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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

WILLIAM HOWARD,  
Plaintiff,  
v.  
CONTRA COSTA COUNTY; DAVID  
LIVINGSTON; SEAN FAWELL; TOWN  
OF DANVILLE; STEVEN SIMPKINS; and  
DOES 1-50,  
Defendants.

Case No. 13-cv-03626 NC  
**ORDER ON DEFENDANTS'  
MOTION TO DISMISS**  
Re: Dkt. No. 12

Plaintiff William Howard reported misconduct of a fellow deputy to the Contra Costa County Sheriff’s Office. The report resulted in the arrest of the deputy who was criminally prosecuted for his involvement in setting up “Dirty DUI’s.” After reporting the misconduct, Howard was ostracized, harassed, and ultimately fired by the County. Howard then brought this lawsuit against Contra Costa County, the Town of Danville, and their employees, alleging violations of his rights to free speech and due process, retaliation in violation of California Labor Code § 1102.5(b), and state law claims for negligent supervision and intentional infliction of emotional distress. For the reasons set forth below, the Court DENIES defendants’ motion to dismiss Howard’s claims for retaliation in violation of the First Amendment and California Labor Code § 1102.5(b), and GRANTS the motion to dismiss WITH LEAVE TO AMEND as to the remaining claims.

Case No. 13-cv-03626 NC  
ORDER ON MOTION TO DISMISS

1 **I. BACKGROUND**

2 **A. The Allegations of the Complaint**

3 **1. Howard Is Assigned as Deputy Tanabe’s Cover Officer.**

4 Plaintiff William Howard was employed by the County Sheriff’s Office as a Level II  
5 Reserve Deputy. Dkt. No. 1 ¶ 16. As a Level II Reserve Deputy, Howard could perform  
6 general law enforcement assignments while under the immediate supervision of a peace  
7 officer who had completed the Regular Basic Course. *Id.* In January 2009, Howard began  
8 working as a per diem deputy for Marine Patrol, a division of the County Sheriff’s Office.  
9 *Id.*

10 Despite his assignment to Marine Patrol, on January 14, 2011, Howard was assigned  
11 as the cover officer for Deputy Stephen Tanabe, a police officer employed by the County,  
12 on a shift to take place from 6:00 p.m. to 4:00 a.m. on January 15, 2011 in Danville. *Id.* ¶¶  
13 17, 19. During this shift, Deputy Tanabe received numerous phone calls from someone  
14 whom Deputy Tanabe identified as being his “P.I. friend.” *Id.* ¶ 19. During the phone  
15 calls, Howard surmised that Deputy Tanabe was receiving information about a possible  
16 suspect under the influence of alcohol from the “P.I. friend.” *Id.*

17 Deputy Tanabe drove the patrol vehicle adjacent to a wine bar known as the Vine. *Id.*  
18 ¶ 20. Howard and Deputy Tanabe observed an individual, later identified as Mitchell Katz,  
19 leaving the Vine in a truck. *Id.* Deputy Tanabe pulled his patrol vehicle behind Katz’s  
20 truck and followed Katz for a short distance. *Id.* Deputy Tanabe stopped Katz for a traffic  
21 violation and arrested him for driving under the influence of alcohol. *Id.* Deputy Tanabe  
22 processed Katz at the Danville Police Station, and Katz was then transported to the  
23 Martinez Detention Facility by another deputy. *Id.*

24 **2. Deputy Tanabe Comes to Howard’s House.**

25 On February 16, 2011, Deputy Tanabe called Howard asking if he could visit Howard  
26 at his home. Dkt. No. 1 ¶ 21. When Deputy Tanabe stopped by Howard’s home around  
27 8:00 p.m. that evening, Howard perceived that Deputy Tanabe was in a highly disturbed and  
28 agitated state. *Id.* Deputy Tanabe informed Howard that Christopher Butler and the County

1 Narcotics Enforcement Team Assistant Sheriff had been arrested by the State of California  
2 Department of Justice. *Id.* Deputy Tanabe told Howard for the first time that his “P.I.  
3 friend” was Butler. *Id.* Deputy Tanabe said that the police were going to start an  
4 investigation into Deputy Tanabe’s involvement with Butler. *Id.* Deputy Tanabe expected  
5 the police would search his home and expressed concern about an item he possessed that the  
6 police would find. *Id.* Deputy Tanabe asked Howard if he could leave something at  
7 Howard’s home until things settled down. *Id.*

8 Deputy Tanabe went out to his vehicle, retrieved an item covered with a black plastic  
9 garbage bag and asked Howard to place the item in his attic. *Id.* ¶ 22. Howard felt very  
10 uncomfortable with what Deputy Tanabe was asking him to do, but to avoid a confrontation  
11 with Deputy Tanabe while he was in his highly disturbed and agitated state, Howard took  
12 the item. *Id.* Howard also needed time to process the information Deputy Tanabe provided  
13 him and to determine what course of action to take. *Id.* Howard did not look in the bag and  
14 did not know what the bag contained. *Id.*

### 15 **3. Howard Reports Deputy Tanabe’s Conduct.**

16 On February 17, 2011, Howard decided he had to report the events around Katz’s  
17 arrest the night of January 14, 2011, and Deputy Tanabe’s request to leave a black plastic  
18 garbage bag containing an unidentified item at Howard’s home. Dkt. No. 1 ¶ 23. Howard  
19 decided that he would report these incidents to Lieutenant George Wright of Marine Patrol  
20 (Howard’s commanding officer at the County Sheriff’s Office) after the holiday weekend.  
21 *Id.*

22 On February 23, 2011, Howard reported Deputy Tanabe’s conduct to Lieutenant  
23 Wright. *Id.* ¶ 24. Howard was not on duty nor in uniform when he made this report to  
24 Lieutenant Wright. *Id.* Howard spent several hours reviewing the details of Deputy  
25 Tanabe’s conduct on January 14 and February 16, 2011, with Lieutenant Wright. *Id.*  
26 Lieutenant Wright asked Howard to provide a verbal statement. *Id.* After Howard  
27 completed his statement, Lieutenant Wright instructed him to report to Assistant Sheriff  
28 Pascoe at the Field Offices Bureau in Martinez, California. *Id.* Howard was further

1 informed that he would not be working for the County Sheriff's Office that day. *Id.*

2 When Howard arrived at the Field Offices Bureau, Assistant Sheriff Pascoe turned  
3 Howard over to Sergeant Paul Beard and Sergeant Jason Vorhauer. *Id.* ¶ 25. Howard was  
4 then interviewed again regarding Deputy Tanabe's conduct. *Id.* Sergeant Vorhauer stated  
5 to Howard at the beginning of the interview that he was being treated as a civilian and not  
6 as an employee. *Id.* After the interview, Sergeant Beard and Sergeant Vorhauer followed  
7 Howard to his home to collect the unidentified item in the garbage bag and opened the  
8 package in his presence. *Id.* ¶ 26.

9 **4. Howard Experiences Retaliatory Conduct for Reporting Deputy Tanabe.**

10 On March 4, 2011, Deputy Tanabe was arrested and his house was searched based on  
11 an affidavit prepared by Sergeant Vorhauer. Dkt. No. 1 ¶ 27. On March 9, 2011, Howard  
12 was named in a news article on page one in a newspaper published by the San Francisco  
13 Chronicle regarding Deputy Tanabe and the "dirty DUI's." *Id.* ¶ 28. "Dirty DUI's" was a  
14 term used by Deputy Tanabe and Butler to describe Butler hiring co-conspirators to assist in  
15 determining if a "target" male, usually the husband of his female client, would drink alcohol  
16 in a quantity sufficient to exceed the legal limit to drive an automobile. *Id.* Once the  
17 "target" male had been observed to consume this amount of alcohol likely to exceed the  
18 legal limit to drive, Butler would tip off Deputy Tanabe. *Id.* Deputy Tanabe would arrest  
19 the "target" for driving under the influence and Butler would compensate Deputy Tanabe.  
20 *Id.* This is what occurred the night of the Katz arrest. *Id.* In the media reports, Howard  
21 was identified as the person who reported Deputy Tanabe to the County regarding the Katz  
22 arrest. *Id.* Numerous other news articles and television news broadcasts regarding the  
23 "dirty DUI's" and identifying Howard by name followed over the next several weeks. *Id.*  
24 During that period of time, Howard's peers continued to talk about Deputy Tanabe's arrest  
25 of Katz and Howard reporting Deputy Tanabe for the alleged "dirty DUI's." *Id.* ¶ 29.  
26 Howard's peers criticized him for trying to ruin the career of a respected and well-liked  
27 sheriff deputy. *Id.* Howard was told he could not talk to anyone about Deputy Tanabe and  
28 the arrest of Katz, so Howard was not able to explain to his peers the truth about what

1 actually happened. *Id.*

2 On April 13, 2011, Howard received a telephone call from Sergeant Roxane  
3 Gruenheid of Volunteer Services at the County Sheriff's Office telling him that they had  
4 received a sealed envelope from the Law Offices of James McGrail. *Id.* ¶ 30. Howard  
5 asked Sergeant Gruenheid to forward the envelope to him and told her that depending on  
6 the contents, he may need guidance with the situation. *Id.* On April 16, 2011, Howard  
7 received the envelope that Sergeant Gruenheid had forwarded. *Id.* Enclosed in the  
8 envelope was a subpoena for Howard to attend Katz's DMV hearing. *Id.* Howard emailed  
9 Sergeant Gruenheid with his concerns of having to provide a sworn statement that might  
10 adversely affect the criminal investigation surrounding Deputy Tanabe and the arrest of  
11 Katz. *Id.* Sergeant Gruenheid responded that as far as she was concerned, Howard was "on  
12 [his] own." *Id.* On April 20, 2011, Howard also received an email from Lieutenant Dan  
13 Hoffman advising Howard that he would not be receiving legal advice from anyone in  
14 Volunteer Services. *Id.* Howard felt isolated from the County Sheriff's Office. *Id.*

15 On April 30, 2011, Howard was advised by the County Sheriff's Office that he had  
16 been removed from the schedule for his shift that day. *Id.* ¶ 31. It was the first time that  
17 had ever happened in the eighteen years he had worked for the County Sheriff's Office. *Id.*

18 On May 8, 2011, Howard was scheduled to work a shift as the cover officer for  
19 Deputy Mike Berry. *Id.* ¶ 32. Deputy Berry arrived two hours late without making an  
20 attempt to notify Howard, was very hostile towards Howard, and sent Howard home two  
21 hours early. *Id.* Howard continued to feel isolated and ostracized from the County Sheriff's  
22 Office. *Id.*

23 On May 27, 2011, the Marine Patrol's work schedule was published for the week, and  
24 for the first time since Howard had begun working with the Marine Patrol, he had not been  
25 assigned a single day of work. *Id.* ¶ 33.

