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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
5

6 EDWARD L. POOL,

7 Plaintiff,

8 vs.
9

10 HAROLD L. WHITE, in his individual
11 capacity,

12 Defendant.
13

NO. 2:16-CV-00218-JLQ

ORDER RE: PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT

14 BEFORE THE COURT is Plaintiff's Motion for Partial Summary Judgment Re:
15 Liability (ECF No. 22). Response and Reply briefs have been filed. (ECF No. 25 & 32).
16 Plaintiff set the motion for hearing without oral argument, and neither side has requested
17 oral argument. Accordingly, the matter was submitted on the briefs.

18 **I. Introduction**

19 Plaintiff Edward Pool alleges he was wrongfully terminated by Defendant White in
20 violation of his First Amendment rights. Plaintiff alleges he was employed by the
21 Washington State Department of Transportation ("WSDOT") from August 1, 2015 to
22 March 3, 2016. (Compl. ¶ 2.2). Defendant White was the Assistant Regional
23 Administrator for WSDOT at all relevant times. Plaintiff alleges that while at work on
24 February 8, 2016, he "made a comment and gesture critical" of President Obama.
25 (Complaint ¶ 2.2). Plaintiff claims Defendant White fired him on March 3, 2016, because
26 of this comment and gesture. Plaintiff brings his claim pursuant to 42 U.S.C. § 1983
27 based on the First Amendment. Defendant White admits to discharging Plaintiff, but
28 denies the termination was in violation of Plaintiff's First Amendment rights.

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II. Factual Background

2 In summary judgment proceedings, the facts are viewed in a light most favorable to
3 the non-movant, in this case the Defendant. The following facts are set forth in a light
4 favorable to the Defendant and key factual disputes are noted.

5 Defendant Harold White is the Assistant Regional Administrator for Operations at
6 WSDOT. Plaintiff Edward Pool was hired on or about July 30, 2015, to a "Non-
7 Permanent, In-Training Appointment" as an Information Technology Specialist. (ECF
8 No. 28-2, Letter of July 30, 2015). The Appointment letter informed Mr. Pool, "this
9 appointment is anticipated to last for a period of approximately one year; however, this
10 appointment may end at any time with one working days' notice." (*Id.*). Pool began work
11 on August 3, 2015, and his immediate supervisor was Ken Heale.

12 The events precipitating Pool's termination occurred on February 8, 2016. On that
13 day, around 4:30 p.m., Pool came to the doorway of co-worker Robin Pritchard's office.
14 (ECF No. 28-3, Pritchard Depo. p. 43). He stood in the doorway for a minute or two, and
15 neither he or Ms. Pritchard said anything, as she was working and watching traffic
16 monitors. (*Id.* at 43-45). He then made a simulated gesture of pointing a rifle at Ms.
17 Pritchard. She asked, "what are you doing?" (*Id.* at 45-46). He did not respond
18 immediately, and she then asked, "well, what are you doing?" (*Id.* at 46). Pool then raised
19 the pretend gun away from Ms. Pritchard and said, "I'm going to shoot Obama." (*Id.*).
20 Pool then left.

21 Pritchard testified she felt "paralyzed" by the comment, could not concentrate, and
22 could not effectively perform her job duties during the remainder of her shift, from 4:30
23 p.m. to 6:00 p.m. (*Id.* at 53). Approximately 34-hours after this incident, at 2:50 a.m. on
24 February 10, 2016, Pritchard sent an e-mail to Ken Heale and Mike Kress, with the
25 subject line "Panic attacks" and which read as follows:

26 On Monday afternoon around 4:30 Larry was leaning on his office door and
27 had his arms kind of pointing at me, I asked him what he was doing and it was like
28 he raised a rifle and pointed it away from me and said he was going to kill Obama.
I've tried to stop thinking about it, but I can't sleep and I have panic attacks.
I will be going to my doctor tomorrow to get some medication. I will bring in a

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doctors note for being under a doctors care.

2 (ECF No. 28-3; Pritchard Depo Ex. 2). Pritchard was then subsequently absent from
3 work for several weeks on Family Medical Leave Act (FMLA) leave allegedly related to
4 anxiety.

