selected as the hearing officer for the pretermination hearing.

19 Id.

20 Second, the process afforded Trevino at the pretermination
21 hearing was minimal. He was not permitted to call witnesses at it,
22 indeed Luhring examined no witnesses at the hearing or prior to it.
23 Luhring Depo. at 70:18-73:15. The sparseness of the process
24 provided at this hearing is not in and of itself constitutionally
25 problematic, but a reasonable jury could find that it was deficient
26 in light of the delayed -- and ultimately non-occurring -- post-

1 termination hearing. See Loudermill, 470 U.S. at 547 & n. 12.

2 A reasonable jury could also find that the Board's initial
3 selection of Gross as a hearing officer for the post-termination
4 hearing indicates a lack of neutrality and impartiality in the
5 process. See Clements, 69 F.3d at 332 n. 15; see also Ward, 409
6 U.S. at 59-60; Marshall, 446 U.S. at 241. There is evidence that
7 Gross had, in the years before the plaintiff's discipline action,
8 represented the District in other employment matters. See Cady
9 Depo. at 52:5-56:22. In this context, he had often met with Cady
10 and had been involved in some capacity with the preparation of
11 Cady's 2006 employment contract. Id. at 42:10-14, 52:5-56:22. Gross
12 himself testified that he stepped down from the role of hearing
13 officer due to the perceived conflict of interest in his roles
14 representing both Cady and Trevino. Gross Depo. at 56:3-7. Finally,
15 it is undisputed that Gross was selected by Jones and plaintiffs
16 have tendered some evidence of Jones' long-standing professional
17 and financial relationship with Cady. See Cady Depo. at 18:2-22:25,
18 23:12-24:2, 25:6-26:12. A reasonable jury might infer from this
19 that Jones was not impartial when recommending Gross as hearing
20 officer. These facts, while not dispositive, would permit a
21 reasonable jury to conclude that Board acted contrary to the
22 requirements of due process in selecting Gross as hearing officer
23 for the post-termination hearing. See Clements, 69 F.3d at 332;
24 Walker, 951 F.2d at 184.

25 Finally, a jury could also reasonably conclude that the LMUD's
26 delay in providing the post-termination hearing was itself a denial

1 of due process. As the Supreme Court has explained, whether a delay
2 in the post-termination hearing constitutes a due process violation
3 depends on the importance of the plaintiff's interest and the harm
4 he would suffer as result of the delay, the state's reason for the
5 delay and the underlying interest they serve, and the likelihood
6 that the termination decision was erroneous. Mathews, 424 U.S. 319.

7 The Court has long acknowledged that an employee possesses an
8 "important interest" in his continued employment. Mallen, 486 U.S.
9 at 242 (citations omitted). In addition to this, plaintiffs have
10 tendered evidence that Steven Trevino had a particularly strong
11 interest in his continued employment due to his need for medical
12 benefits for his wife, who was undergoing cancer treatment. Trevino
13 Aff. ¶ 16.

14 Such an important interest cannot be overcome without a
15 "substantial justification" for the state's delay of the post-
16 termination hearing. Mallen, 486 U.S. at 242. Here, the plaintiffs
17 have tendered evidence that Gross failed to hold the post-
18 termination hearing within the 30 days recommended by LMUD's
19 policies because he was too busy to do so. Gross Depo. at 53:7-16.
20 A jury could reasonably conclude that this is not a sufficiently
21 substantial justification for the delay.

22 Finally, there is evidence that the initial decision to
23 terminate Steven Trevino was erroneous. The Board eventually
24 reversed the decision and offered to reinstate him. One Board
25 member has testified that he disagreed with Luhring's conclusion
26 that Trevino's conduct on the golf course was of such a nature as

1 to discredit the District. Sargent Depo. at 40:12-22.

2 Accordingly, the court denies defendants' motion to the extent
3 that they argue that a reasonable jury would be required to find
4 that Steven Trevino received all the process he was due in his
5 termination proceedings.

6 **2. Plaintiffs' Cross-Motion for Summary Judgment Against**
7 **LMUD**

8 Plaintiffs seek summary judgment in their favor against LMUD
9 on Steven Trevino's procedural due process claim, to the extent
10 that they seek injunctive relief. The court grants this motion in
11 part.

12 Defendants have offered no counter-evidence addressing the
13 Mathews factors, regarding the delay in the post-termination
14 hearing. It therefore remains undisputed that plaintiff had a
15 substantial interest in his continuing employment, that the only
16 evidence of the government's justification for the delay was the
17 business of the hearing officer, and that the termination decision
18 was later concluded to be erroneous by the Board, as discussed
19 above.⁹

20 Defendants' arguments in opposition to plaintiffs' motion are
21 unpersuasive. Defendants' sole basis for opposing plaintiffs'
22 motion is their assertion that plaintiffs have not shown that LMUD
23 is liable under Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 691

24
25 ⁹The court concludes, however, that plaintiffs have not shown
26 that the evidence is so unequivocal that no reasonable jury could
find in defendants' favor as to the impartiality of Luhring and
Gross and the adequacy of the pre-termination hearing.