26 On June 22, 2011, Howard received a phone call from the office of the County  
27 Assistant Sheriff Sean Fawell advising Howard that Assistant Sheriff Fawell wanted to  
28 meet with him at 10:00 a.m. *Id.* ¶¶ 7, 34. Given the hostile treatment of the County

1 Sheriff's Office towards Howard, Howard asked what the purpose of the meeting was to  
2 determine whether he needed to have legal representation with him, and also stated that he  
3 would not attend the meeting until after he had consulted with an attorney. *Id.* Instead of a  
4 response, Lieutenant Hoffman was dispatched to Howard's home in full uniform and in a  
5 marked vehicle to escort Howard to the meeting. *Id.* When he got to Fawell's office,  
6 Howard was left standing outside the office for fifty minutes before Assistant Sheriff Fawell  
7 met with him. *Id.* Once inside the office, Assistant Sheriff Fawell advised Howard that the  
8 purpose of their meeting was to address his role in the Katz arrest. *Id.* Assistant Sheriff  
9 Fawell continued, stating, "if you were a regular, I would have fired your ass." *Id.* After  
10 several more statements similar to this, Assistant Sheriff Fawell advised Howard that he  
11 was no longer allowed to work in Marine Patrol and had been reassigned to "Civil." *Id.* It  
12 is Howard's understanding that Reserve Deputies are never assigned to the Civil division  
13 and that a reassignment to the Civil division was a demotion. *Id.* Assistant Sheriff Fawell  
14 then instructed Lieutenant Hoffman to take Howard to "Civil" before driving him home. *Id.*

15 Lieutenant Hoffman instead took Howard directly home, complaining that his work  
16 schedule had suffered because Howard had not driven himself, told Howard that people like  
17 him were not supposed to ask the Commander the purpose of a meeting, and stated, "I know  
18 Tanabe and I like him, and I don't know you at all." *Id.* ¶ 35.

19 On July 6, 2011, Howard began his assignment in the Civil division, but was not to  
20 report to work until July 12, 2011. *Id.* ¶ 36. On July 12, 2011, Howard was advised by the  
21 Lieutenant of the Civil division that Howard would not be paid per diem for his services in  
22 the Civil division as he had for his services in the Marine Patrol. *Id.* This was the first  
23 Howard was hearing of this, and at that point it became clear to him that he had received a  
24 demotion. *Id.*

25 On July 31, 2011, Howard and his wife worked the raffle at the Sheriff's Annual  
26 BBQ, which they had done for the fourteen years prior. *Id.* ¶ 37. While Howard was on the  
27 stage, just prior to the raffle beginning, Assistant Sheriff Fawell approached him and  
28 accused him of having a lack of team spirit and of having a borderline disrespectful

1 demeanor. *Id.* Assistant Sheriff Fawell then quizzed Howard about his assignment in the  
2 Civil division, and stated that he was “keeping an eye on” Howard. *Id.*

3 On August 11, 2011, Howard was advised by Volunteer Services that even though he  
4 had been transferred to the Civil division, he could still volunteer at Marine Patrol for  
5 special events when additional deputies were needed, but under no circumstances would he  
6 be permitted to receive per diem pay. *Id.* ¶ 38.

7 On August 17, 2011, Howard visited the Court Security division of the County  
8 Sheriff’s Office to talk to a Sergeant Gregory who had told Howard when he left Court  
9 Security for Marine Patrol that if he ever wanted to return, he would be welcomed back. *Id.*  
10 ¶ 39. However, when Howard walked into the Court Security office, he was approached by  
11 four or five deputies who, upon finding out who Howard was stated, “so you’re the rat dirty  
12 DUI guy.” *Id.* This prompted the other deputies to say other derogatory remarks to  
13 Howard. *Id.* Howard left because of the hostility and realized that he would not be able to  
14 return to Court Security without being harassed by other deputies. *Id.*

15 Throughout the next several months, Howard continued to endure similar types of  
16 harassment from other deputies within the County Sheriff’s Office. *Id.* ¶ 40. In the Civil  
17 division, Howard was forced to work alone and other employees kept their distance from  
18 him once they learned it was Howard who had reported Deputy Tanabe. *Id.*

19 **5. Howard Complains to the County Sheriff About Retaliatory Conduct.**

20 On April 12, 2012, at Howard’s request, Howard met with County Sheriff David  
21 Livingston. Dkt. No. 1 ¶¶ 7, 41. Howard complained about the harassment and retaliation  
22 he was experiencing because of Howard’s report about Deputy Tanabe, but Sheriff  
23 Livingston ignored Howard’s complaints. *Id.* ¶ 41. Instead, Sheriff Livingston told  
24 Howard that he should consider himself “lucky” that he had not been dismissed and  
25 suggested writing a letter of apology for being involved in the “dirty DUI’s.” *Id.* Sheriff  
26 Livingston ended the meeting by telling Howard that he was “too sensitive” and “needed to  
27 grow thicker skin.” *Id.*

28 On June 8, 2012, Sheriff Livingston called Howard to inform him that Howard had

1 been removed from the Sheriff's Annual BBQ team that Howard had been a part of for the  
2 fifteen years prior. *Id.* ¶ 42.

3 **6. Howard Is Terminated.**

4 On August 13, 2012, Howard received a phone call from Sergeant Hebert instructing  
5 him that he needed to report to Volunteer Services. Dkt. No. 1 ¶ 43. Howard asked the  
6 purpose of being called in and Sergeant Hebert replied that he did not know the reason but  
7 advised Howard he should be prepared to turn in his gear. *Id.* Howard told Sergeant Hebert  
8 that he would not attend such a meeting without his lawyer present. *Id.* Later, Captain  
9 Burton called and told Howard that the purpose of the meeting was to hand Howard a letter.  
10 *Id.* Howard and Captain Burton then scheduled a time to meet so Howard's attorney could  
11 attend the meeting as well. *Id.*

12 On August 14, 2012, Howard and his attorney went to Volunteer Services to meet  
13 with Captain Burton. *Id.* ¶ 44. Howard was handed a sealed envelope which contained a  
14 termination letter dated August 6, 2012. *Id.* Captain Burton advised Howard that there  
15 would not be a hearing regarding Howard's termination, and that the decision to terminate  
16 came from the "highest level" and was "not reversible." *Id.*

17 **B. Procedural History**

18 Howard initiated this action by filing a complaint on August 5, 2013. Dkt. No. 1.  
19 The complaint names as defendants Contra Costa County, Sheriff David Livingston,  
20 Assistant Sheriff Sean Fawell, the Town of Danville, the Sheriff of Danville, Steven  
21 Simpkins, Does 1 through 10 (California public entities), and Does 11 through 50  
22 (employees and agents of the County and the Town of Danville). *Id.*

23 The complaint alleges eight causes of action for relief: (1) for violation of the right to  
24 free speech, due process, and to be free from arbitrary action of the government and conduct  
25 from an officer that is deliberately indifferent and shocks the conscience under 42 U.S.C. §  
26 1983 against Livingston, Fawell and Does 11 through 50; (2) for violation of civil rights  
27 under 42 U.S.C. § 1983 against the County and Does 1 through 10 for failing to instruct,  
28 supervise, control and/or discipline Livingston and Fawell in the performance of their duties



1 to refrain from retaliating against Howard for having exercised his constitutionally  
2 protected rights; (3) for violation of civil rights under 42 U.S.C. § 1983 against Livingston,  
3 Fawell and Does 11 through 50 for failing to instruct, supervise, control and/or discipline  
4 employees of the County Sheriff's Office in the performance of their duties to refrain from  
5 retaliating against Howard for having exercised his constitutionally protected rights; (4) for  
6 violation of California Labor Code § 1102.5 against the County and Does 1 through 50, for  
7 retaliating against Howard for reporting the unlawful conduct of Deputy Tanabe; (5) against  
8 all defendants for negligent hiring, retention, supervision, and training of their employees  
9 and agents, including Deputy Tanabe; (6) under California Civil Code § 52.1, for violation  
10 of the right to free speech, due process, to be free from arbitrary action of the government  
11 and conduct from an officer that is deliberately indifferent and shocks the conscience, and  
12 the right to be free from retaliation under California Labor Code § 1102.5, against the  
13 County, Livingston, Fawell and Does 1 through 50; (7) against the County, Livingston, and  
14 Does 1 through 50 for negligent hiring, retention, supervision, and training of Fawell and/or  
15 Does 11 through 50; and (8) intentional infliction of emotional distress (IIED) against the  
16 County, Livingston, Fawell and Does 1 to 50. *Id.*

17 The Court has subject matter jurisdiction over Howard's 42 U.S.C. § 1983 claims  
18 under 28 U.S.C. § 1331, and has supplemental jurisdiction over the state law claims under  
19 28 U.S.C. § 1367(a). All parties have consented to the jurisdiction of a United States  
20 magistrate judge under 28 U.S.C. § 636(c). Dkt. Nos. 5, 18.

21 On October 14, 2013, defendants moved to dismiss the complaint for failure to state a  
22 claim under Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 12. Defendants contend  
23 that (1) as to the first and third causes of action, Howard fails to state a claim for retaliation  
24 in violation of the First or Fourteenth Amendments or for violation of due process in  
25 violation of the Fifth and Fourteenth Amendments; (2) as to the second cause of action,  
26 Howard fails to allege a *Monell* claim against any municipal defendant; (3) as to the fourth  
27 cause of action, Howard fails to state a claim in that he has not alleged that he has exhausted  
28 his administrative remedies and for the additional reason that he has no claim under

1 California Labor Code § 1102.5 for statements arising out of an official duty; and (4) as to  
2 the fifth through eighth causes of action, those claims are barred by California Labor Code  
3 §§ 3600, *et. seq.*, and for the additional reason that Howard has failed to state a claim under  
4 any theory.

## 5 **II. STANDARD OF REVIEW**

6 To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
7 accepted as true, to state a claim for relief that is plausible on its face. *Bell Atl. Corp. v.*  
8 *Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The  
9 plausibility standard is not akin to a probability requirement, but it asks for more than a  
10 sheer possibility that a defendant has acted unlawfully . . . . Where a complaint pleads facts  
11 that are merely consistent with a defendant’s liability, it stops short of the line between  
12 possibility and plausibility of entitlement to relief.” *Iqbal*, 556 U.S. at 678 (quoting  
13 *Twombly*, 550 U.S. at 556–57) (internal quotation marks omitted). A court is not required  
14 to accept as true conclusory allegations, unreasonable inferences, or unwarranted  
15 deductions of fact. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031  
16 (9th Cir. 2008). Additionally, a pleading that offers “labels and conclusions” or “a  
17 formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at  
18 555. Where a court dismisses for failure to state a claim under Rule 12(b)(6), it should  
19 normally grant leave to amend unless it determines that the pleading could not possibly be  
20 cured by the allegation of other facts. *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*,  
21 911 F.2d 242, 247 (9th Cir. 1990).

## 22 **III. DISCUSSION**

### 23 **A. Defendants’ Motion to Dismiss Howard’s 42 U.S.C. § 1983 Claims (First and** 24 **Third) Is Granted in Part and Denied in Part.**

#### 25 **1. The Complaint States a Claim for First Amendment Retaliation.**

26 Howard’s first claim for relief under 42 U.S.C. § 1983 states in part that defendants  
27 Livingston and Fawell violated his “right to engage in free speech guaranteed by the First  
28 Amendment to the United States Constitution” because he was harassed and retaliated

1 against for speaking on a matter of public concern as a citizen. Dkt. No. 1 ¶ 46a. Howard's  
2 third claim also seeks relief under 42 U.S.C. § 1983 against Livingston and Fawell for  
3 failing to instruct, supervise, control and/or discipline employees of the County Sheriff's  
4 Office in the performance of their duties to refrain from retaliating against Howard for  
5 having exercised his constitutionally protected rights. *Id.* ¶ 59. Howard alleges that he was  
6 retaliated against for reporting Deputy Tanabe's conduct during the arrest of Katz on  
7 January 14, 2011 and during Deputy Tanabe's February 16, 2011 visit to Howard's home.  
8 *Id.* ¶¶ 23-24. Howard also alleges that he reported to Livingston that Howard was being  
9 harassed and retaliated against for the statements made about Deputy Tanabe. *Id.* ¶ 41.  
10 Defendants move to dismiss the first and third claims on the ground that Howard was not  
11 acting as a private citizen as required to state a claim for retaliation in violation of the First  
12 Amendment. Dkt. No. 12 at 18-22.