5 Mr. Heale received the email in the early morning hours of February 10, 2016, and
6 at about 7:00 a.m. contacted Bobbi Collins Whitehead, the Human Resources Manager.
7 (ECF No. 28-5, Heale Depo. p. 14). Heale and Whitehead arranged to meet with
8 Plaintiff at about 2:30 p.m. on February 10, 2016, to talk to him about what was described
9 in the email. Whitehead testified that Pool admitted making the comment about Obama,
10 but said it was a joke and that he needed to be careful in jest about making such
11 comments. (ECF No. 28-4, Whitehead Depo. p. 20). The workplace violence policy was
12 discussed at the meeting. (*Id.* at 21). Whitehead testified the incident was "inherently
13 disruptive" to the workplace, resulting in a situation where a fact-finding investigation
14 was required. (*Id.* at 30). She further testified Pritchard's absence from the workplace
15 was "significant". (*Id.*).

16 The WSDOT "Violence-Free Workplace" Policy (hereafter "Policy") provides in
17 relevant part: "Violence, threats, or intimidation of any kind is strictly prohibited and will
18 be cause for appropriate management intervention to diffuse the incident and restore a
19 violence-free work environment." (ECF No. 28-1; White Depo. Ex. 3). The Policy
20 further provides "unacceptable behavior" includes verbal "threats toward a person" and
21 "intimidation". (*Id.*). The Policy also defines as "unacceptable behavior" the "use or
22 threatened use of a weapon" and "threatening, intimidating gestures." (*Id.*) Finally, the
23 Policy provides that violation of the standards of conduct set forth may result in
24 "disciplinary action up to and including dismissal." (*Id.*)

25 Defendant White made the ultimate decision to terminate Plaintiff. (ECF No. 28-1,
26 White Depo. p. 7). He concluded Plaintiff's actions violated the workplace violence
27 policy and considered that Plaintiff was a temporary employee. (*Id.*). He had been
28 informed by Mr. Heale that Plaintiff "had made a threat against the President of the

1 United States" and had made a simulated gesture of holding a rifle while making the
2 threat. (*Id.*). The threat was taken seriously enough that WSDOT contacted Washington
3 State Patrol Captain Otis to inquire whether the threat should be reported to the Secret
4 Service. (*Id.* at 14). White additionally discussed it with a WSDOT employee, Mike
5 Dubee, who had previously served as a WSP Captain. Otis recommended it be reported.
6 Dubee told White it probably did not need to be reported, and ultimately it was not
7 reported. (*Id.* at 14). White prepared a letter terminating Plaintiff on February 19, 2016.
8 (ECF No. 28-1, White Depo Ex. 1).

9 The above-recitation of facts is largely undisputed. Plaintiff admits making a
10 statement about assassinating the President and making a simulated gun shooting gesture.
11 There is some dispute concerning the exact words used and there is also a dispute as to
12 context. Plaintiff claims he had been talking with Pritchard about politics earlier in the
13 day and some of Obama's "ridiculous" actions. (Pool Depo. p. 48-49). However, Plaintiff
14 cannot recall what policies were allegedly discussed, and Pritchard denies any political
15 conversation occurred that day. Plaintiff's Statement of Fact also overlooks testimony or
16 misrepresents the record by stating: "There is no evidence that Mr. Pool's gun simulation
17 conduct disrupted the DOT workplace in any fashion." (ECF No. 23, ¶ 13). In fact,
18 Pritchard testified to the immediate disruptive effect, and she then took subsequent leave
19 for anxiety. Whitehead, *supra*, also discussed the "inherently disruptive" nature of the
20 incident and significant impact of Pritchard's absence.

21 **III. Discussion**

22 **A. Summary Judgment Standard**

23 The purpose of summary judgment is to avoid unnecessary trials when there is no
24 dispute as to the material facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dept.*
25 *of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled to
26 summary judgment when, viewing the evidence and the inferences arising therefrom in
27 the light most favorable to the nonmoving party, there are no genuine issues of material
28 fact in dispute. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252

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2 (1986). While the moving party does not have to disprove matters on which the opponent
3 will bear the burden of proof at trial, they nonetheless bear the burden of producing
4 evidence that negates an essential element of the opposing party's claim and the ultimate
5 burden of persuading the court that no genuine issue of material fact exists. *Nissan Fire &*
6 *Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102 (9th Cir. 2000). When the
7 nonmoving party has the burden of proof at trial, the moving party need only point out
8 that there is an absence of evidence to support the nonmoving party's case. *Devereaux v.*
9 *Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001).

