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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 JACOB MALAE,

8 Plaintiff,

9 v.

10 CITY OF SANTA CLARA, *et al.*,

11 Defendants.

Case No. [21-cv-01453-SI](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS AND
GRANTING PLAINTIFF LEAVE TO
AMEND**

Re: Dkt. No. 23

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13 Defendants have moved to dismiss the first amended complaint. The Court previously
14 determined that the motion was appropriate for determination without oral argument, in accordance
15 with Local Rule 7-1(b). For the reasons set forth below, the motion is GRANTED IN PART and
16 DENIED IN PART. The Court grants plaintiff leave to amend. The amended complaint shall be
17 filed no later than **August 17, 2021**.

18
19 **BACKGROUND**

20 Plaintiff Jacob Malae has worked for the Santa Clara Police Department (“SCPD”) for over
21 22 years, and he has been a Sergeant for over ten years. First Amended Compl. ¶¶ 7-8. Malae is
22 Samoan, and he alleges that defendants have discriminated against him on the basis of his race and
23 national origin by denying him promotions to command staff positions at SCPD and denying him
24 overtime pay to which he was entitled. Malae also claims that defendants retaliated against him
25 based on his speech after he spoke out about systemic racism and possible corruption within the
26 SCPD. Defendants are the City of Santa Clara, SCPD Chief of Police Patrick Nikolai, and Captain
27 Todd Cummins, Malae’s supervisor.

28 Malae claims that the promotional process for top management positions at SCPD is

1 discriminatory and “rigged” in favor of Caucasians, and he alleges that one way the inequitable
2 system is maintained is through manipulation of the examination process and promotional lists for
3 management positions. Malae alleges that although he scored the second highest on an October
4 2019 Police Lieutenant’s promotional exam and was next in line to be promoted, in January 2020
5 Chief Nikolai told him that he was being passed over for promotion because one SCPD employee
6 had reported that she had had an interaction with Malae that made her feel “threatened and unsafe”
7 and another SCPD employee had reported that on one occasion he/she found Malae’s “presence”
8 “intimidating,” although Malae “had said nothing and did not do anything.” *Id.* ¶¶ 20-25. “Until
9 that meeting with Nikolai, neither purported incident was discussed with Plaintiff, had not been
10 reflected in any performance evaluation of Plaintiff (which had been highly favorable), and had not
11 been documented and placed in Plaintiff’s personnel file.” *Id.* ¶ 25. SCPD and City policy is for
12 allegations of misconduct to be investigated, and when plaintiff asked Nikolai why investigations
13 were not conducted regarding either complaint, “Nikolai had no answers.” *Id.* ¶ 23.

14 In early June 2020, Malae met with Chief Nikolai in his office and discussed systemic racism
15 at SCPD, including against Pacific Islanders and Samoans, and he asked about any steps Chief
16 Nikolai would take to address racism within the department. *Id.* ¶ 27. In that conversation Malae
17 also raised the recent federal criminal indictment of a former SCPD captain, Brian Gilbert, and
18 Malae expressed his concern about the “racism connected to those charges”¹ and his concerns about
19 how the department had covered up improper behavior by Gilbert and other Caucasian officers while
20 they were employed at SCPD. *Id.* ¶ 27. Chief Nikolai responded by stating “plaintiff was the only
21 ‘unhappy’ employee at the agency.” *Id.* at ¶ 27. Chief Nikolai then “shifted in his seat and gave no
22 response” when plaintiff asked whether “SCPD would be willing to work with community
23 organizations, such as the NAACP, to promote change within the department.” *Id.*

24
25 ¹After working at SCPD, Gilbert worked at eBay as a security employee. *Id.* ¶ 28. Gilbert
26 was criminally indicted for “engaging in a scheme to harass publishers of a newsletter critical of
27 eBay.” *Id.* Among other allegations, plaintiff alleges on information and belief that Gilbert and his
28 co-conspirators created a Samoan-sounding Twitter name to make online threats to the newsletter
publishers, Gilbert sent a text proposing creating a Samoan person of interest in Santa Clara to take
the blame for the scheme, and Gilbert also allegedly offered “SCPD assets to assist the conspirators
in the eBay case.” *Id.* ¶¶ 28-31.