13 "It is well settled that the state may not abuse its position as employer to stifle 'the  
14 First Amendment rights [its employees] would otherwise enjoy as citizens to comment on  
15 matters of public interest.'" *Dahlia v. Rodriguez*, 735 F.3d 1060, 1066 (9th Cir. 2013), *cert.*  
16 *denied sub nom., Burbank, Cal. v. Dahlia*, No. 13-620, 2014 WL684080, at \*1 (U.S. Feb.  
17 24, 2014) (quoting *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009)). The Ninth Circuit  
18 has developed a five-step inquiry for First Amendment retaliation cases involving public  
19 employees, which asks:

20 (1) whether the plaintiff spoke on a matter of public concern; (2) whether  
21 the plaintiff spoke as a private citizen or public employee; (3) whether the  
22 plaintiff's protected speech was a substantial or motivating factor in the  
23 adverse employment action; (4) whether the state had an adequate  
justification for treating the employee differently from other members of  
the general public; and (5) whether the state would have taken the adverse  
employment action even absent the protected speech.

24 *Id.* (quoting *Eng*, 552 F.3d at 1070). "[A]ll the factors are necessary, in the sense that  
25 failure to meet any one of them is fatal to the plaintiff's case." *Id.* at 1067 n.4.

26 Here, defendants contend that Howard cannot meet the second element because his  
27 speech was part of his official duties and therefore he was not acting as a citizen expressing  
28 himself regarding a matter of public concern. Dkt. No. 12 at 18-22. When determining

1 whether an employee’s speech was made pursuant to his or her official duties, “[t]he proper  
2 inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties  
3 an employee actually is expected to perform, and the listing of a given task in an  
4 employee’s written job description is neither necessary nor sufficient to demonstrate that  
5 conducting the task is within the scope of the employee’s professional duties for First  
6 Amendment purposes.” *Garcetti v. Ceballos*, 547 U.S. 410, 424-25 (2006) (citation  
7 omitted). Acknowledging the fact-intensive nature of the inquiry, the Ninth Circuit in  
8 *Dahlia* articulated the following guiding principles relevant to determining the scope of a  
9 public employee’s job duties: (1) whether the employee confined the communication to his  
10 chain of command, which generally would be within his duties; (2) what is the subject  
11 matter of the communication, i.e., an employee’s preparation of a routine report pursuant to  
12 normal departmental procedure is typically within his job duties, as contrasted to the  
13 employee’s communication raising broad concerns about corruption or systemic abuse,  
14 which is likely outside of his job duties; and (3) whether the employee speaks in direct  
15 contravention to his supervisor’s orders, or is threatened or harassed by his superiors for  
16 engaging in a particular type of speech, in which case the speech may often fall outside the  
17 employee’s job duties. *Dahlia*, 735 F.3d at 1074-75.

18 Applying the factors outlined in *Dahlia*, the Court concludes that the complaint here  
19 states a claim for First Amendment retaliation. Defendants argue that Howard reported his  
20 suspicions of misconduct by a fellow officer up the chain of command. This factor,  
21 however, is not dispositive. Likewise, it is not dispositive that a public employee expresses  
22 his views inside his office, or that his speech concerns the subject matter of his  
23 employment. *Dahlia*, 735 F.3d at 1069 (citing *Garcetti*, 547 U.S. at 420-21).

24 Defendants further contend that Howard’s conduct is indistinguishable from the  
25 officer’s conduct in *Dahlia*, where the Ninth Circuit concluded that “the only reasonable  
26 conclusion is that Dahlia acted pursuant to his job duties when he—as a detective  
27 investigating the Porto’s robbery and prior to receiving any threats or orders to the  
28 contrary—reported up the chain of command to the supervising lieutenant overseeing the

1 investigation about abuse related to that same investigation.” Dkt. No. 26 at 2:19-3:3  
2 (quoting *Dahlia*, 735 F.3d at 1076). The Court, however, finds that *Dahlia* is  
3 distinguishable and agrees with Howard that the complaint alleges facts that could support  
4 the conclusion that his reporting of Deputy Tanabe’s conduct was not a routine report  
5 pursuant to normal departmental procedure.

6 The facts alleged here, asserting that Deputy Tanabe visited Howard’s home in an  
7 agitated state in the evening and asked Howard to place a black plastic garbage bag in his  
8 attic so it would not be discovered if the police searched Deputy Tanabe’s home, support a  
9 reasonable inference that Howard did not act pursuant to his official duties. Dkt. No. 1 ¶¶  
10 21-22. The complaint further alleges that Deputy Tanabe was implicated in a larger  
11 investigation which involved an arrest of Butler and the County Narcotics Enforcement  
12 Team Assistant Sheriff by the State of California Department of Justice, which also  
13 supports an inference that Howard’s report raised broader concerns about corruption, not  
14 limited to Howard’s job duties related to the arrest of Katz. *Id.* The complaint alleges that  
15 Howard reported Deputy Tanabe’s conduct to Lieutenant Wright verbally and that Howard  
16 was not on duty nor in uniform when he made that report. *Id.* ¶ 24. Howard was further  
17 informed that he would not be working for the County Sheriff’s Office that day. *Id.* When  
18 Howard emailed Sergeant Gruenheid of Volunteer Services with his concerns of having to  
19 provide a sworn statement that might adversely affect the criminal investigation  
20 surrounding Deputy Tanabe and the arrest of Katz, she responded that as far as she was  
21 concerned, Howard was “on [his] own.” *Id.* ¶ 30.

22 Additionally, while the complaint alleges that Howard was instructed by his  
23 supervisor to report to the Field Offices Bureau, Howard was also told at the beginning of  
24 the interview that he was being treated as a civilian and not as an employee. *Id.* ¶¶ 24-25.  
25 Howard’s initial report was not pursuant to an order, and it was in fact, in direct  
26 contravention to the request by Deputy Tanabe to conceal the item. Moreover, Howard  
27 alleges that, in a meeting to address his role in the Katz arrest, Assistant Sheriff Fawell told  
28 Howard “if you were a regular, I would have fired your ass.” *Id.* ¶ 34. Later, at the

1 Sheriff's Annual BBQ, Assistant Sheriff Fawell approached Howard, accused him of  
2 having a lack of team spirit and of having a borderline disrespectful demeanor, and stated  
3 that he was "keeping an eye on" Howard. *Id.* ¶ 37. Based on these allegations, it could be  
4 inferred that Howard was threatened or harassed by his superiors for reporting Deputy  
5 Tanabe's conduct.

6 These alleged facts support Howard's contention that his statements were not made in  
7 his official capacity as an officer. While defendants attempt to discount some of the facts as  
8 "ambiguous," Dkt. No. 26 at 3:4-12, drawing all reasonable inferences in Howard's favor,  
9 the Court concludes that Howard has adequately alleged that his reporting of Deputy  
10 Tanabe's conduct is protected by the First Amendment.

11 Defendants argue that Howard's testimony at Deputy Tanabe's criminal trial shows  
12 that his report was made on his next duty day, and that this testimony contradicts the  
13 allegation in the complaint that Howard was not on duty when he made the report. Dkt. No.  
14 12 at 22:12-20. Howard responds that, while he may have been scheduled to work at some  
15 point on the day he made the report, he was not on duty. Dkt. No. 23 at 18 n.6. The Court  
16 declines to take judicial notice of Howard's testimony at the criminal trial because, even if  
17 it creates a disputed issue of fact as to whether Howard was on duty when he made his  
18 report, the dispute must be resolved in Howard's favor at the pleading stage.

19 Defendants also contend that Howard's report was within his official duties based on  
20 the grounds that (1) he had an affirmative duty under state law to report Deputy Tanabe's  
21 misconduct, Dkt. No. 12 at 21:12-25; and (2) Sheriff's Office policies, of which defendants  
22 request the Court to take judicial notice, required Howard to report Deputy Tanabe's  
23 misconduct, Dkt. No. 12 at 22:1-11. Defendants' arguments, however, are not conclusive in  
24 determining the scope of Howard's job duties. The Supreme Court has "rejected 'the  
25 suggestion that employers can restrict employees' rights by creating excessively broad job  
26 descriptions.'" *Dahlia*, 735 F.3d at 1069 (quoting *Garcetti*, 547 U.S. at 424). The Ninth  
27 Circuit in *Dahlia* also disagreed with the proposition that "police officers are unique under  
28 California law for the purpose of First Amendment retaliation claims . . . because California

1 police officers have a freestanding professional duty to disclose the unlawful conduct of  
2 others to their superiors as well as to outside law enforcement agencies.” *Dahlia*, 735 F.3d  
3 at 1071. Defendants’ request for judicial notice of the County Sheriff’s Office policies is,  
4 therefore, denied.<sup>1</sup>

5 In his opposition to the motion to dismiss, Howard also argues that his report to  
6 Sheriff Livingston that Howard was being harassed and retaliated against for the statements  
7 he made about Deputy Tanabe is also protected speech that can support his claim of First  
8 Amendment retaliation. Dkt. Nos. 23 at 19:1-7; 1 ¶¶ 7, 41. Defendants argue that this  
9 theory is precluded by the principle that the First Amendment does not “protect a public  
10 employee’s right to speak internally about matters of purely personal interest.” Dkt. No. 26  
11 at 4:4-16 (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983); *Gearhart v. Thorne*, 768 F.2d  
12 1072, 1073 (9th Cir. 1985)).

13 The Supreme Court has held that “[w]hether an employee’s speech addresses a matter  
14 of public concern must be determined by the content, form, and context of a given  
15 statement, as revealed by the whole record.” *Connick*, 461 U.S. at 147-48. “Unlawful  
16 conduct by a government employee or illegal activity within a government agency is a  
17 matter of public concern.” *Thomas v. City of Beaverton*, 379 F.3d 802, 809 (9th Cir. 2004)  
18 (citations omitted). Furthermore, “reporting police abuse and the attempts to suppress its  
19 disclosure—is quintessentially a matter of public concern.” *Dahlia*, 735 F.3d at 1067  
20 (citations omitted); *see also Robinson v. York*, 566 F.3d 817, 823 (9th Cir. 2009) (county  
21 employee follow-up communications, sent after he failed to receive adequate response to  
22 his earlier reports of misconduct by fellow officers, “clearly addressed at least two matters  
23 of public concern: the misconduct itself and the distinct question of whether the  
24 investigating officers were . . . sweeping misconduct under the rug.”). The fact that a public  
25 employee’s speech also involves some element of private interest does not preclude a First  
26

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27 <sup>1</sup> Defendants’ remaining requests for judicial notice are also denied as they do not bear on the  
28 Court’s determination of the issues presented by the pending motions to dismiss. Dkt. Nos. 13, 14,  
27.

1 Amendment retaliation claim. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121,  
2 1130 (9th Cir. 2008) (agreeing with the Sixth Circuit that “statements presenting ‘mixed  
3 questions of private and public concern’ properly fall within the scope of First Amendment  
4 protection.” (citation omitted)).

5 Here, Howard has alleged facts supporting an inference that his speech was not  
6 limited to an issue of “purely personal interest” as defendants argue. The two cases cited by  
7 defendants are factually distinguishable. In *Connick*, plaintiff circulated a questionnaire to  
8 her coworkers soliciting comments about office policies, morale, and level of confidence in  
9 supervisors. 461 U.S. at 148. The Court concluded that the questions, with one exception,  
10 did not relate to matters of public concern but were mere extensions of plaintiff’s dispute  
11 over her transfer to another section of the criminal court. *Id.* at 148-49. Similarly, in  
12 *Gearhart*, the Ninth Circuit found that an employee’s grievances related only to refuting  
13 false charges of his ineptitude, allegedly brought in retaliation for his actions, and were thus  
14 “matters only of personal interest,” not entitled to First Amendment protection. 768 F.2d at  
15 1073. Unlike the speech in *Connick* and *Gearhart*, Howard’s report to Sheriff Livingston  
16 implicated Howard’s statements about Deputy Tanabe’s misconduct, as well as the County  
17 Sheriff’s Office’s response to the disclosure of that misconduct. The Court is not persuaded  
18 by defendants’ contention that Howard’s speech was simply an internal personnel grievance  
19 and does not rise to the level of a matter of public concern.