1 (1978). See Defs.' Opp'n to Pls.' Mot. for Summ. J. at 11-15. This
2 is unpersuasive. Monell's requirement that a plaintiff may only
3 prevail against a state entity for Constitutional rights violations
4 when the violation occurred pursuant to a state policy, does not
5 apply when the plaintiff seeks only prospective relief. Chaloux v.
6 Killeen, 886 F.2d 247, 250 (9th Cir. 1989). In Chaloux, plaintiffs
7 sued Idaho sheriffs in their official capacities to prevent the
8 implementation of allegedly unconstitutional garnishment statutes.
9 Id. Plaintiffs sought declaratory and injunctive relief. Id. The
10 court held that Monell's "official policy or custom" requirement
11 applied only to actions for damages under § 1983, because the
12 statute's purpose was to "alleviate the imposition of financial
13 liability on local governments." Id. Because this concern was
14 absent when injunctive and declaratory relief was sought, the court
15 declined to apply the Monell limitation to such suits. Id. at 251.
16 Consequently, because plaintiffs only seek summary judgment on
17 their claims for injunctive relief, Monell is no impediment to the
18 success of their motion.¹⁰

19 To the extent that defendants intended to incorporate the
20 arguments in their motion for summary judgment into their
21 opposition to plaintiffs' motion, those arguments are also
22 unpersuasive. First, defendants argue that Trevino received back
23 pay for this period. See Defs.' Mot. for Summ. J. at 19 (citing
24 Defs.' SSUF ¶¶ 77-78, 88). This fact does not foreclose plaintiff's

25
26 ¹⁰Moreover, as explained below, there is sufficient evidence
from which a jury could impose Monell liability here.

1 procedural due process claim, especially given that plaintiffs'
2 motion for summary judgment seeks injunctive relief, not damages.
3 See, e.g., Clements, 69 F.3d at 332-34 (when defendant has violated
4 plaintiff's due process rights, plaintiff may recover damages for
5 emotional distress and nominal damages, in addition to the
6 compensatory damages sought).

7 Defendants also argue that Codd v. Velger, 429 U.S. 624, 627
8 (1977) (per curiam) bars Trevino's recovery here. As stated in note
9 8, *supra*, that case dealt only with plaintiff's liberty interest
10 in his reputation and the process due in that circumstance. Aside
11 from a brief citation to Loudermill, defendants do not otherwise
12 discuss how the delay in the post-termination hearing relates to
13 plaintiff's property interest in his continued employment.

14 Accordingly, the court grants plaintiffs' motion for summary
15 judgment on the first cause of action, to the extent that it
16 alleges that Steven Trevino's procedural due process rights were
17 violated.

18 The court grants in part Steven Trevino's request for
19 injunctive relief. Plaintiffs seek an order reinstating Trevino and
20 requiring defendants to "strictly comply with the General Managers
21 Administrative Procedure (2006-03) should any future disciplinary
22 action be taken against Mr. Trevino." Generally speaking, the Ninth
23 Circuit has held that reinstatement is an appropriate form of
24 injunctive relief only where plaintiff has shown that "another
25 substantive right coexists with the right to procedural due
26 process." Brady, 859 F.2d at 1552. Relying on prior Ninth Circuit

1 and Supreme Court precedent, the Brady court concluded that in
2 general the proper remedy for a procedural due process violation
3 is to give the plaintiff the process he was due and attendant
4 damages. Id. (collecting cases). The court noted that it had only
5 ordered reinstatement in a few cases where there was an underlying
6 violation of plaintiff's First Amendment rights as well as a due
7 process violation. Id. (citing Burton v. Cascade Sch. Dist. Union
8 High Sch. No. 5, 512 F.2d 850 (9th Cir. 1975) and Cain v. McQueen,
9 580 F.2d 1001 (9th Cir. 1978)).