1 Around June 18, 2020, plaintiff discussed the indictment of Gilbert during a Telephonic
2 Conference with the Peace Officers Association (“POA”) and its President (Alex Torke). *Id.* ¶ 28.
3 Plaintiff believed Gilbert wanted to create an “aura of menace” with his Samoan references and that
4 this mindset was “evidence of racism that currently infected SCPD.” *Id.* ¶ 31. Malae told the POA
5 group that “he was aware of conduct by Gilbert and others like him that was covered up in the past
6 and which allowed them to promote at the SCPD and to protect their careers,” urged the POA to
7 make a statement “encouraging members to read the FBI Affidavit concerning Gilbert and to
8 denounce Gilbert’s behavior,” and informed the POA that “SCPD issued no public statement about
9 the George Floyd incident (May 25, ’20), should have condemned what occurred, and should have
10 made a statement about no tolerance for racism.” *Id.* at ¶¶ 31-32. Malae also expressed his view
11 that the SCPD should make a statement denouncing racism, “especially since news outlets were
12 running the eBay story with pictures of Brian Gilbert in a SCPD uniform.” *Id.* ¶ 32. POA president
13 Torke responded that “he was satisfied with the department’s response.” *Id.* On June 22, 2020,
14 Chief Nikolai stated in a patrol meeting “he had been informed by Torke of Plaintiff’s
15 comments/criticisms voiced at the POA meeting days before.” *Id.*

16 On June 19, 2020, plaintiff told Chief Nikolai in the SCPD locker room that Gilbert’s photo
17 should be “removed from the [department’s] ‘Legacy Wall’ in light of the criminal allegations
18 against Gilbert and the racism against Pacific Islanders [] evident from the [] Samoan-sounding
19 Twitter accounts.” *Id.* ¶ 33. Chief Nikolai stated he would not take down Gilbert’s picture until
20 “there’s a conviction.” *Id.* However, after Malae contacted Assistant Chief Rush and told him how
21 seeing Gilbert’s photo affected him as a Samoan, Rush told Malae that Gilbert’s photo would be
22 taken down, and the photo was removed. *Id.* ¶ 34.

23 On June 29, 2020, the Lieutenant Promotional List including plaintiff as a candidate was
24 terminated. *Id.* ¶ 35. The termination occurred 11 days after plaintiff spoke at the POA and 10 days
25 after he spoke to Chief Nikolai. *Id.* On August 26, 2020, Captain Cummins denied plaintiff and the
26 entire Traffic Unit overtime. *Id.* ¶ 36. Plaintiff alleges the funds earmarked for the Traffic Unit
27 were “inexplicably[] allowed to expire leaving approximately \$40,000 in funds that had not been
28 used.” *Id.*

1 On or around October 28, 2020, plaintiff's close friend Officer Lozada was "summarily
2 terminated" despite Officer Lozada's experience, performance and seniority. *Id.* ¶ 37. Malae
3 alleges that "SCPD command staff know of his strong friendship with Officer Lozada" and that "the
4 termination of Officer Lozada is another manner by which SCPD" has retaliated against Malae. On
5 October 30, 2020, Assistant Chief Rush called plaintiff and informed him the second, new
6 Promotional List including plaintiff was eliminated, and he provided no reason. *Id.*

7 Plaintiff filed suit in this court on March 1, 2021 alleging three causes of action: (1)
8 Deprivation of Civil Rights under 42 U.S.C. § 1983 for Free Speech Retaliation, against the City of
9 Santa Clara, Nikolai and Cummins; (2) Race Discrimination against the City of Santa Clara; and (3)
10 Retaliation under California's Fair Employment and Housing Act ("FEHA") and Title VII of the
11 Civil Rights Act of 1964, against the City of Santa Clara.²