20 Accordingly, defendants’ request to dismiss Howard’s claim under 42 U.S.C. § 1983  
21 for violation of the First Amendment is denied.

22 **2. The Complaint Fails to State a Claim for Violation of Due Process.**

23 Howard’s first claim for relief under 42 U.S.C. § 1983 is based on the alternative  
24 ground that defendants violated his right to due process by failing to provide him with a  
25 “name-clearing” hearing after his termination. Dkt. No. 1 ¶ 46b. Defendants contend that  
26 this claim should be dismissed because (1) a name-clearing hearing was not constitutionally  
27 necessary; and (2) Howard’s claim is barred due to his failure to request a name-clearing  
28 hearing.



1 The requirements of procedural due process apply “when a constitutionally protected  
2 liberty or property interest is at stake.” *Matthews v. Harney Cnty., Or., Sch. Dist. No. 4*,  
3 819 F.2d 889, 891 (9th Cir. 1987) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972)).  
4 “[A] liberty interest is implicated in the employment termination context if the charge  
5 impairs a reputation for honesty or morality.” *Id.* The procedural protections of due  
6 process are triggered if (1) “the accuracy of the charge is contested”; (2) “there is some  
7 public disclosure of the charge”; and (3) “the charge is made in connection with termination  
8 of employment.” *Id.* at 891-92 (citations omitted). “[A] terminated employee has a  
9 constitutionally based liberty interest in clearing his name when stigmatizing information  
10 regarding the reasons for the termination is publicly disclosed.” *Cox v. Roskelley*, 359 F.3d  
11 1105, 1110 (9th Cir. 2004) (citing *Roth*, 408 U.S. at 573). “Failure to provide a ‘name-  
12 clearing’ hearing in such a circumstance is a violation of the Fourteenth Amendment’s due  
13 process clause.” *Id.*

14 (a) ***Howard Has Failed to Allege Facts Triggering the Requirement to***  
15 ***Provide a Name-Clearing Hearing.***

16 Defendants argue that Howard has not shown he was entitled to a name-clearing  
17 hearing because he does not allege that he was terminated based on any act of dishonesty or  
18 malfeasance, nor does he allege that defendants disseminated a stigmatizing charge against  
19 him in connection with his termination. Dkt. No. 12 at 23:15-24.

20 In his opposition, Howard does not argue that defendants charged him with any  
21 misconduct or that there was a public disclosure of the charge. Instead, he argues that he  
22 was entitled to a name-clearing hearing based on the following allegations: (1) he “was  
23 linked to Deputy Tanabe’s case and the Dirty DUI’s through various pre-termination media  
24 reports,” Dkt. No. 1 ¶ 28; (2) he “was already ‘stigmatized’ by these reports throughout the  
25 community prior to his termination”; (3) “Defendants knew that terminating Plaintiff while  
26 these media reports were swirling would certainly create the impression that Plaintiff had  
27 also engaged in improper conduct resulting in his termination”; and thus (4) “[t]erminating  
28 Plaintiff while the on-going criminal cases against Deputy Tanabe and Butler were pending

1 impacted Plaintiff's 'good name, reputation, honor [and] integrity.'" Dkt. No. 23 at 20:8-  
2 17.

3 As an initial matter, the facts alleged in the complaint do not support the contention  
4 that Howard was stigmatized throughout the community by media reports and that  
5 defendants knew that terminating Howard while these media reports were swirling would  
6 create the impression that he had also engaged in improper conduct resulting in his  
7 termination. The complaint merely alleges that "[i]n the media reports, [Howard] was  
8 identified as the person who reported Deputy Tanabe to the County regarding the Katz  
9 arrest." Dkt. No. 1 ¶ 28. Howard's due process claim is thus based on impermissible  
10 speculation.

11 Moreover, even if Howard's assertions were supported by facts in the complaint, they  
12 would not be sufficient to trigger the procedural due process protections because there are  
13 no facts alleged showing that defendants charged him with misconduct and publicized the  
14 charge. Howard has failed to cite to any authority supporting his contention that a name-  
15 clearing hearing is required in such circumstances. The two California cases cited in his  
16 opposition are inapposite because, unlike this case, they involve the termination of police  
17 officers for alleged misconduct and the maintenance of stigmatizing information in their  
18 personnel files. Dkt. No. 23 at 20:18-28 (citing *Murden v. Cnty. of Sacramento*, 160 Cal.  
19 App. 3d 302, 309 (1984); *Lubey v. City and Cnty. of S.F.*, 98 Cal. App. 3d 340 (1979)).

20 "The Supreme Court has stated that a hearing for a nontenured employee based on  
21 stigmatization is required '[o]nly if the employer creates and disseminates a false and  
22 defamatory impression about the employee in connection with his termination.'" *Fleisher*  
23 *v. City of Signal Hill*, 829 F.2d 1491, 1495 (9th Cir. 1987) (quoting *Codd v. Velger*, 429  
24 U.S. 624, 628 (1977) (per curiam)); see also *Debose v. U.S. Dep't of Agric.*, 700 F.2d 1262,  
25 1266 (9th Cir. 1983) ("A liberty interest in future employment is only abridged when an  
26 employee's termination creates a stigma foreclosing freedom to take advantage of other  
27 employment opportunities . . . . There can be no such stigma when there is no public  
28 disclosure of the reasons for discharge." (citations omitted)). As stated by the Supreme

1 Court in *Roth*, due process accords an employee an opportunity to refute the employer’s  
2 charge against him where “a person’s good name, reputation, honor, or integrity is at stake  
3 *because of what the government is doing to him.*” 408 U.S. at 573 (citations omitted)  
4 (emphasis added).

5 While the parties have not cited to any binding authority addressing the precise  
6 argument made by Howard here, and the Court is not aware of any, cases outside of this  
7 Circuit have found that, in some circumstances, an “explicit public statement” accusing the  
8 discharged employee of immoral or illegal conduct may not be necessary. Those cases,  
9 however, have markedly different facts. *See Quinn v. Syracuse Model Neighborhood*  
10 *Corp.*, 613 F.2d 438, 445-47 (2d Cir. 1980) (City officials arguably publicized false and  
11 stigmatizing charges against plaintiff despite the absence of an explicit public charge where  
12 they “engineered a purposeful campaign” to thrust upon plaintiff the onus of responsibility  
13 for missing funds, and where “the existence of a criminal investigation, the press reports  
14 linking [plaintiff] with that investigation, and the role of the defendants in initiating a  
15 criminal inquiry all ma[de] it arguable that they openly charged [plaintiff] with illegal and  
16 immoral conduct.”); *McGhee v. Draper*, 564 F.2d 902, 906-10 (10th Cir. 1977) (where  
17 teacher had been made the subject of public accusations of allegedly immoral conduct and  
18 those accusations were aired at a public hearing of the school board, the board’s discharge  
19 of her “against this immediate background raised a substantial question whether the board  
20 declining to re-employ had imposed a stigma or other disability which foreclosed plaintiff’s  
21 freedom to take advantage of other employment opportunities.”); *Fraternal Order of Police*  
22 *Lodge No. 5 v. Tucker*, 868 F.2d 74, 83 (3d Cir. 1989) (“When a police department  
23 announces to the media that it has information sufficient to occasion an investigation of on-  
24 duty drug use, that in this context the officer under investigation refused urinalysis, and that  
25 the Department considered the overall situation such as to warrant dismissal, other law  
26 enforcement agencies are unlikely to consider the officer for other employment because, at  
27 least without more information than that reported, they will conclude that the officer is more  
28 likely than not guilty as charged.”). *Cf. Melton v. City of Oklahoma City*, 928 F.2d 920, 931

1 (10th Cir. 1991) (“[T]he mere reporting of the defamatory accusations of a third party will  
2 not make governmental agencies or governmental officials liable for the deprivation of a  
3 protected liberty interest. That conclusion does not hold, however, if the governmental  
4 entity overtly or impliedly adopts those defamatory accusations as the basis for punitive  
5 action against an employee.”).

6 Here, the complaint contains no allegations that defendants made any charges against  
7 Howard or investigated him for improper conduct in connection with the “dirty DUI’s.”  
8 Moreover, there is no allegation that such charges or investigation were publicized by the  
9 defendants. There is no allegation implicating defendants in creating a media campaign of  
10 innuendo as to misconduct by Howard. Neither is there any allegation of accusations  
11 against Howard made by a third party that were expressly or impliedly adopted by  
12 defendants. Howard also does not allege that the fact of his termination was publicized by  
13 defendants. The argument that Howard was stigmatized by defendants because of the mere  
14 fact of his termination and the existence of unspecified media reports “link[ing him] to  
15 Deputy Tanabe’s case and the Dirty DUI’s” is not sufficient to trigger the requirement to  
16 provide a name-clearing hearing.

17 Moreover, in the absence of any allegations that defendants charged Howard with any  
18 misconduct or that the charges were disputed, it is unclear a name-clearing hearing would  
19 serve any useful purpose. *See Codd v. Velger*, 429 U.S. 624, 627 (1977) (“[T]he remedy  
20 mandated by the Due Process Clause of the Fourteenth Amendment is ‘an opportunity to  
21 refute the charge.’ . . . ‘The purpose of such notice and hearing is to provide the person an  
22 opportunity to clear his name,’ . . . But if the hearing mandated by the Due Process Clause  
23 is to serve any useful purpose, there must be some factual dispute between an employer and  
24 a discharged employee which has some significant bearing on the employee’s reputation.”).

25 Howard’s claim relief under 42 U.S.C. § 1983 for violation of due process is  
26 dismissed with leave to amend.

27 //

1                                   **(b) Howard’s Due Process Claim Is Not Barred Due to His Failure to**  
2                                   **Request a Name-Clearing Hearing.**

3                   Defendants also argue that Howard’s due process claim must be dismissed because he  
4 did not request a name-clearing hearing prior to filing this action. Defendants argue that,  
5 while the Ninth Circuit does not have a published opinion directly on point, a majority of  
6 other circuits have determined that a plaintiff is required to request a name-clearing hearing  
7 prior to filing a deprivation of liberty interest claim. Dkt. No. 12 at 23:28-24:3; *see*  
8 *Holscher v. Olson*, No. 07-cv-3023, 2008 WL 2645484, at \*12 (E.D. Wash. June 30, 2008)  
9 (acknowledging the lack of Ninth Circuit authority on point and following other circuit  
10 authority in holding that failure to request a name-clearing hearing barred plaintiff’s liberty  
11 interest claim). Other district courts in the Ninth Circuit, however, have declined to impose  
12 such a requirement. *See, e.g., Adcock v. City of Canby*, No. 09-cv-1301, 2011 WL 609799,  
13 at \*8 (D. Or. Feb. 15, 2011) (finding that “plaintiff’s failure to request a name clearing  
14 hearing prior to this lawsuit is not dispositive on the issue of summary judgment.”); *Boggs*  
15 *v. Hoover*, No. 09-cv-116, 2009 WL 2447553, at \*8 (D. Or. Aug. 6, 2009) (holding, in light  
16 of the absence of Supreme Court or Ninth Circuit precedent, that failure to request a name-  
17 clearing hearing did not preclude plaintiff from bringing a denial of due process claim);  
18 *Tibbetts v. State Acc. Ins. Fund Corp.*, No. 06-503, 2008 WL 4144441, at \*5-7 (D. Or. Sept.  
19 4, 2008) (observing that “[n]either the Supreme Court nor the Ninth Circuit have required  
20 plaintiffs to request a name-clearing hearing prior to filing a section 1983 action for  
21 deprivation of a liberty interest,” but finding that plaintiffs’ communications disputing the  
22 basis for their termination provided adequate notice to employer of the need for a name-  
23 clearing hearing that would satisfy such a requirement).