10 Here, LMUD has offered reinstatement and informed plaintiff
11 that defendant Cady is no longer General Manager there. In this
12 situation, the Brady court's concerns appear absent and
13 reinstatement appears to be an appropriate remedy. Although
14 plaintiff also requests that the court order the defendants to
15 comply strictly with GMAP 2006-03 during the entirety of his
16 employment, the court disfavors injunctions that would require
17 supervision from the court for many years or for an indefinite
18 period. See Natural Resources Def. Council v. United States Env'tl.
19 Prot. Agency, 966 F.2d 1292, 1300 (9th Cir. 1992). Instead, the
20 court cautions the defendants that by reinstating plaintiff Steven
21 Trevino they have implicitly agreed to adhere to the due process
22 requirements imposed on them by law and described herein. Future
23 violations of these requirements, the court expects, may give rise
24 to another suit by plaintiffs.

25 **3. Qualified Immunity of the Individual Defendants**

26 Defendants Cady and Luhring assert that they are entitled to

1 qualified immunity on plaintiffs' procedural due process claims.
2 The court grants defendant Cady's motion and denies defendant
3 Luhring's.

4 **i. Defendant Cady**

5 Preliminarily, defendant Cady argues that he is not liable for
6 the deprivation of Steven Trevino's procedural due process rights
7 because he was not sufficiently involved in the discipline
8 proceedings so as to reasonably be found to have caused the
9 deprivation.

10 A government official is immune from liability for
11 discretionary functions, so long as the official's conduct "does
12 not violate clearly established statutory or constitutional rights
13 of which a reasonable person would have known." Harlow v.
14 Fitzgerald, 457 U.S. 800, 818 (1982). Here, plaintiffs appear not
15 to dispute that Cady's conduct at issue implicated a discretionary
16 function. In conducting a qualified immunity analysis, the court
17 must determine whether the facts, taken in the light most favorable
18 to the injured party, show that the official's conduct violated a
19 constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001).

20 Even viewing the evidence in the light most favorable to
21 plaintiffs here, there is insufficient evidence from which a jury
22 could conclude that Cady caused the deprivation of the plaintiffs'
23 procedural due process rights. The evidence tendered to the court
24 shows that Cady initially placed Steven Trevino on administrative
25 leave; that immediately after the golf course incident, he
26 discussed it with Luhring and Jones; two days later he emailed

1 Jones, Luhring, and the Board relating his version of events and
2 opining that Steven Trevino was guilty of various crimes and LMUD
3 rule infractions; and that four days after the incident, he was
4 present at a closed personnel meeting with Jones and Luhring, the
5 result of which was Luhring being given the authority to act as
6 General Manager for the matter of Trevino's discipline.

7 As the court explained above, the evidence of the procedural
8 due process violations against Steven Trevino encompass the
9 adequacy of the pre-termination hearing, the impartiality of the
10 hearing officers, and the delay in the post-termination hearing.
11 Plaintiffs have not tendered any evidence establishing a causal
12 link between these possible violations and Cady's actions. Simply
13 because Cady set the discipline proceedings in motion initially
14 does not render him liable for the process that was eventually
15 provided. Even Cady's March 12, 2007 e-mail appears at most to
16 suggest what result Cady believed the discipline process should
17 have, but did not implicate the process provided. Nor is there any
18 evidence tendered that could lead a reasonable jury to conclude
19 that Cady was involved in the selection of Luhring or Gross as
20 hearing officers. Put plainly, plaintiffs have not borne their
21 burden to produce evidence permitting a reasonable jury to conclude
22 that Cady caused Steven Trevino's procedural due process
23 violations. Accordingly, Cady's motion for summary judgment is
24 granted as to that cause of action.

25 **ii. Defendant Luhring**

26 Defendant Luhring is not entitled to qualified immunity.

1 First, there is evidence from which a reasonable jury could
2 conclude that Luhring caused Steven Trevino's due process
3 violations. It is undisputed that as of March 14, 2007, Luhring was
4 charged with acting as General Manager for the purposes of
5 Trevino's discipline proceedings, which were governed not only by
6 constitutional requirements but also by LMUD's policies as stated
7 in GMAP 2006-03. Luhring conducted the pre-termination hearing on
8 March 26, 2007, which, as discussed above, a jury could find to be
9 constitutionally deficient. Additionally, although the evidence
10 indicates that the delay in holding the post-termination hearing
11 appeared to be most directly the result of Gross's actions, a
12 reasonable jury could conclude that as acting General Manager for
13 the purposes of the discipline matter, Luhring also bore some
14 responsibility. As acting General Manager, he was charged with
15 enforcing GMAP 2006-03, which provides that "[a]ll efforts shall
16 be made to schedule the [posttermination] hearing within 30 days
17 of the Notice of Appeal." Accordingly, a reasonable jury could find
18 that Luhring caused Steven Trevino's procedural due process
19 deprivations.