12
13 **I. First Cause of Action: 42 U.S.C. § 1983 Claim Against Defendants City of Santa
14 Clara, Cummins and Nikolai**

15 Plaintiff alleges defendants violated plaintiff's rights under the First Amendment by
16 retaliating against him based on his speech. Plaintiff alleges his speech regarding systemic racism
17 within the SCPD, potential SCPD corruption, and accusations of SCPD cover-ups of past employee
18 misconduct is protected under the First Amendment. FAC ¶ 40. Plaintiff alleges that defendants,
19 acting under color of state law, retaliated against him for this protected speech by terminating the
20 Police Lieutenant promotional lists which listed plaintiff, denying plaintiff overtime, and
21 terminating plaintiff's friend Officer Lozada. *Id.* ¶¶ 37, 42-43.³

22
23 ² The FAC does not state whether the second cause of action is brought under Title VII
24 and/or FEHA, and the FAC states that the third cause of action is brought under Title VII and FEHA.
25 Defendants' motion and reply treat both causes of action as if they are brought under both statutes,
26 while plaintiff's opposition refers to the second and third causes of action as "state law" claims. In
27 the amended complaint, plaintiff shall clarify whether these causes of action are brought under state
28 and/or federal law. Because the elements of the claims are largely the same under state or federal
law, the Court's analysis in this order applies regardless of which law applies.

³ Although paragraph 37 of the FAC alleges that Officer Lozada was terminated in
retaliation for plaintiff's speech, the first cause of action focuses on the termination of the
promotional lists and the denial of overtime as the alleged retaliation. Plaintiff's opposition does
not mention Officer Lozada's termination, and thus it is unclear whether plaintiff has abandoned
this allegation. If plaintiff wishes to pursue the claim that Officer Lozada's termination was

1 “It is well settled that the state may not abuse its position as employer to stifle ‘the First
2 Amendment rights [its employees] would otherwise enjoy as citizens to comment on matters of
3 public interest.’” *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). The Ninth Circuit has
4 articulated a five-part inquiry for First Amendment retaliation claims, three elements of which are
5 relevant at this stage in litigation: (1) whether the plaintiff spoke on a matter of public concern; (2)
6 whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff’s
7 protected speech was a substantial or motivating factor in the adverse employment action. *Dahlia*
8 *v. Rodriguez*, 735 F.3d 1060, 1067 (9th Cir. 2013) (en banc) (quoting *Eng v. Cooley*, 552 F.3d 1062,
9 1070 (9th Cir. 2009)); *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003).

10 Defendants move to dismiss the first cause of action on several related grounds. Defendants
11 contend that plaintiff’s official capacity claims against defendants Cummins and Nikolai should be
12 dismissed as redundant because plaintiff is suing the City, and that the individual capacity claims
13 are unsupported by factual allegations regarding how Cummins and Nikolai retaliated against Malae
14 based on his speech. Defendants also contend that the claim against the City should be dismissed
15 because plaintiff has not alleged a basis for municipal liability under *Monell v. Department of Social*
16 *Services*, 436 U.S. 658 (1978). Finally, defendants contend that plaintiff has not alleged the
17 elements of a First Amendment retaliation claim.

18
19 **A. Cummins and Nikolai**

20 The FAC alleges that plaintiff brings suit against defendants Cummins and Nikolai in their
21 individual and official capacities. FAC ¶¶ 2-3. The Court agrees with defendants that plaintiff’s
22 official capacity claims against Cummins and Nikolai are duplicative of the claim against the City
23 because a “state official in his or her capacity . . . is no different from a suit against the State itself,”
24 *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 62, 71 (1989). Accordingly, the Court GRANTS
25 defendants’ motion to dismiss the official capacity claims against the individual defendants.