24                   Because the Court dismisses Howard’s claim for violation of due process and it is  
25 unclear whether he will be able to allege facts that state a due process claim, the Court does  
26 not need to reach this issue. Moreover, even if the Supreme Court or Ninth Circuit were to  
27 impose a general requirement that a plaintiff must first request a name-clearing hearing  
28 before bringing a due process claim, it is unlikely that such a requirement would apply in

1 the specific circumstances here where Howard was specifically told at his termination  
2 meeting that he would not have a name-clearing hearing and that the decision came from  
3 the “highest level” and was “not reversible.” Dkt. No. 1 ¶ 44.

4 **3. The § 1983 Claim Against Defendant Fawell Is Barred by the Statute of**  
5 **Limitations.**

6 Defendants move to dismiss the § 1983 claim against Fawell as barred by the  
7 applicable statute of limitations. Dkt. No. 12 at 25:7-19; 26 at 5:15-6:2.

8 Neither defendants, nor Howard in his opposition, distinguish between the individual  
9 and official capacity in which Fawell is sued. The complaint states that each individual  
10 defendant is sued in his individual capacity as well as official capacity. Dkt. No. 1 ¶ 10.  
11 However, an “official capacity” suit against a governmental officer is equivalent to a suit  
12 against the governmental entity itself. *Larez v. City of L.A.*, 946 F.2d 630, 646 (9th Cir.  
13 1991) (citation omitted). Because the Court finds elsewhere in this order that the complaint  
14 fails to state a *Monell* claim based on an unconstitutional policy or custom, Fawell may not  
15 be held liable under § 1983 in his official capacity. Moreover, “if individuals are being  
16 sued in their official capacity as municipal officials *and* the municipal entity itself is also  
17 being sued, then the claims against the individuals are duplicative and should be dismissed.”  
18 *Vance v. Cnty. of Santa Clara*, 928 F. Supp. 993, 996 (N.D. Cal. 1996); *see also Haines v.*  
19 *Brand*, No. 11-cv-1335 EMC, 2011 WL 6014459, at \*3 (N.D. Cal. Dec. 2, 2011)  
20 (dismissing with prejudice § 1983 claims against city employees on the ground that an  
21 “official capacity” suit would “only duplicate Plaintiff’s claim against the City, as they both  
22 depend on the same theory of liability.”). Accordingly, the § 1983 claim against Fawell in  
23 his official capacity is dismissed without prejudice.

24 Additionally, as a supervisor, Fawell may be held liable in his individual capacity  
25 under § 1983 if he “was personally involved in the constitutional deprivation or a sufficient  
26 causal connection exists between the supervisor’s unlawful conduct and the constitutional  
27 violation.” *Edgerly v. City & Cnty. of S.F.*, 599 F.3d 946, 961 (9th Cir. 2010) (quoting *Lolli*  
28 *v. Cnty. of Orange*, 351 F.3d 410, 418 (9th Cir. 2003)). However, the Court agrees that the

1 § 1983 claim against Fawell in his individual capacity must also be dismissed because, as  
2 currently alleged, it is time-barred.

3 A claim accrues when the plaintiff “knows or has reason to know of the injury which  
4 is the basis of the action.” *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). Because  
5 42 U.S.C. § 1983 does not prescribe a limitations period, the Court applies California’s two-  
6 year statute of limitations for personal injury actions, set forth in California Civil Procedure  
7 Code § 335.1. *TwoRivers*, 174 F.3d at 991 (citing *Wilson v. Garcia*, 471 U.S. 261, 279-80  
8 (1985)). Here, the only retaliatory conduct alleged against Fawell occurred in June to July  
9 2011. Dkt. No. 1 ¶¶ 34, 37. Under the two-year statute of limitations, Howard’s § 1983  
10 claim against Fawell in his individual capacity expired on July 31, 2013. Because Howard  
11 initiated this action on August 5, 2013, his claim against Fawell is time-barred. Dkt. No. 1.

12 In opposition, Howard argues that he was “continually harassed and retaliated against  
13 by both his superiors and his peers within the same organization,” and, therefore, “the acts  
14 were cumulative in effect and there is no statute of limitations issue with respect to the 42  
15 U.S.C. 1983 claim filed against Defendant Fawell.” Dkt. No. 23 at 22:6-12. In support for  
16 his position, Howard cites to *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 801 (2001) and  
17 *Yanowitz v. L’Oreal USA, Inc.*, 36 Cal. 4th 1028, 1056 (2005). However, the Supreme  
18 Court has rejected the “continuing violation” theory in retaliation cases, stating that  
19 “discrete discriminatory acts are not actionable if time barred, even when they are related to  
20 acts alleged in timely filed charges.” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101,  
21 113 (2002). Although *Morgan* was a Title VII case, the Ninth Circuit has applied *Morgan*  
22 to bar § 1983 claims predicated on discrete time-barred acts, notwithstanding that those acts  
23 are related to timely-filed claims. *Carpinteria Valley Farms, Ltd. v. County of Santa*  
24 *Barbara*, 344 F.3d 822, 829 (9th Cir. 2003); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d  
25 1045, 1061 (9th Cir. 2002); *see also McCollum v. California*, 610 F. Supp. 2d 1053, 1057  
26 (N.D. Cal. 2009) *aff’d*, 647 F.3d 870 (9th Cir. 2011) (“The claims in this lawsuit allege  
27 discrete discriminatory acts by different people at different times and at different  
28 institutions and thus the continuing violation doctrine is inapplicable.”). Howard’s citations

1 to *Richards* and *Yanowitz* are inapposite because they do not follow the *Morgan* rule. *See*  
2 *Yanowitz*, 36 Cal. 4th at 1057-59 (“[F]oreclosing the application of the continuing violation  
3 doctrine in a case such as this one, where the plaintiff alleges a retaliatory course of conduct  
4 rather than a discrete act of retaliation, would undermine the fundamental purpose of the  
5 FEHA by encouraging early litigation and the adjudication of unripe claims.”).

6 Howard alleges that different employees took retaliatory actions against him. To the  
7 extent there is an actionable claim for Fawell’s conduct in June and July 2011, the cause of  
8 action for those acts accrued on the date each of them occurred. To the extent Howard  
9 intends to allege a § 1983 claim based on other acts of harassment or retaliation aside from  
10 the alleged conduct by Fawell in June and July 2011, Howard has not alleged any facts  
11 plausibly linking Fawell to those other alleged unconstitutional acts. However, because it is  
12 not clear that Howard could not amend the complaint to state a § 1983 claim against Fawell  
13 that is within the statute of limitations, the claim against him in his individual capacity is  
14 dismissed with leave to amend.

15 **B. Defendants’ Motion to Dismiss Howard’s 42 U.S.C. § 1983 Claim (Second)**  
16 **Against Contra Costa County or Danville Is Granted.**

17 Howard’s second claim for relief is for violation of civil rights under 42 U.S.C.  
18 § 1983 against the County and Does 1 through 10 for “intentionally, knowingly, recklessly,  
19 or with deliberate indifference to the rights of Plaintiff, fail[ing] to instruct, supervise,  
20 control and/or discipline, on a continuing basis, Defendants Livingston and Fawell and/or  
21 Does 11 through 50, inclusive, in the performance of their duties to refrain from retaliating  
22 against Plaintiff for having exercised his constitutionally protected rights.” Dkt. No. 1 ¶ 51.  
23 The complaint alleges that “Defendants Livingston and Fawell and/or Does 11 through 50,  
24 inclusive, were acting . . . pursuant to either official policy or the practice, custom, and  
25 usage of Defendants [County] and/or Does 1 through 10.” *Id.* ¶ 50. Defendants move to  
26 dismiss on the basis that Howard’s allegations against the Town and the County are  
27 conclusory and thus fail to state a claim under *Monell*. Dkt. No. 12 at 27:1-8.

28 //



1 It is well established that “a municipality cannot be held liable *solely* because it  
2 employs a tortfeasor-or, in other words, a municipality cannot be held liable under § 1983  
3 on a *respondeat superior* theory.” *Monell v. Dep’t of Soc. Servs. of City of New York*, 436  
4 U.S. 658, 691 (1978). For the City to be liable under § 1983, a municipal “policy or  
5 custom” must have caused the constitutional injury. *Id.* at 694. “A policy can be one of  
6 action or inaction.” *Waggy v. Spokane Cnty. Wash.*, 594 F.3d 707, 713 (9th Cir. 2010)  
7 (citations omitted). “[I]t is not enough for a § 1983 plaintiff merely to identify conduct  
8 properly attributable to the municipality,” however; “[t]he plaintiff must also demonstrate  
9 that, through its *deliberate* conduct, the municipality was the ‘moving force’ behind the  
10 injury alleged.” *Bd. of Cnty. Comm’rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 404  
11 (1997). Municipal liability under § 1983 may be established in any one of three ways: (1)  
12 “the plaintiff may prove that a city employee committed the alleged constitutional violation  
13 pursuant to a formal governmental policy or a longstanding practice or custom which  
14 constitutes the standard operating procedure of the local governmental entity”; (2) “the  
15 plaintiff may establish that the individual who committed the constitutional tort was an  
16 official with final policy-making authority and that the challenged action itself thus  
17 constituted an act of official governmental policy”; or (3) “the plaintiff may prove that an  
18 official with final policy-making authority ratified a subordinate’s unconstitutional decision  
19 or action and the basis for it.” *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992)  
20 (citations and internal quotation marks omitted).

21 “A municipality’s culpability for a deprivation of rights is at its most tenuous where a  
22 claim turns on a failure to train.” *Connick v. Thompson*, 131 S. Ct. 1350, 1359-60 (2011)  
23 (citation omitted). A *Monell* claim based on inadequate training requires that the claimant  
24 allege and prove that the failure to provide a particular kind of training showed deliberate  
25 indifference to the possibility of a constitutional violation. *City of Canton, Ohio v. Harris*,  
26 489 U.S. 378, 390 (1989). Training is inadequate for purposes of § 1983 when “in light of  
27 the duties assigned to specific officers or employees the need for more or different training  
28 is so obvious, and the inadequacy so likely to result in the violation of constitutional rights,

1 that the policymakers of the city can reasonably be said to have been deliberately indifferent  
2 to the need.” *Id.* “Thus, when city policymakers are on actual or constructive notice that a  
3 particular omission in their training program causes city employees to violate citizens’  
4 constitutional rights, the city may be deemed deliberately indifferent if the policymakers  
5 choose to retain that program.” *Connick*, 131 S. Ct. at 1359 (citation omitted).

6 Previously, the rule in the Ninth Circuit was that “a claim of municipal liability under  
7 section 1983 is sufficient to withstand a motion to dismiss ‘even if the claim is based on  
8 nothing more than a bare allegation that the individual officers’ conduct conformed to  
9 official policy, custom, or practice.’” *Karim–Panahi v. L.A. Police Dep’t*, 839 F.2d 621,  
10 624 (9th Cir.1988) (quoting *Shah v. County of L.A.*, 797 F.2d 743, 747 (9th Cir. 1986)).  
11 Following the Supreme Court’s decisions in *Twombly* and *Iqbal*, courts in this Circuit have  
12 moved away from this lax standard. *Cuviello v. City & Cnty. of S.F.*, 940 F. Supp. 2d 1071,  
13 1090 (N.D. Cal. 2013) (citing *AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 637  
14 (9th Cir. 2012)). The Ninth Circuit explained that the following two principles apply to  
15 *Monell* claims: (1) a complaint “may not simply recite the elements of a cause of action, but  
16 must contain sufficient allegations of underlying facts to give fair notice and to enable the  
17 opposing party to defend itself effectively”; and (2) “the factual allegations that are taken as  
18 true must plausibly suggest an entitlement to relief, such that it is not unfair to require the  
19 opposing party to be subjected to the expense of discovery and continued litigation.” *AE*,  
20 666 F.3d at 637 (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)).