20 Second, the law governing Luhring's actions was clearly
21 established at the time. Saucier, 533 U.S. at 201-202 (the second
22 step of the qualified immunity analysis is whether the
23 constitutional right was "clearly established" at the time of the
24 violation, such that a reasonable official would have understood
25 that his actions violated that right). The law regarding an
26 employee's procedural due process rights surrounding termination

1 is long settled. In Loudermill, the Court expressed the
2 constitutional importance of there being held both a pre-
3 termination and prompt post-termination hearing. 470 U.S. at 546-
4 47. This principle has been reaffirmed over the last three decades
5 by both the Supreme Court and the Ninth Circuit. Mathews, 424 U.S.
6 319; Gilbert, 520 U.S. at 932; Mallen, 486 U.S. at 242; Vanelli,
7 667 F.2d at 778-79; see also Bd. of Regents v. Roth, 408 U.S. 564
8 (1972) (public employee has a property interest in continued
9 employment, such that his procedural due process rights attach).
10 The Supreme Court and the Ninth Circuit have also long held that
11 the Constitutional adequacy of the pre-termination hearing is
12 determined, in part, by the process provided in the post-
13 termination hearing. Loudermill, 470 U.S. at 547 & n. 12; Clements,
14 69 F.3d at 332. In 1988, the Ninth Circuit expressly held that the
15 law governing procedural due process, specifically regarding the
16 process due at a pre-termination hearing and the factors used in
17 determining whether the delay in a post-termination hearing was
18 Constitutional, were clearly established. Brady, 859 F.2d at 1556.
19 Given that there has been no intervening change in law on these
20 issues, the law remained clearly established at the time of Steven
21 Trevino's disciplinary proceedings.

22 Given this, it appears clear that a reasonable official in
23 Luhring's position should have known that the process provided at
24 the pre-termination hearing and the delay in the post-termination
25 hearing violated Steven Trevino's rights. Defendant Luhring's
26 motion is therefore denied on the issue of qualified immunity for

1 the first cause of action.

2 **4. Liability of LMUD**

3 As discussed above, summary judgment is granted to plaintiffs
4 against defendant LMUD to the extent that plaintiffs' first cause
5 of action seeks injunctive relief. Defendant argues that LMUD
6 cannot be liable for damages under Monell. The court denies
7 defendants' motion on this issue.

8 Municipal liability may be established in one of three ways.
9 See Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992). A
10 plaintiff may prove that the actions in question were conducted
11 pursuant to an official custom, policy, or practice; that the
12 individual who committed the act was an official with final
13 policymaking authority; or that such an official ratified a
14 subordinate's unconstitutional act. Id.; accord Monell v. New York
15 Dep't of Soc. Serv., 436 U.S. 658, 691 (1978); Weiner v. San Diego
16 County, 210 F.3d 1025, 1028 (9th Cir. 2000). An agency may not be
17 liable on a *respondeat superior* theory, but only if there is
18 evidence that there is "an affirmative link between the policy and
19 the specific constitutional violation alleged." City of Oklahoma
20 v. Tuttle, 471 U.S. 808, 821 (1985).

21 In explaining the second route to municipal liability -- that
22 a municipal policymaker committed the harm to plaintiff -- the
23 Supreme Court has explained that a policymaker is one who has been
24 granted final authority to enact the policy in question by the
25 legislature or had that authority delegated to him by an official
26 who possesses such authority. Pembaur v. City of Cincinnati, 475

1 U.S. 469, 482-83 (1986). In Pembaur, the Court explained this rule
2 in a city employment context. Using the example of a county
3 sheriff, the Court held that the county would not be liable for
4 employment decisions by the sheriff, even if the sheriff possessed
5 the authority to unilaterally hire and fire. Id. at 483 n. 12. This
6 did not constitute a "delegation" of county authority for Monell
7 purposes. Id. Instead, the county would only be liable if it had
8 delegated to the sheriff the final authority to "establish final
9 employment policy." Id.

10 Here, the policy governing employee discipline was set forth
11 in GMAP 2006-03. It was implemented pursuant to California Public
12 Utility Code § 11926 and § 11937. Ferrannini Decl. ¶ 4, Ex. C.
13 Section 11926 provides that the Board shall appoint the General
14 Manager, who has "full charge and control of . . . the
15 administration of business affairs of the district." Section 11937
16 provides that the powers of the General Manager include
17 "administer[ing] the civil service system of the district and . .
18 . to remove such employees, in accordance with the provisions of
19 the civil service system." The statute does not provide that these
20 decisions are subject to the Board's review. The civil service
21 system is set forth in Public Utility Code §§ 12161-12167. It
22 provides that the General Manager is the person responsible for
23 setting a discipline hearing, appointing a committee to conduct the
24 hearing, and review the committee's decision. Cal. Pub. Util. Code
25 §§ 12164-12166.