10 Once the moving party has carried its burden, the opponent must do more than
11 simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec.*
12 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the opposing party
13 must come forward with specific facts showing that there is a genuine issue for trial. *Id.*

14 Although a summary judgment motion is to be granted with caution, it is not a
15 disfavored remedy: "Summary judgment procedure is properly regarded not as a
16 disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a
17 whole, which are designed to secure the just, speedy and inexpensive determination of
18 every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)(citations and quotations
19 omitted).

20 **B. First Amendment Claim**

21 "The First Amendment shields public employees from employment retaliation for
22 their protected speech activities." *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068
23 (9th Cir. 2012). In order to prevail on a First Amendment claim, a plaintiff must initially
24 prove that his statements were constitutionally protected. *Johnson v. Multnomah Co.*, 48
25 F.3d 420, 422 (9th Cir. 1995). It is the plaintiff's burden to show the speech at issue
26 "substantially involved matters of public concern." *Id.* If the plaintiff meets the burden,
27 the burden then shifts to the employer to show that its administrative interests outweigh
28 the First Amendment interest. *Id.* "Speech involves a matter of public concern when it
can fairly be considered to relate to any matter of political, social, or other concern to the

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2 community." *Id.* Whether the employees's speech addresses a matter of public concern is
3 generally a question of law to be determined by the content, form, and context of the
4 statement. *Karl*, 678 F.3d at 1069. Of the factors, content is generally the most important.
5 *Id.*

6 In this case, there appears to be a dispute of fact as to the exact words used.
7 Pritchard states Plaintiff said, "I'm going to shoot Obama." Plaintiff claims he said, "well,
8 if he (Obama) does that, I will be the first to assassinate him." (ECF No. 23, ¶ 4). "It is
9 well established that the First Amendment protects speech that others might find
10 offensive or even frightening." *Fogel v. Collins*, 531 F.3d 824, 829 (9th Cir. 2008).
11 However, the protections afforded are not absolute. *Id.* "True threats" are not protected.
12 "A true threat is an expression of an intention to inflict evil, injury, or damage on another
13 and such speech receives no First Amendment protection." *Id.* at 830.

14 True threats to kill, kidnap, or inflict bodily harm on the President of the United
15 States are not protected speech. In fact, such threats are subject to criminal prosecution.
16 18 U.S.C. § 871. "Deciding whether political speech is protected political hyperbole or
17 an unprotected true threat can be an issue for a jury, particularly in cases of criminal
18 prosecution." *Fogel*, 531 F.3d at 829. There has been confusion concerning the standard
19 for determining whether a statement constitutes a "true threat" *Id.* at 831 ("This circuit has
20 thus far avoided deciding whether to use an objective or subjective standard in
21 determining whether there has been a true threat."). Under an objective standard, the
22 court asks, "whether a reasonable person would foresee that the statement would be
23 interpreted by those to whom the maker communicates the statement as a serious
24 expression of intent to harm or assault." *Id.* The subjective standard requires that the
25 speaker subjectively intended the speech as a threat. *Id.* The objective standard looks at
26 the surrounding factual context including the "reaction of listeners." *Id.*

27 The reaction of the primary listener, Ms. Pritchard, was quite strong. She was
28 immediately upset, could not focus for the remainder of her day, and ultimately took
medical leave related to anxiety. Plaintiff's employer took the threat seriously enough to

1 speak to two law enforcement officers and considered reporting it to the Secret Service.
2 As to subjective intent, Plaintiff contends the statement was made in jest and that he and
3 Ms. Pritchard had been joking. He testified there was "laughing" and they were in a
4 "jovial, joking mood". (ECF No. 24-1, Pool Depo. p. 49).