21 In this case, Howard does not contend that the constitutional violations were  
22 committed by or ratified by an official with final policy-making authority. Instead, Howard  
23 is premising his *Monell* claim against the County based on an alleged policy or custom in  
24 “fail[ing] to instruct, supervise, control and/or discipline” employees “to refrain from  
25 retaliating against Plaintiff for having exercised his constitutionally protected rights.” Dkt.  
26 No. 1 ¶ 51. These allegations do little more than assert legal conclusions. The complaint  
27 does not identify what the training practices were, or how they were deficient. *See AE*, 666  
28 F.3d at 637; *Harris v. City of Clearlake*, No. 12-cv-0864 YGR, 2013 WL 120965, \*4-5

1 (N.D. Cal. Jan. 8, 2013). *Cf. Mateos-Sandoval v. Cnty. of Sonoma*, 942 F. Supp. 2d 890,  
2 900 (N.D. Cal. 2013) (denying motion to dismiss *Monell* claim finding that plaintiffs’  
3 allegations sufficiently “specify the content of the policies, customs, or practices the  
4 execution of which gave rise to Plaintiffs’ constitutional injuries”); *Haines v. Brand*, No.  
5 11-cv-1335 EMC, 2011 WL 6014459, at \*5 (N.D. Cal. Dec. 2, 2011) (plaintiff sufficiently  
6 identified relevant policy or custom by alleging that the City “failed or refused to  
7 adequately fund, employ, train, supervise, evaluate or discipline [Mobile Crisis Team  
8 (“MCT”)] members as to their response to persons seeking sources of physical sustenance  
9 and desiring to obtain lay counseling who, while detained by police, do thereafter assert  
10 their fundamental rights when approached and questioned by MCT members”; “[a]t no  
11 relevant time did the MCT have adequate resources and relevant training necessary to  
12 properly assess every traumatized person within the City of Berkeley”; and that plaintiff and  
13 others like him “are customarily targeted by the Telegraph team for police detentions prior  
14 to face-to-face assessment.”).

15 In his opposition, Howard argues that “the municipalities’ failures to instill its officers  
16 with the appropriate skills and training necessary to address these situations evidences a  
17 custom in which police officers are frowned upon for reporting serious matters of public  
18 concern such as corruption and abuse within their departments.” Dkt. No. 23 at 22:22-28.  
19 Such a custom, however, is not alleged in the complaint. Because Howard has failed to  
20 sufficiently allege a *Monell* claim against the County, or the Town, defendants’ motion to  
21 dismiss the second claim for relief is granted with leave to amend.

22 **C. Defendants’ Motion to Dismiss the 42 U.S.C. § 1983 Claim Against Defendant**  
23 **Simpkins Is Granted.**

24 Defendants move to dismiss Howard’s § 1983 claim against Simpkins on the basis  
25 that the complaint fails to allege any facts to infer liability against him on any theory. Dkt.  
26 Nos. 12 at 24:9-25:6; 26 at 6:3-11. The Court agrees.

27 The complaint alleges that defendant Simpkins is the sheriff and policymaker of  
28 Danville. Dkt. No. 1 ¶ 9. The complaint further alleges that defendants Livingston, Fawell,

1 and Simpkins were acting “under the color of the statutes, ordinances, regulations, policies,  
2 customs, practices and usages” of Danville, the County, and the State of California, and that  
3 “the wrongful acts hereinafter described flow from the very exercise of their authority.” *Id.*  
4 ¶ 11.

5 As an initial matter, to the extent Howard seeks to bring a § 1983 claim against  
6 Simpkins in his official capacity, that claim is dismissed without prejudice for the same  
7 reasons as stated above with respect to defendant Fawell.

8 Additionally, as a supervisor, Simpkins may be held liable in his individual capacity  
9 under § 1983 if he “was personally involved in the constitutional deprivation or a sufficient  
10 causal connection exists between the supervisor’s unlawful conduct and the constitutional  
11 violation.” *Edgerly*, 599 F.3d at 961 (quoting *Lolli v. Cnty. of Orange*, 351 F.3d 410, 418  
12 (9th Cir. 2003)). Supervisors “can be held liable for: (1) their own culpable action or  
13 inaction in the training, supervision, or control of subordinates; (2) their acquiescence in the  
14 constitutional deprivation of which a complaint is made; or (3) for conduct that showed a  
15 reckless or callous indifference to the rights of others.” *Id.* (quoting *Cunningham v. Gates*,  
16 229 F.3d 1271, 1292 (9th Cir. 2000)); *see also Larez*, 946 F.2d at 645-46 (a supervisor’s  
17 individual liability “hinges upon his participation in the deprivation of constitutional  
18 rights,” which “may involve the setting in motion of acts which cause others to inflict  
19 constitutional injury.”).

20 In his opposition, Howard argues that defendant Simpkins is liable under § 1983  
21 because he “failed to adequately supervise his officers thus denying Plaintiff of his  
22 constitutional and statutory rights, privileges, and immunities.” Dkt. No. 23 at 21:13-24.  
23 However, the complaint does not allege any facts plausibly linking Simpkins to the alleged  
24 unconstitutional conduct. The § 1983 claim against Simpkins in his individual capacity is  
25 dismissed with leave to amend.

26 **D. Defendants’ Motion to Dismiss Howard’s Claim for Retaliation in Violation of**  
27 **California Labor Code § 1102.5(b) (Fourth) Is Denied.**

28 Howard’s fourth claim is for violation of California Labor Code § 1102.5 against the

1 County for retaliating against Howard for reporting the unlawful conduct of Deputy Tanabe.  
2 Dkt. No. 1 ¶¶ 65-67. California Labor Code § 1102.5(b) prohibits retaliation by an  
3 employer against an employee for disclosing information to a government or law  
4 enforcement agency, where the employee has reasonable cause to believe that the  
5 information discloses a violation of state or federal statute, or a violation or noncompliance  
6 with a state or federal rule or regulation. Cal. Lab. Code § 1102.5(b).

7 Defendants move to dismiss this claim on two grounds: (1) that Howard has not  
8 alleged that he has exhausted his administrative remedies; and (2) that he has no claim  
9 under Labor Code § 1102.5 for statements arising out of an official duty.

10 **1. Howard Was Not Required to File a Complaint with the California Labor**  
11 **Commissioner as a Prerequisite for Commencing a Lawsuit Under**  
12 **California Labor Code § 1102.5(b).**

12 California Labor Code § 98.7(a) states:

13 Any person who believes that he or she has been discharged or otherwise  
14 discriminated against in violation of any law under the jurisdiction of the  
15 Labor Commissioner *may* file a complaint with the division within six months  
after the occurrence of the violation.

16 Cal. Labor Code § 98.7(a) (emphasis added). In addition, California Labor Code section  
17 98.7(f) provides that “[t]he rights and remedies provided by this section do not preclude an  
18 employee from pursuing any other rights and remedies under any other law.” *Id.* § 98.7(f).

19 There is a split of authority as to whether California Labor Code § 98.7 requires a  
20 plaintiff to exhaust the Labor Code’s administrative remedy or whether it merely provides  
21 an alternative remedy. The only post-*Campbell* published opinion by the California Court  
22 of Appeals on this question, *Lloyd v. Cnty. of L.A.*, 172 Cal. App. 4th 320, 331-32 (2009)  
23 held that administrative remedy exhaustion is not required and that § 98.7 “merely provides  
24 the employee with an additional remedy, which the employee may choose to pursue.”

25 While defendants rely on *MacDonald v. State*, 219 Cal. App. 4th 67 (2013), which  
26 disagreed with *Lloyd* and held that administrative exhaustion is required, that case was  
27 recently depublished. Dkt. Nos. 12 at 28:16-21; 26 at 7:16-26.

28 In support of their position, defendants also rely on the California Supreme Court’s

1 decision in *Campbell v. Regents of Univ. of Cal.*, 35 Cal. 4th 311, 317 (2005). In *Campbell*,  
2 the Court recited the general rule under California law that “where an administrative  
3 remedy is provided by statute, relief must be sought from the administrative body and this  
4 remedy exhausted before the courts will act.” *Id.* at 321. The Court held that because  
5 university policy required employees to resort initially to internal grievance practices and  
6 procedures, university employees had an administrative remedy that they were required to  
7 exhaust before suing under California Labor Code § 1102.5. *Id.* at 317, 324.

8 While *Campbell* did not address § 98.7, a number of federal district courts have  
9 extended *Campbell* to require a plaintiff to file a complaint with the Labor Commissioner  
10 under § 98.7(a) as a prerequisite to filing a lawsuit alleging a violation under Labor Code  
11 § 1102.5. See *Melgar v. CSK Auto, Inc.*, No. 13-cv-3769 EMC, 2014 WL 546915, \*2 (N.D.  
12 Cal. Feb. 7, 2014) (“The majority of federal district courts to address this question have  
13 held that a plaintiff must file a complaint with the Labor Commissioner under section  
14 98.7(a) before filing a lawsuit alleging a violation under Labor Code sections 98.6 or  
15 1102.5.”). For example, both *Miller v. Sw. Airlines, Co.*, 923 F. Supp. 2d 1206, 1210 (N.D.  
16 Cal. 2013), and *Ferretti v. Pfizer Inc.*, 855 F. Supp. 2d 1017, 1023 (N.D. Cal. 2013),  
17 interpreted *Campbell* as holding that § 98.7(a) provides an administrative remedy that a  
18 plaintiff must exhaust before filing a § 1102.5 claim. In *Reynolds v. City and Cnty. of S.F.*,  
19 No. 09-cv-0301 RS, 2011 WL 4808423, at \*1 (N.D. Cal. Oct. 11, 2011), the Court found  
20 that, while the issue in *Campbell* was only whether a plaintiff had to exhaust internal  
21 administrative remedies, its reasoning applied to the exhaustion requirements of the Labor  
22 Code as well.

23 However, a number of other courts have reached the opposite conclusion, finding that  
24 *Campbell* did not resolve the application of § 98.7 and finding persuasive that the language  
25 of § 98.7 is permissive and does not itself require exhaustion. *Melgar*, 2014 WL 546915, at  
26 \*2; *Dowell v. Contra Costa Cnty.*, 928 F. Supp. 2d 1137, 1153 (N.D. Cal. 2013); *Turner v.*  
27 *City and Cnty. of S.F.*, 892 F. Supp. 2d 1188, 1200 (N.D. Cal. 2012) (reconsideration  
28 denied). This Court finds this interpretation persuasive.

1 In addition, the California legislature recently implemented Labor Code § 244, which  
2 states that administrative exhaustion is not required unless the specific section expressly  
3 mandates it. Cal. Labor Code § 244(a) (effective January 1, 2014). The Court in *Melgar*  
4 held that § 244(a) “expressly rejects a general mandatory exhaustion requirement in Labor  
5 Code cases.” *Melgar*, 2014 WL 546915, at \*2. The Court further noted that “[t]he  
6 legislative history of section 244 suggests the legislature did not intend to amend the current  
7 state of the law, but rather sought to ‘clarify[] that an employee or job applicant is not  
8 required to exhaust administrative remedies or procedures in order to bring a civil action  
9 under any provision of the Labor Code.’” *Id.* at \*4 (quoting *Gonzalez v. City of*  
10 *McFarland*, No. 13-cv-00086, 2014 WL 294581, at \*2 (E.D. Cal. Jan. 24, 2014)). The  
11 Court concluded that “because section 244 does not create new rights . . . or impose new  
12 liabilities . . . , the Court finds that it applies to this case and confirms this Court’s prior  
13 reasoning in *Turner*.” *Id.* (citing *Gonzalez*, 2014 WL 294581, at \*2).