26 Defendants also move to dismiss the individual capacity claims. “Unlike an official capacity
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retaliatory, the amended complaint must include more allegations about the termination, including
facts supporting a claim that the termination was made in retaliation for plaintiff’s speech.

1 claim, where the constitutional injury ‘must be attributable to [an] official policy or custom,’ an
2 individual capacity claim ‘hinges upon [the individual defendant’s] participation in the deprivation
3 of constitutional rights.’” *Torres v. Goddard*, 793 F.3d 1046, 1057 (9th Cir. 2015) (internal citation
4 omitted). Further, the complaint must plausibly allege “that each of the defendants was an integral
5 participation in the violation” of the constitutional right. *Keates v. Koile*, 883 F.3d 1228 at 1242-43
6 (9th Cir. 2018).

7 Plaintiff alleges Captain Cummins is a “policy maker and final decision maker concerning
8 internal administrative or criminal investigations of alleged misconduct by personnel” and that
9 Cummins retaliated against plaintiff by denying him overtime. FAC ¶¶ 3, 36, 42. However, the
10 FAC does not allege that Captain Cummins knew of plaintiff’s speech before denying plaintiff
11 overtime, nor does plaintiff allege any facts indicating that plaintiff’s protected speech was a
12 substantial or motivating factor in Captain Cummins’ decision to deny plaintiff overtime. In
13 addition, the FAC is unclear as to whether plaintiff claims that Captain Cummins was involved in
14 other allegedly retaliatory acts, such as the decision to eliminate the promotional lists. In the
15 amended complaint, plaintiff shall clarify Captain Cummins’ role in the alleged retaliation, and
16 include any facts that support plaintiff’s claim that his protected speech was a substantial or
17 motivating factor in the adverse employment action.

18 Plaintiff alleges Chief Nikolai is “charged with the duty and granted the authority to render
19 final decisions regarding, among other things, the promotion of personnel, including decisions
20 whether or not to eliminate promotional/eligible lists, and approvals/disapprovals over the granting
21 of overtime” and that Chief Nikolai was witness to or knew about plaintiff’s speech. *Id.* ¶¶ 2, 27,
22 32, 33-34. However, the FAC does not explicitly allege that Nikolai was involved in the decisions
23 to terminate the promotional lists and deny overtime to plaintiff. The amended complaint shall
24 clarify Chief Nikolai’s role with regard to the alleged retaliatory acts.

25 Accordingly, the Court GRANTS plaintiff leave to amend the claims against defendants in
26 their individual capacities. Because the Court is granting plaintiff leave to amend, the Court finds
27 it unnecessary to address defendants’ arguments about qualified immunity. If plaintiff pursues
28 individual claims against defendants Nikolai and Cummins, defendants may renew their assertion

1 of qualified immunity.

2
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4 **B. Municipal Liability Under *Monell***

5 Local government entities are “persons” subject to liability under § 1983 where official
6 policy or custom causes a constitutional tort, *see Monell*, 436 U.S. at 690; however, a municipality
7 may not be held vicariously liable for the unconstitutional acts of its employees under the theory of
8 respondeat superior, *see Board of County Comm’rs v. Brown*, 520 U.S. 397, 403 (1997); *Monell*,
9 436 U.S. at 691. Thus, a public entity “cannot be held liable solely because it employs a tortfeasor.”
10 *Monell*, 436 U.S. at 691.

11 To establish an official policy that would give rise to *Monell* liability, a plaintiff must allege
12 facts to support one of the following to survive dismissal of its claim: (1) an unconstitutional custom
13 or policy behind the violation of rights; (2) a deliberately indifferent omission, such as a failure to
14 train or failure to have a needed policy; or (3) a final policymaker’s involvement in, or ratification
15 of, the conduct underlying the violation of rights. *Clouthier v. County of Contra Costa*, 591 F.3d
16 1232, 1249-50 (9th Cir. 2010) (synthesizing authorities), *overruled on other grounds by Castro v.*
17 *Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016).