26 By statute, therefore, the General Manager is vested with the

1 final decision-making authority over termination decisions.
2 California statute grants this to the General Manager directly and
3 provides for no review by the Board of the General Manager's
4 discipline decisions. This is in accord with GMAP 2006-03, which
5 provides that it is made effective only upon approval by the
6 General Manager. The parties do not dispute that the authority of
7 the General Manager was delegated by the Board to Luhring on March
8 14, 2007 with respect to Trevino's discipline proceedings.
9 Accordingly, as of that date Luhring acted as the final policy
10 maker for the District. See Pembaur, 475 U.S. at 482-83. LMUD may
11 therefore be liable for damages on plaintiffs' first cause of
12 action.¹¹

13 **5. Violation of Amy Trevino's Due Process Rights**

14 Amy Trevino's procedural due process claims allege that the
15 defendants violated her procedural and substantive due process
16 rights by depriving her of her "constitutionally-protected right
17 to be free from unconstitutional government-imposed impact to her
18 marital relationship with her husband" and the "care,

19
20 ¹¹ Moreover, even if one were to find that the Board rather
21 than the General Manager possessed final policymaking authority
22 over employment decisions, there is evidence from which a
23 reasonable jury could find that the Board's own acts caused the
24 plaintiffs' Constitutional deprivations. These acts include
25 choosing Luhring to conduct the discipline proceedings despite the
26 evidence that Luhring would not have reversed Cady's decision,
choosing Gross as hearing officer for the post-termination hearing
despite his possible conflict of interest, and possibly delaying
the scheduling of regular Board meetings in May and June 2007,
which a factfinder might infer was done for the purpose of delaying
the post-termination hearing. See Cardenas Depo. at 28:13-29:5;
Nagel Depo. at 25:21-26:13; Langston Depo. at 41:24-42:8; Luhring
Depo. at 142:17-143:7.

1 companionship, society, and guidance of her husband." Third Amended
2 Complaint ¶¶ 45, 48, 69. As the court explained in its April 9,
3 2008 order, there is a recognized liberty interest in a person's
4 companionship with a family member, such that the state's
5 interference with it may constitute a violation of that person's
6 substantive or procedural due process rights. See Smith v. City of
7 Fontana, 818 F.2d 1411, 1419-20 (9th Cir. 1987) (overruled on other
8 grounds by Hodger-Durgin v. De La Fina, 199 F.3d 1037 (9th Cir.
9 1999)); see also Kelson v. City of Springfield, 767 F.2d 651, 654-
10 55 (9th Cir. 1985). This is cognizable as the basis of a § 1983
11 claim. Smith, 818 F.2d at 1420.

12 As they did in their motion to dismiss, the defendants again
13 rely on Trujillo v. Bd. of County Commissioners, 768 F.2d 1168,
14 1190 (10th Cir. 1985) for the proposition that Amy Trevino's claim
15 can only succeed if the defendants intended to interfere with her
16 marital relationship. This holding has been expressly rejected by
17 the Ninth Circuit. Ward v. City of San Jose, 967 F.2d 280, 284 (9th
18 Cir. 1991). The court explained as much in its April 9, 2008
19 order.¹² See Order, April 9, 2008 at 9. As the court explained,
20 "[t]he plaintiff need not show that the actor acted with malice in
21

22 ¹²Defendants' counsel are reminded of their ethical duty to
23 not knowingly make false representations of the law to the court.
24 See Local Rule 83-180(e) (requiring counsel to comply with the
25 American Bar Association's Model Rules of Professional Conduct
26 where applicable); ABA Model Rules of Prof'l Conduct R. 3.3 &
Comment 4 ("Legal argument based on a knowingly false
representation of law constitutes dishonesty toward the tribunal.
A lawyer is not required to make a disinterested exposition of the
law, but must recognize the existence of pertinent legal
authorities.").

1 order to succeed in this claim; a showing of deliberate
2 indifference or "more than mere[] neglig[ce]" is sufficient." Id.
3 (citations omitted)).

4 Amy Trevino's alleged due process violation appears to stem
5 entirely from defendants' conduct in the termination of Steven
6 Trevino. See Third Amended Complaint ¶¶ 45-75. As discussed above,
7 there is insufficient evidence that defendant Cady caused any of
8 the improprieties in the procedural due process afforded Steven
9 Trevino. As such, he similarly could not reasonably be found to
10 have caused any violation of Amy Trevino's liberty interest that
11 may have resulted from the Constitutionally infirm termination
12 proceedings.

13 Defendant Luhring argues that he are protected by qualified
14 immunity because a reasonable official in his positions would not
15 have known that his conduct violated Amy Trevino's constitutional
16 rights. The court agrees.