14 This Court joins *Melgar*, *Dowell*, and *Turner*, in holding that Howard was not  
15 required to file a complaint with the Labor Commissioner under § 98.7(a) as a prerequisite  
16 to filing a claim under Labor Code § 1102.5.

17 **2. Defendants’ Argument that Howard’s Reporting Was Within His Job**  
18 **Duties Does Not Preclude His Claim Under § 1102.5(b).**

19 Defendants also argue that Howard’s § 1102.5 claim should be dismissed because his  
20 alleged whistleblowing activity was within his general job duties, and therefore, is not  
21 actionable under California Labor Code § 1102.5. Dkt. No. 12 at 29:6-27.

22 In support of this argument, defendants contend that a California Court of Appeal has  
23 held that an employee cannot sustain a claim under § 1102.5 when notifying the employer  
24 about suspected actions is consistent with the employee’s job duties, citing *Edgerly v. City*  
25 *of Oakland*, 211 Cal. App. 4th 1191, 1207 (2012). The *Edgerly* court found that  
26 reimbursement requests did not violate state law and that plaintiff’s refusal to pay  
27 reimbursement requests that the plaintiff believed were inappropriate was consistent with, if  
28 not required by, her job duties as a city administrator and therefore not a protected activity

1 under California Labor Code § 1102.5(c) (prohibiting employers from retaliating against an  
2 employee “for refusing to participate in an activity that would result in a violation of state  
3 or federal statute, or a violation or noncompliance with a state or federal rule or  
4 regulation”). *Id.* at 1207.

5 The *Edgerly* opinion does not support defendants’ position that Howard’s reporting of  
6 Deputy Tanabe’s misconduct is not actionable as a whistleblowing activity under  
7 § 1102.5(b) because it is “consistent” with Howard’s “general job duties.” *See also Colores*  
8 *v. Bd. of Trustees*, 105 Cal. App. 4th 1293, 1311-12 (2003) (holding that the fact that the  
9 plaintiff “was simply doing her job when she uncovered the unauthorized use of state assets  
10 . . . associated with facilities operations” did not defeat her right to whistleblower status  
11 under § 1102.5(b)); *Jaramillo v. Cnty. of Orange*, 200 Cal. App. 4th 811, 825-26 (2011)  
12 (holding that assistant sheriff’s report to county sheriff of wrongdoing by the sheriff  
13 himself, who subsequently summarily dismissed assistant sheriff, was protected by the state  
14 whistleblower statute).<sup>2</sup>

15 Moreover, at the pleading stage, the Court cannot conclude as a matter of law that  
16 “when Plaintiff reported the Tanabe incidents to Lt. Wright, he was simply performing his  
17 job duties.” Dkt. No. 12 at 29:19-27. Defendants’ request to dismiss Howard’s § 1102.5  
18 claim is also denied on this basis.

19 **E. Defendants’ Motion to Dismiss Howard’s Claims for Negligent Hiring (Fifth and**  
20 **Seventh) and IIED (Eighth) Is Granted.**

21 **1. Howard’s Fifth, Seventh, and Eighth Causes of Action Are Barred by the**  
22 **Workers’ Compensation’s Exclusivity Rule.**

23 Howard’s fifth and seventh claims for relief are for negligent hiring, retention,  
24 supervision, and training of Deputy Tanabe and Fawell. In connection with his fifth claim,  
25 Howard alleges that defendants knew or should have known that Deputy Tanabe would  
26

27 <sup>2</sup> The Court notes that California Labor Code § 1102.5(b) was amended recently, specifying that  
28 retaliation is prohibited “regardless of whether disclosing the information is part of the employee’s  
job duties.” Cal. Lab. Code § 1102.5(b) (effective January 1, 2014).



1 abuse his position and authority. Dkt. No. 1 ¶ 75. Howard further alleges that as a result of  
2 defendants failing to insure that Deputy Tanabe was fit for duty, Howard was injured from  
3 being placed in a position of witnessing Deputy Tanabe commit a crime. *Id.* ¶¶ 76-77, 81.  
4 In connection with the seventh claim, the complaint alleges that the County and Sheriff  
5 Livingston “negligently, carelessly, recklessly, and/or with a reckless disregard” employed  
6 and supervised defendant Fawell and “assigned [him] to duties which enabled [him] to  
7 harass and retaliate against persons who report crimes of other law enforcement officers,  
8 proximately causing severe injuries to Plaintiff.” *Id.* ¶ 91. Howard also alleges a claim for  
9 intentional infliction of emotional distress against the County, Livingston, and Fawell,  
10 asserting that the conduct described in the complaint was outrageous, and done with the  
11 intent of causing, or with reckless disregard to the probability of causing, severe emotional  
12 distress, and did actually cause Howard to suffer humiliation, mental anguish, and  
13 emotional and physical distress. *Id.* ¶ 97.

14 Defendants move to dismiss the negligent hiring and IIED claims on the basis that  
15 workers’ compensation is the exclusive remedy for injuries arising out of and in the course  
16 of the employment relationship. Dkt. No. 12 at 30:1-31:5; citing Cal. Lab. Code §§ 3600,  
17 3602; *Jones v. Dep’t of Corr. and Rehab.*, 152 Cal. App. 4th 1367, 1384 (2007). “When the  
18 misconduct attributed to the employer is actions which are a normal part of the employment  
19 relationship, such as demotions, promotions, criticism of work practices, and frictions in  
20 negotiations as to grievances, an employee suffering emotional distress causing disability  
21 may not avoid the exclusive remedy provisions of the Labor Code by characterizing the  
22 employer’s decisions as manifestly unfair, outrageous, harassment, or intended to cause  
23 emotional disturbance resulting in disability.” *Cole v. Air Oaks Fire Prot. Dist.*, 43 Cal. 3d  
24 148, 160 (1987); *see Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*, 14 Cal. App. 4th  
25 1595, 1605-06 (1993) (claim against employer for negligent supervision in connection with  
26 alleged sexual harassment and wrongful termination of employee is barred by workers’  
27 compensation exclusivity principle); *but see Greenfield v. Am. W. Airlines, Inc.*, No. 03-cv-  
28 05183 MHP, 2004 WL 2600135, at \*7-8 (N.D. Cal. Nov. 16, 2004) (describing *Coit* as an

1 anomaly and holding that plaintiff’s claim of negligent supervision related to the same set  
2 of facts alleged in sexual harassment claim was outside the normal scope of employment  
3 and thus not within the exclusivity of the workers’ compensation system); *Jefferson v.*  
4 *Kellogg Sales Co.*, No. 08-cv-04132 SI, 2008 WL 4862511, at \*3 (N.D. Cal. Nov. 11, 2008)  
5 (negligent supervision claim was based on racially discriminatory acts by employer that  
6 were contrary to public policy and thus fell outside the exclusivity provisions of the  
7 Workers’ Compensation Act).

8 The California Supreme Court has described “a tripartite system for classifying  
9 injuries arising in the course of employment.” *Fermino v. Fedco, Inc.*, 7 Cal. 4th 701, 713-  
10 715 (1994): (1) “injuries caused by employer negligence or without employer fault that are  
11 compensated at the normal rate under the workers’ compensation system”; (2) “injuries  
12 caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an  
13 employee, for which the employee may be entitled to extra compensation under section  
14 4553”; and (3) “there are certain types of intentional employer conduct which bring the  
15 employer beyond the boundaries of the compensation bargain, for which a civil action may  
16 be brought.” *Id.*

17 A number of cases have found exceptions to this general rule of preemption. *Grotz v.*  
18 *Kaiser Found. Hospitals*, No. 12-cv-3539 EMC, 2012 WL 5350254, at \*10 (N.D. Cal. Oct.  
19 29, 2012); *see, e.g., Maynard v. City of San Jose*, 37 F.3d 1396, 1405-06 (9th Cir. 1994)  
20 (holding that state law claims for intentional and negligent infliction of emotional distress  
21 based on alleged retaliation for plaintiff’s assistance of a black person and for his reporting  
22 of perceived irregularities in the purchase of communications equipment arose out of  
23 conduct that implicates fundamental public policies, and were thus not preempted by the  
24 Workers’ Compensation Act).

25 The California Supreme Court has recognized that there are exceptions to the  
26 preemption rule for “conduct that ‘contravenes fundamental public policy’ . . . [and] conduct  
27 that ‘exceeds the risks inherent in the employment relationship.’” *Miklosy v. Regents of*  
28 *Univ. of Cal.*, 44 Cal. 4th 876, 902 (2008) (citing *Livitsanos v. Superior Court*, 2 Cal. 4th

1 744, 754 (1992)). In *Miklosy*, however, the Court clarified that the “exception for conduct  
2 that ‘contravenes fundamental public policy’ is aimed at permitting a *Tameny* action to  
3 proceed despite the workers’ compensation exclusive remedy rule. *Id.* at 902-03. With  
4 respect to the second exception, the Court rejected the argument that whistleblower  
5 retaliation is not a risk inherent in the employment relationship, citing *Shoemaker v. Myers*,  
6 52 Cal. 3d 1, 9 (1990). *Miklosy*, 44 Cal. 4th at 903. The Court held that the alleged  
7 wrongful conduct “occurred at the worksite, in the normal course of the employer-employee  
8 relationship” and that workers’ compensation was thus the exclusive remedy for a claim  
9 despite incorporating allegations of whistleblower retaliation. *Id.* at 902; *see also Ferretti v.*  
10 *Pfizer Inc.*, No. 11-cv-04486, 2012 WL 3638541, \*11-12 (N.D. Cal. Aug. 22, 2012)  
11 (plaintiff’s IIED claim that she suffered severe emotional distress after she was “subjected  
12 to harassment, retaliation, threats, and termination for reporting what she in good faith  
13 believed to be unlawful and unethical conduct by Defendant” did not qualify under either  
14 exception to the preemption rule).

15 Here, Howard argues that the harassment and retaliation defendants allegedly directed  
16 at him exceed the normal risk of the employment relationship. Dkt. No. 23 at 28:22-25.  
17 Howard further asserts that he “was a whistleblower and reported a serious matter of public  
18 concern only to be harassed, retaliated against, and mocked for standing-up for the rights  
19 and the best interests of the public.” *Id.* In support of his position, Howard cites to  
20 *Cabesuela v. Browning–Ferris Indus. of Cal., Inc.*, 68 Cal. App. 4th 101 (1998). Dkt. No.  
21 23 at 28:15-21. In *Cabesuela*, the court found that a plaintiff’s IIED claim, for being  
22 terminated for raising health and safety concerns related to working hours, was “premised  
23 upon his employer’s violation of a fundamental public policy” and was thus not preempted  
24 by the Workers’ Compensation Act. *Id.* at 112. However, as explained by the Court in  
25 *Ferretti*, plaintiff’s reliance on *Cabesuela* is misplaced as it was effectively overruled by the  
26 California Supreme Court in *Miklosy*, which held that an IIED claim is preempted even  
27 where it is based on conduct that violates a fundamental public policy. *Ferretti*, 2012 WL  
28 3638541, at \*11-12. Howard has not provided any authority supporting the proposition that

1 the defendants' alleged negligent acts of hiring, which placed Howard in a position to  
2 witness a crime and be harassed and retaliated against for reporting the crime, exceed the  
3 risk inherent in the employment relationship. Accordingly, the fifth and seventh claims for  
4 negligent hiring and the eighth claim for IIED are dismissed with leave to amend.