18 Defendants contend that plaintiff makes formulaic recitations of *Monell* liability and fails to
19 plead “any official City policy, practice, or custom demonstrating the City routinely violates
20 employees’ 1st Amendment rights or retaliates against employees that speak on matters of public
21 concern.” Def’s Motion at 18-19.

22 The FAC alleges that defendants Chief Nikolai and Captain Cummins acted “under color of
23 state law,” were the “moving force behind the constitutional violation alleged [in]” the first cause
24 of action, and thus the City of Santa Clara is liable under *Monell*. FAC ¶ 46. Plaintiff’s opposition
25 also asserts that the City is liable because the SCPD has a *de facto* policy of manipulating the
26 examination and promotional list. Pl’s Opp’n at 22.

27 The Court agrees with defendants that the FAC does not adequately allege a basis for *Monell*
28 liability. As discussed *supra*, although the FAC alleges that Cummins and Nikolai are final

1 policymakers, the FAC does not sufficiently allege their “involvement in, or ratification of, the
2 conduct underlying the violation of rights” – retaliating against plaintiff on account of his speech.
3 If plaintiff can allege that Cummins and/or Nikolai made the decisions to deny plaintiff overtime
4 and to terminate the promotional lists in retaliation for plaintiff’s speech, those allegations would
5 support a *Monell* claim against the City. *See Clouthier*, 591 F.3d at 1250; *see also Ulrich v. City*
6 *and County of San Francisco*, 308 F.3d 968, 984-85 (9th Cir. 2002). As to plaintiff’s argument that
7 he has alleged a *de facto* policy of manipulating the examination and promotional process in favor
8 of Caucasians and against people of color, the Court agrees with defendants that this allegation, on
9 its own, does not support a *Monell* claim alleging that defendants retaliated against plaintiff *based*
10 *on his speech*. Plaintiff’s allegations about a rigged promotional process support his claims of
11 discrimination based on race and national origin. Pleading *Monell* liability requires more facts
12 showing a causal link between the alleged policy and plaintiff’s First Amendment injury. *See*
13 *Monell*, 436 U.S. at 690-92; *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013).

14 15 C. *Dahlia* Elements

16 Finally, although the Court concludes that plaintiff has not adequately alleged that his speech
17 was a substantial or motivating factor in the adverse employment action for the reasons stated above,
18 the Court finds as a pleading matter that the FAC sufficiently alleges the other required elements of
19 a First Amendment retaliation claim, namely that plaintiff spoke on a matter of public concern and
20 that plaintiff spoke as a private citizen. *See Dahlia*, 735 F.3d at 1067 (9th Cir. 2013).

21 Accordingly, the Court GRANTS defendants’ motion to dismiss the first cause of action and
22 GRANTS plaintiff leave to amend consistent with this order.

23 24 II. Second and Third Causes of Action: Title VII and FEHA⁴

25 A. Race/National Origin Discrimination

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27 ⁴ Defendants initially moved to dismiss plaintiff’s Title VII and FEHA claims on the ground
28 that plaintiff had failed to file an administrative complaint. In response, plaintiff submitted a copy
of his DFEH complaint. Dkt. No. 25-1. Accordingly, the Court finds that this issue is now moot.

1 The second cause of action alleges that the City discriminated against him on the basis of
2 race and national origin. FEHA⁵ makes it unlawful “[f]or an employer, because of the race, ... [or]
3 national origin ... of any person ... to discriminate against the person in compensation or in terms,
4 conditions, or privileges of employment.” Cal. Gov’t Code § 12940(a). Under FEHA, a “plaintiff
5 may raise a presumption of discrimination by presenting a ‘prima facie case,’ the components of
6 which vary depending upon the nature of the claim, but typically require evidence that ‘(1) [the
7 plaintiff] was a member of a protected class, (2) [the plaintiff] was qualified for the position he [or
8 she] sought or was performing competently in the position . . . held, (3) [the plaintiff] suffered an
9 adverse employment action, such as termination, demotion, or denial of an available job, and (4)
10 some other circumstance [that] suggests discriminatory motive.’” *Serri v. Santa Clara Univ.*, 226
11 Cal. App. 4th 830, 860 (2014) (internal quotation marks and citation omitted).