17 Even if defendant Luhring's actions violated Amy Trevino's
18 procedural due process rights, that she possessed such a right is
19 not clearly established such that a reasonable official in
20 Luhring's position would have known that his conduct violated those
21 rights.¹³ See Saucier, 533 U.S. at 201-202. In order to be clearly
22 established, "the contours of the right must be sufficiently clear"
23 so as to be obvious to a reasonable official. Anderson v.

24
25 ¹³ In Pearson v. Callahan, ___ U.S. ___, 2009 WL 128768 (Jan.
26 21, 2009), the Court held that the qualified immunity analysis need
not proceed in the sequential manner set forth in Saucier.

1 Creighton, 483 U.S. 635, 640 (1978). To meet this standard, the
2 right alleged to be violated cannot be only the "general
3 constitutional guarantee (e.g., the Fourth Amendment freedom from
4 unreasonable searches and seizures), but its application in a
5 particular context." Baker v. Racansky, 887 F.2d 183, 186 (9th Cir.
6 1989) (citing Anderson, 483 U.S. at 639-40 and Todd v. United
7 States, 849 F.2d 365, 370 (9th Cir. 1988)).

8 There need not be case law directly on point in order for a right
9 to be considered clearly established, but the extant law must make
10 the right "apparent." Anderson, 483 U.S. at 640; Hope v. Pelzer,
11 536 U.S. 122 (2002).

12 Here, Amy Trevino's due process interest was not clearly
13 established at the time of Luhring's actions. The court recognized
14 in its April 9, 2008 order that there was no in-circuit precedent
15 for the proposition that a person possesses a liberty interest in
16 the companionship of her spouse. Order, April 9, 2008 at 10-12.
17 While previous cases had dealt with this interest in the context
18 of the parent-child relationship, the court concluded that the
19 reasoning behind the recognition of this interest seemed to apply
20 in equal force to a marital relationship, particularly given the
21 purpose of the Klu Klux Klan Act and the Court's longstanding
22 recognition of the importance of the marital relationship. Id.

23 The court cannot conclude that its understanding of this
24 liberty interest is such an inevitable extension of the Circuit's
25 precedent as to render Amy Trevino's liberty interest apparent to
26 a reasonable state official. Although the analogy between the

1 parent-child and marital relationship seems appropriate in the due
2 process context, at the time of alleged deprivation no court in
3 this circuit had held that the liberty interest extends to any
4 relationship beyond that of natural parent and child. See, e.g.,
5 Ward, 967 F.2d 280 (declining to extend it to a sibling
6 relationship); Santos v. County of Los Angeles Dep't of Children
7 and Family Servs., 299 F. Supp. 2d 1070, 1081 (C.D. Cal. 2004)
8 (declining to extend to aunt-nephew relationship). In light of
9 this, it would not have been apparent to a reasonable official in
10 Luhring's position that Amy Trevino's liberty interests may have
11 been violated as a result of the termination process provided to
12 Steven Trevino.

13 Although Luhring is entitled to qualified immunity, that
14 offers no defense to LMUD. Owen v. City of Independence, Missouri,
15 445 U.S. 662 (1980). As previously explained, there are facts from
16 which a reasonable jury could conclude that LMUD is liable under
17 Monell. Defendant LMUD's motion is therefore denied as to
18 plaintiffs' first cause of action to the extent that it alleges
19 violations of Amy Trevino's rights.

20 **6. Plaintiffs' Causes of Action Based on Violations of**
21 **Their Substantive Due Process Rights**

22 In plaintiffs' second cause of action, they allege that
23 defendants' conduct in terminating Steven Trevino violated
24 plaintiffs' substantive due process rights. Their third cause of
25 action alleges defendants conspired to commit these deprivations.
26 In their opposition to defendants' motion, plaintiffs abandon their

1 causes of action premised on violations of their substantive due
2 process rights, conceding that they are moot. Pls.' Opp'n to Defs.'
3 Mot. for Summ. J. at 27-28. Nevertheless, they contend that they
4 are entitled to attorney's fees if they are found to be the
5 prevailing parties on this claim, if plaintiffs' filing suit
6 brought about the result they sought. See Clark v. City of Los
7 Angeles, 803 F.2d 989, 990 (9th Cir. 1986). Plaintiffs do not
8 themselves seek summary judgment on the issue of whether they are
9 the prevailing parties on this claim and, in any event, whether a
10 party is a prevailing party under § 1988 is not an issue for
11 summary judgment. Lewis v. Continental Bank Corp., 494 U.S. 472,
12 480 (1990).