5 **2. Howard's Claim for Negligent Hiring of Deputy Tanabe (Fifth) Is Not**  
6 **Barred by the Fireman's Rule.**

7 Defendants argue that the fifth claim for negligent hiring, supervision, and retention  
8 of Deputy Tanabe should also be dismissed because it is barred by the "Fireman's Rule."  
9 Dkt. Nos. 12 at 32:1-13; 26 at 9:11-18. This argument is not persuasive.

10 Under the California common law doctrine known as the "Fireman's Rule," "[o]ne  
11 who negligently causes the event to which a police officer responds owes no duty of care  
12 with respect to the initial negligent act." *Calatayud v. State of California*, 18 Cal. 4th 1057,  
13 1059 (1998) (citing *Walters v. Sloan*, 20 Cal. 3d 199, 202 (1977)). "The undergirding legal  
14 principle of the rule is assumption of the risk, i.e., the legal conclusion that the person who  
15 starts a fire owes no duty of care to the firefighter who is called to respond to the fire." *Id.*  
16 at 1061 (internal quotation marks and citations omitted). The rule is also grounded in  
17 considerations of public policy in that "it is the fireman's business to deal with that very  
18 hazard [the fire] and hence, perhaps by analogy to the contractor engaged as an expert to  
19 remedy dangerous situations, he cannot complain of negligence in the creation of the very  
20 occasion for his engagement." *Id.* at 1061-62 (internal quotation marks and citations  
21 omitted).

22 Here, the Court cannot conclude that defendants' alleged negligence of hiring,  
23 retention, and supervision resulting in Deputy Tanabe's criminal conduct was the very  
24 hazard to which Howard was engaged and paid to respond. Defendants have not cited to  
25 any case in which a firefighter or police officer was found to have assumed the risk of  
26 corrupt or criminal behavior by fellow firefighters or officers. The Court declines to hold  
27 that the "Fireman's Rule" bars Howard's claim for negligent hiring of Deputy Tanabe.

28 //

1           **3. Howard Has Sufficiently Alleged Outrageous Conduct as Required to**  
2           **State a Claim for IIED (Eighth).**

3           Defendants also contend that the IIED claim should be dismissed because Howard has  
4 not alleged conduct on the part of defendants that could conceivably be construed as  
5 extreme and outrageous, and that the allegations that defendants were rude and unfriendly  
6 to him are not sufficient. Dkt. Nos. 12 at 31 at 6-26; 26 at 10:24-11:6.

7           “Ordinarily mere insulting language, without more, does not constitute outrageous  
8 conduct.” However, behavior may be considered outrageous if “a defendant (1) abuses a  
9 relation or position which gives him power to damage the plaintiff’s interest; (2) knows the  
10 plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or  
11 unreasonably with the recognition that the acts are likely to result in illness through mental  
12 distress.” *Cole*, 43 Cal. 3d at 155.

13           In his opposition, Howard responds that he endured more than mere insults or rude  
14 behavior. Dkt. No. 23 at 29:14-20. Howard alleges that he was intentionally ostracized and  
15 criticized, and systematically subjected to hostile behavior from his fellow deputies for  
16 telling the truth about Deputy Tanabe. *See* Dkt. No. 1 ¶ 29 (criticized by his peers for  
17 trying to ruin the career of a respected and well-liked sheriff deputy, and not being allowed  
18 to talk about the events to explain the truth); *id.* ¶ 32 (treated with hostility by deputy); *id.* ¶  
19 34 (not told the purpose of meeting with the Assistant Sheriff and instead was escorted from  
20 his home to the meeting by a lieutenant in full uniform and in a marked vehicle, left  
21 standing outside the office for fifty minutes, told by the Assistant Sheriff “if you were a  
22 regular, I would have fired your ass” and several more statements similar to this); *id.* ¶ 35  
23 (treated with hostility by lieutenant); *id.* ¶ 37 (approached by the Assistant Sheriff at the  
24 Sheriff’s Annual BBQ who accused him of having a lack of team spirit and of having a  
25 borderline disrespectful demeanor, and was told the Assistant Sheriff was “keeping an eye  
26 on” him); *id.* ¶ 39 (treated with hostility and derogatory comments from deputies at the  
27 Court Security division of the County Sheriff’s Office); *id.* ¶ 40 (similar types of  
28 harassment from other deputies within the County Sheriff’s Office throughout the next

1 several months); *id.* ¶ 41 (when complaining about the harassment and retaliation being told  
2 by the Sheriff he should consider himself “lucky” that he had not been dismissed, that he  
3 was “too sensitive” and “needed to grow thicker skin”).

4 Drawing the reasonable inferences in favor of Howard, the complaint alleges a  
5 sufficient factual basis to infer that defendants abused their position of authority over him  
6 and that their conduct was sufficiently outrageous to support an IIED claim. *See Faurie v.*  
7 *Berkeley Unified Sch. Dist.*, No. 08-cv-0060 TEH, 2008 WL 820682, at \*11 (N.D. Cal.  
8 Mar. 26, 2008) (plaintiff stated a claim for IIED despite the fact that some of the acts  
9 complained of were part of personnel management activity, plaintiff also alleged an  
10 ongoing course of humiliation and harassment, and that the conduct was an abuse of a  
11 relationship in which the defendants had authority over him); *Vierria v. Cal. Highway*  
12 *Patrol*, 644 F. Supp. 2d 1219, 1247 (E.D. Cal. 2009) (plaintiff sufficiently alleged extreme  
13 and outrageous conduct by alleging that defendants abused their position by conspiring to  
14 use their authority and control of the workers’ compensation system to intimidate,  
15 embarrass and humiliate plaintiff by “bringing false or exaggerated disciplinary charges  
16 against [her for] not cooperat[ing] in the fraud”; taking advantage of her mental distress  
17 caused by her PTSD, by subjecting her to another “sham investigation” after four  
18 physicians agreed that Vierria's physical and emotional symptoms were caused by work-  
19 related stressors and approved three months leave).

20 Accordingly, defendants’ motion to dismiss the IIED claim on the basis that it does  
21 not allege conduct that is sufficiently outrageous is denied.

22 **F. Defendants’ Motion to Dismiss Howard’s Bane Act Claim (Sixth) Is Granted.**

23 Howard’s sixth cause of action is under California Civil Code § 52.1, for violation of  
24 his right to free speech, due process, to be free from arbitrary action of the government and  
25 conduct from an officer that is deliberately indifferent and shocks the conscience, and the  
26 right to be free from retaliation under California Labor Code § 1102.5. Dkt. No. 1 ¶ 85.  
27 California Civil Code § 52. 1, known popularly as the Bane Act, creates a cause of action  
28 for “any individual whose exercise or enjoyment of rights secured by the Constitution or

1 laws of the United States, or . . . of this state, has been interfered with, or attempted to be  
2 interfered with” by any other person through “threats, intimidation, or coercion.” Cal. Civ.  
3 Code § 52.1(a)-(b).

4 Defendants move to dismiss the Bane Act claim on two grounds. First, they claim  
5 that because Howard’s rights under the First Amendment were not violated, he has no claim  
6 under § 52.1. Dkt. No. 12 at 32:17-23. However, because the Court denies defendants’  
7 motion to dismiss Howard’s § 1983 claim based on alleged violation of the First  
8 Amendment, defendants’ motion to dismiss his § 52.1 claim on this ground is likewise  
9 denied.

10 Additionally, defendants argue that the § 52.1 claim should be dismissed because  
11 Howard has not alleged that he was subjected to threats of violence against him. Dkt. Nos.  
12 12 at 32:24-33:7; 26 at 11:8-19. Section 52.1 requires “an attempted or completed act of  
13 interference with a legal right, accompanied by a form of coercion.” *Richardson v. City of*  
14 *Antioch*, 722 F. Supp. 2d 1133, 1147 (N.D. Cal. 2010) (citing *Jones v. Kmart Corp.*, 17 Cal.  
15 4th 329, 334 (1998)). “The test is whether a reasonable person, standing in the shoes of the  
16 plaintiff, would have been intimidated by the actions of the defendants and have perceived a  
17 threat of violence.” *Id.* (citations omitted). “A ‘threat’ under this section means ‘an  
18 expression of an intent to inflict evil, injury, or damage to another.’” *Cuviello v. Expo*, No.  
19 11-cv-2456, 2013 WL 3931650, \*21 (E.D. Cal. 2013) (citation omitted); *In re M.S.*, 10 Cal.  
20 4th 698, 710 (1995).

21 In his opposition, Howard does not dispute that to state an action under the Bane Act  
22 based on speech alone, he must show that the speech threatened violence against him and he  
23 reasonably feared that violence will be directed against him. Dkt. No. 23 at 30:17-31:1;  
24 Cal. Civ. Code § 52.1(j). Instead, he argues that by the nature of his job for a police agency,  
25 “working with dangerous weapons and apprehending violent criminals,” he reasonably  
26 feared and experienced isolation and resentment from his co-workers that could have  
27 seriously jeopardized his safety. Dkt. No. 23 at 31:2-6. However, Howard does not cite to  
28 any case supporting this theory of liability. Even viewing the complaint in the light most

1 favorable to Howard, defendants' alleged speech does not express an intent to subject him  
2 to violence. Therefore, the Bane Act claim is dismissed with leave to amend.

#### 3 **IV. CONCLUSION**

4 The Court grants in part and denies in part defendants' motion to dismiss the  
5 complaint as follows:

- 6 1. Defendants' motion to dismiss Howard's 42 U.S.C. § 1983 claims (first and  
7 third) is granted in part and denied in part.
  - 8 a. The request to dismiss Howard's claim under 42 U.S.C. § 1983 for  
9 violation of the First Amendment is denied.
  - 10 b. Howard's claim under 42 U.S.C. § 1983 for violation of due process is  
11 dismissed with leave to amend.
  - 12 c. Howard's claim under 42 U.S.C. § 1983 against defendant Fawell in his  
13 official capacity is dismissed without prejudice.
  - 14 d. Howard's claim under 42 U.S.C. § 1983 against defendant Fawell in his  
15 individual capacity is dismissed with leave to amend.
- 16 2. Defendants' motion to dismiss Howard's 42 U.S.C. § 1983 claim (second) is  
17 granted and the claim is dismissed with leave to amend.
- 18 3. Defendants' motion to dismiss Howard's 42 U.S.C. § 1983 claim against  
19 defendant Simpkins is granted.
  - 20 a. Howard's claim under 42 U.S.C. § 1983 against defendant Simpkins in  
21 his official capacity is dismissed without prejudice.
  - 22 b. Howard's claim under 42 U.S.C. § 1983 against defendant Simpkins in  
23 his individual capacity is dismissed with leave to amend.
- 24 4. Defendants' motion to dismiss Howard's claim for retaliation in violation of  
25 California Labor Code § 1102.5(b) (fourth) is denied.
- 26 5. Defendants' motion to dismiss Howard's claims for negligent hiring (fifth and  
27 seventh) and IIED (eighth) is granted and the claims are dismissed with leave  
28 to amend.

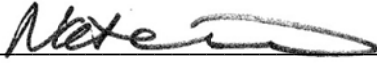


1           6.       Defendants' motion to dismiss Howard's Bane Act Claim (sixth) is granted  
2                   and the claim is dismissed with leave to amend.

3           Howard has until March 26, 2014, to file an amended complaint in accordance with  
4 this order.

5           IT IS SO ORDERED.

6           Date: February 28, 2014

  
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Nathanael M. Cousins  
United States Magistrate Judge