12 Defendants contend that plaintiff has not alleged facts demonstrating that similarly situated
13 people outside his protected class were treated more favorably or other circumstances giving rise to
14 an inference of discrimination.

15 The Court disagrees with defendants with regard to plaintiff’s allegations regarding being
16 passed over for promotion and the termination of the promotional lists. The FAC alleges that
17 plaintiff is Samoan and that he was qualified for a promotion because he had received positive job
18 evaluations and commendations, experience working in all divisions of the SCPD, and scored well
19 on the Lieutenant’s exam. Plaintiff also alleges that he was told he was being passed over for a
20 promotion because of vague allegations that plaintiff’s “presence” was “intimidating” and that
21 plaintiff made a co-worker feel “threatened,” although contrary to SCPD policies those allegations
22 were never investigated or reported to plaintiff prior to him being told he was not receiving the
23 promotion. Plaintiff also alleges that the promotional lists upon which he appeared were terminated
24 without reason, and that other promotional lists from which Caucasian employees were promoted
25 were not terminated. Those allegations support an inference of discriminatory motive. Further,
26 plaintiff has alleged instances where non-Samoan/Pacific Islander SCPD employees were treated

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28 ⁵ Plaintiff’s opposition refers to the second cause of action as a state claim, and thus the Court analyzes this cause of action under FEHA.

1 more favorably than plaintiff with regard to the promotional process.

2 However, the Court agrees with defendants that plaintiff has not alleged facts suggesting a
3 discriminatory motive with regard to the denial of overtime. Although the FAC alleges that the
4 denial of overtime was discriminatory, FAC ¶ 55, plaintiff does not allege that similarly situated
5 individuals outside of the protected class were treated differently, and to the contrary the FAC
6 alleges that the entire Traffic Unit was denied overtime. *Id.* ¶ 36. Nor does the FAC allege any
7 circumstances suggesting that the denial of overtime was due to a discriminatory motive. Plaintiff's
8 opposition does not address the overtime denial in the context of his discrimination claim, and thus
9 it is unclear if plaintiff has abandoned this allegation.

10 Accordingly, the Court DENIES defendants' motion to dismiss the discrimination claim to
11 the extent plaintiff is challenging SCPD's failure to promote him and the termination of the
12 promotional lists, and the Court GRANTS the motion as it relates to plaintiff's claim that the denial
13 of overtime was discriminatory. When plaintiff amends the complaint, plaintiff shall specify
14 whether the second cause of action is brought under Title VII and/or FEHA, and if plaintiff wishes
15 to pursue the claim that the denial of overtime was discriminatory, plaintiff must allege additional
16 facts suggesting discriminatory motive.

17
18 **B. Title VII and FEHA Retaliation**

19 Plaintiff alleges that his criticisms about racism and the Department's failure to promote
20 non-white officers constituted protected activity under FEHA and Title VII, and that defendants
21 retaliated against him based on that speech. Thus, the third cause of action is based on the same
22 facts and theory as the First Amendment retaliation cause of action.