13 Accordingly, defendants' motion for summary judgment is
14 granted as to plaintiffs' second and third causes of action to the
15 extent that they allege deprivations of plaintiffs' substantive due
16 process rights. This grant of summary judgment does not preclude
17 plaintiffs from presenting evidence at the appropriate time that
18 they are entitled to attorneys' fees for these causes of action.

19 **B. Intentional Infliction of Emotional Distress Claim**

20 In their sixth cause of action, plaintiffs allege that
21 defendants' conduct surrounding Steven Trevino's termination was
22 extreme and outrageous and intended to cause plaintiffs emotional
23 distress. Plaintiffs allege that it did cause them severe emotional
24 distress. Third Amended Complaint ¶ 87.

25 Defendants seek summary judgment on two grounds. First, they
26 contend that there is insufficient evidence from which a jury could

1 conclude that defendants' conduct was "outrageous," which is an
2 element of the cause of action. See Christensen v. Sup. Court, 54
3 Cal. 3d 868, 903 (1991). Second, they argue that there is
4 insufficient evidence that the defendants acted with the intent to
5 cause emotional distress. The court denies defendants' motion on
6 this cause of action.

7 First, there is sufficient evidence of outrageous conduct such
8 that a reasonable jury could find in plaintiffs' favor. California
9 courts have held that employer conduct may be extreme and
10 outrageous for the purpose of this tort. See, e.g., Rojo v. Kliger,
11 52 Cal. 3d 65 (1990). Here, defendants describe their conduct as
12 "a quintessential personnel management decision." Defs.' Mot. for
13 Summ. J. at 23. Reasonable minds could differ, however, as to
14 whether this is an appropriate characterization. Viewing the
15 evidence in the light most favorable to the plaintiffs, a jury
16 could find that defendants' conduct, beginning with Cady's conduct
17 on March 10, 2007 and through the period after Trevino was
18 terminated and awaiting a post-termination hearing, was so outside
19 the bounds of civilized behavior as to be outrageous.

20 Second, there is sufficient evidence of intent to permit a
21 reasonable jury to find that this element has been met.¹⁴ As the
22

23 ¹⁴Defendants' argument that plaintiffs' claim fails because
24 plaintiffs failed to comply with the presentment requirement is not
25 persuasive. As the court explained in its January 29, 2008 order,
26 a plaintiff need not comply with the presentment requirement if he
has pled that defendant committed an intentional tort and names the
state agency and individual state actor as co-defendants. See Cal.
Gov't Code § 815.3. Those elements were pled here.

1 California Supreme Court explained in Christensen, intentionality
2 can be met with evidence that the defendant acted with reckless
3 disregard to the plaintiffs' rights or that defendant's conduct was
4 directed at plaintiffs. 54 Cal. 3d at 903-905 (collecting cases).
5 Here, there is no dispute that defendants' conduct was directed at
6 Steven Trevino, in the sense that his claim is premised on
7 defendants' conduct in his termination proceedings. In other words,
8 defendants were not acting as mere bystanders to Steven Trevino's
9 injury. See id. at 904 (holding that where the defendants failed
10 to intervene to stop the injury to another or where plaintiff was
11 a bystander observing injury to another, there was insufficient
12 evidence of intentionality).

13 There is also sufficient evidence from which a reasonable jury
14 could find that defendants acted with reckless disregard to Amy
15 Trevino's rights. In a similar case, the California Court of
16 Appeals has held that an employer can be liable for intentional
17 infliction of emotional distress to an employee's spouse resulting
18 from the employee's wrongful termination and loss of medical
19 benefits. Waye v. Rollins Int'l, Inc., 169 Cal. App. 3d 1, 17
20 (1985). Given that there is evidence that defendants knew that
21 Steven Trevino was married and that Amy Trevino was receiving
22 treatment for a serious health condition, see Luhring Depo. at
23 79:10-80:20, per Waye, this appears to suffice to permit a jury to
24 conclude that defendants acted with reckless disregard to the
25 emotional distress their conduct would cause her.

26 ////

1 **C. Claim for Failure to Provide Public Records**

2 In their eighth cause of action, plaintiffs allege that
3 defendant LMUD violated California Government Code § 53060.3 and
4 Labor Code § 1198.5 by failing to provide Steven Trevino with his
5 personnel file when he requested it. The parties agree that Steven
6 Trevino requested his personnel file, through his counsel, on
7 August 14, 2007 and that LMUD provided it to him on November 9,
8 2007. Defendant argues that there is no private right of action for
9 these statutes.