23 FEHA bars employers from retaliating against employees, as an employer may not
24 "discharge, expel, or otherwise discriminate against any person because the person has opposed any
25 practices forbidden under this part." Cal. Gov't Code § 12940(h). To allege a *prima facie* case of
26 retaliation under FEHA (which is nearly identical to alleging a Title VII retaliation claim), a plaintiff
27 must show: (1) involvement in protected activity opposing an unlawful employment practice, (2) an
28 adverse employment action, and (3) a causal link between the protected activity and the adverse

1 action. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042 (2005); *Freitag v. Ayers*, 468 F.3d
2 528, 541 (9th Cir. 2006); *Passantino v. Johnson and Johnson Consumer Products, Inc.*, 212 F.3d
3 493, 506 (9th Cir. 2000).

4 The Court finds plaintiff adequately pled the first two required elements. However, similar
5 to the Court's analysis in preceding sections, plaintiff must allege a causal link between plaintiff's
6 protected conduct and the alleged adverse employment actions to satisfy the causation element.
7 Accordingly, the Court GRANTS defendants' motion to dismiss and GRANTS plaintiff leave to
8 amend this cause of action.

9 10 **III. Punitive Damages**

11 Defendants contend, and plaintiff does not dispute, that punitive damages are not available
12 against the City of Santa Clara under § 1983, Title VII or FEHA. *See City of Newport v. Fact*
13 *Concerts, Inc.*, 453 U.S. 247, 271 (1981) (§ 1983); *Kolstad v. American Dental Ass'n*, 527 U.S. 526,
14 534 (1999) (Title VII); Cal. Gov't Code § 818 ("a public entity is not liable for damages awarded
15 under Section 3294 of the Civil Code [punitive damages] or other damages imposed primarily for
16 the sake of example and by way of punishing the defendant."); *State Personnel Board v. Fair*
17 *Employment and Housing Comm'n*, 39 Cal.3d 422, 434 (1985) (§ 818 prohibits awards of punitive
18 damages against municipalities in cases involving FEHA claims).

19 Plaintiff may seek punitive damages against the individual defendants under the § 1983
20 cause of action, the only cause of action alleged against the individuals. *See Dang v. Cross*, 422
21 F.3d 800, 808 (9th Cir. 2005) (punitive damages available under § 1983 where a defendant has acted
22 maliciously, wantonly, oppressively, or in reckless disregard of the plaintiff's rights). If plaintiff
23 pursues individual claims against defendants Cummins and Nikolai and wishes to seek punitive
24 damages against these defendants, plaintiff is instructed to include factual allegations that meet the
25 requisite standard.

26 27 **CONCLUSION**

28 For the foregoing reasons, the Court hereby **GRANTS** in part and **DENIES** in part

1 defendants' motion to dismiss:

2 (1) § 1983 First Amendment Retaliation: **DISMISSED** with leave to amend. If plaintiff
3 amends this cause of action, plaintiff needs to allege a factual basis for suing the individual
4 defendants in their individual capacities, bolster the *Monell* claim, and allege facts showing that
5 plaintiff's speech was a substantial and motivating factor in the alleged adverse employment
6 actions. Further, if plaintiff claims that Officer Lozada's termination was retaliatory, plaintiff must
7 allege facts supporting such a claim.

8 (2) FEHA/Title VII Discrimination: **DENIED** as to claim that denial of
9 promotions/termination of promotional lists was discriminatory, **GRANTED** with leave to amend
10 with respect to claim that denial of overtime was discriminatory.

11 (3) FEHA/Title VII Retaliation: **DISMISSED** with leave to amend. Plaintiff needs to allege
12 facts showing a causal link between the protected activity and adverse employment actions.

13 (4) Punitive Damages: The punitive damages claim against the City is **STRICKEN**, and the
14 punitive damages claim against individual defendants is **DISMISSED** with leave to
15 amend. Plaintiff can amend claims against individual defendants Chief Nikolai and Captain
16 Cummins to include more detail of defendants' "malice or reckless indifference" if plaintiff
17 sufficiently pleads individual defendants' liability in their individual capacities.

18
19 **IT IS SO ORDERED.**

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21 Dated: August 9, 2021



22 _____
23 SUSAN ILLSTON
24 United States District Judge
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