10 California Government Code § 53060.6 provides that "[e]very
11 employee of a local agency has the right to inspect personnel
12 records pursuant to Section 1198.5 of the Labor Code." Labor Code
13 § 1198.5 provides that, "[e]very employee has the right to inspect
14 the personnel records that the employer maintains relating to the
15 employee's performance or to any grievance concerning the
16 employee." The employer "shall" make the contents of the personnel
17 records available to the employee "at reasonable intervals and at
18 reasonable times." Cal. Labor Code § 1198.5(b). The statute also
19 provides that the requirements therein are "minimum standards" for
20 an employee's inspection of his personnel file. Id. § 1198.5(g).

21 Preliminarily, plaintiffs have tendered no facts from which
22 a jury could find that Amy Trevino's statutory rights were
23 violated. Plaintiffs do not allege, let alone tender facts that
24 show, that Amy Trevino requested Steven Trevino's personnel file.
25 Nor has she alleged or shown that she was damaged by LMUD's failure
26 to timely provide the file. The plaintiffs apparently acknowledge

1 as much, as they do not oppose defendants' motion as to Amy
2 Trevino. Accordingly, defendants' motion is granted on plaintiffs'
3 eighth cause of action as to Amy Trevino.

4 The court disagrees with defendants' contention that there is
5 no private right of action for violations of these statutes. Under
6 California law, a public entity is liable for injuries proximately
7 caused by its failure to discharge a mandatory duty created by an
8 enactment and designed to protect against the particular injury
9 alleged, unless the public entity has been reasonably diligent in
10 attempting to discharge its duty. Cal. Gov't Code § 815.6. Whether
11 a statute imposes a mandatory duty is determined by considering the
12 legislative intent, as evinced by the language of the statute as
13 well as other factors. Nunn v. State of Cal., 35 Cal. 3d 616, 624-
14 25 (1984).

15 Here, the language of the statutes at issue and other evidence
16 of legislative intent indicate that LMUD had a mandatory duty to
17 provide Steven Trevino access to his personnel file. Both
18 Government Code § 53060.6 and Labor Code § 1198.5 frame the
19 employer's duty in terms of the employee's right to view his
20 personnel record. In light of this construction, it seems
21 antithetical to the purpose of either statute that the legislature
22 intended to suggest that that right could be disregarded by the
23 employer. The court's interpretation is supported by the
24 legislature's express intent in passing Government Code § 53060.6,
25 where it found and declared that, "the right of employees to
26 inspect personnel files is a fundamental right of employment . .

1 . ." S.B. 1327 § 12 (2000). Finally, Labor Code § 1198.5 clarifies
2 that the requirements contained therein were minimum standards,
3 suggesting that the employer has a mandatory duty to adhere to them
4 but discretion to create additional access to personnel files if
5 it so chose.

6 The court is similarly unpersuaded that Steven Trevino does
7 not fall under the ambit of the statutes and that the injury of
8 which he complains is not the type of injury the statutes were
9 meant to address. Although Steven Trevino had been terminated prior
10 to his request for his personnel file, his request was made in
11 advance of his post-termination hearing. Given the importance of
12 the post-termination hearing both by due process standards, as
13 discussed above, and within the procedures set forth in GMAP 2006-
14 03, his interest in his file related to a key element of his
15 discipline proceedings. Because the statutes were enacted for the
16 purpose of protecting employees' employment rights and because the
17 post-termination hearing is an essential component of those rights,
18 Steven Trevino was undoubtedly in the class of persons the statute
19 was designed to protect.

20 His injury was also the type that the statutes were intended
21 to avoid. Defendants characterize plaintiff's injury simply as the
22 incurrence of attorneys' fees. This seems to miss the point. Labor
23 Code § 1198.5 expressly requires that employers make personnel
24 files available "at reasonable intervals and at reasonable times."
25 Cal. Labor Code § 1198.5(b). In other words, timely inspection of
26 the file is an interest acknowledged and protected by the statute.

1 Necessarily, then, the harm the legislature sought to avoid was the
2 employee having to expend time and resources to convince or cajole
3 his employer into providing him access to his personnel file. That
4 is essentially the harm Steven Trevino has presented evidence of
5 here. Defendants' motion is therefore denied on plaintiff's eighth
6 cause of action as to Steven Trevino.

7 **IV. CONCLUSION**

8 For the reasons stated herein, defendants' motion for summary
9 judgment (Doc. No. 84) is GRANTED IN PART AND DENIED IN PART.
10 Plaintiffs' motion for partial summary judgment (Doc. No. 88) is
11 GRANTED IN PART AND DENIED IN PART.

12 Defendant LMUD is ORDERED to reinstate plaintiff Steven
13 Trevino to the position he held at the time of his termination.

14 IT IS SO ORDERED.

15 DATED: February 12, 2009.

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17 
18 LAWRENCE K. KARLTON
19 SENIOR JUDGE
20 UNITED STATES DISTRICT COURT
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