5 **C. Pickering Five Step Analysis**

6 Plaintiff argues the statement was clearly not a "true threat". Defendant has not
7 moved for summary judgment on the basis that the statement was unprotected speech nor
8 fully addressed the "true threat" issue in its Response. Instead, the parties agree the five
9 step test derived from *Pickering v. Board of Education*, 391 U.S. 563 (1968), should
10 govern the analysis. The Ninth Circuit has described the sequential five-step *Pickering*
11 test as follows:

12 First, we consider whether the plaintiff has engaged in protected speech activities,
13 which requires the plaintiff to show that the plaintiff: (1) spoke on a matter of
14 public concern; and (2) spoke as a private citizen and not within the scope of her
15 official duties as a public employee. If the plaintiff makes these two showings, we
16 ask whether the plaintiff has further shown that she (3) suffered an adverse
17 employment action, for which the plaintiff's protected speech was a substantial or
18 motivating factor. If the plaintiff meets her burden on these first three steps,
19 thereby stating a prima facie claim of First Amendment retaliation, then the burden
20 shifts to the government to escape liability by establishing either that: (4) the state's
21 legitimate administrative interests outweigh the employee's First Amendment
22 rights; or (5) the state would have taken the adverse employment action even
23 absent the protected speech.

24 *Karl*, 678 F.3d at 1068. Plaintiff argues "there are no factual disputes with respect to any
25 of these five factors." (ECF No. 22, p. 6). Defendant argues there are disputed issues of
26 material fact as to four of the five factors. Defendant does not contest the second factor.

27 Concerning the first factor, Plaintiff claims he and Ms. Pritchard were engaged in a
28 political policy discussion. However, Plaintiff does not recall the details or what policy
actions were discussed. (ECF No.24-1, Pool Depo. p. 50). Ms. Pritchard denies they were
engaged in a political policy discussion. It appears to be Plaintiff's position that
mentioning the President equates to speaking on a matter of public concern. However,
making a true threat against the President would not constitute speaking on a matter of

1 public concern. Plaintiff relies heavily on *Rankin v. McPherson*, 483 U.S. 378, 383
2 (1987), and argues it is "dispositive on this issue, and indeed, on this case." (ECF No. 22,
3 p. 7). Defendant counters that *Rankin* is distinguishable and provides Plaintiff "no aid at
4 all." (ECF No. 25, p. 8).

5 In *Rankin*, the plaintiff was a clerical assistant in the county constable's office.
6 While at work, plaintiff and some co-workers heard report on the radio of the attempted
7 assassination of President Reagan. Discussion was then had of what motivated the
8 attempt and of medicaid, welfare, and food stamp programs. One co-worker said the
9 President is cutting those programs and plaintiff stated: "If they go for him again, I hope
10 they get him." *Id.* at 382. She was fired for this statement. The majority, in a 5-to-4
11 decision, found plaintiff's statement in *Rankin* was on a matter of public concern and the
12 state had not met its burden of justifying the discharge on legitimate grounds.

13 The *Rankin* majority recognized that "a threat to kill the President would not be
14 protected by the First Amendment." *Id.* at 387. However, the court considered the
15 statement "was made in the course of a conversation addressing the policies of the
16 President's administration" and was made in response to a news bulletin. The four
17 dissenting justices noted the statement was "only one step removed" from an
18 assassination threat which is entitled to no First Amendment protection. *Id.* at 397. The
19 dissenters stated: "A statement lying so near the category of completely unprotected
20 speech cannot fairly be viewed as lying within the 'heart' of the First Amendment's
21 protection; it lies within a category of speech that can neither be characterized as speech
22 on matters of public concern nor properly subject to criminal penalties." *Id.* at 397-98.

23 The statement at issue here, "I'm going to shoot Obama," or "well, if he (Obama)
24 does that, I will be the first to assassinate him," is farther from the heart of First
25 Amendment protection than the statement in *Rankin*. The statement in *Rankin* was an
26 aspirational statement of ill-intent concerning the hypothetical actions of others.
27 Defendant's evidence is that Pool's statement was a direct threat that he himself would act
28 against the President. There is also a dispute of fact as to whether Pool's statement was

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made in the context of a conversation on political policy.

2 Although the issue of whether speech is on a matter of public concern can often be
3 determined as a question of law, here there is a dispute as to the exact words said and a
4 significant dispute as to the context in which they were said. Plaintiff is not entitled to
5 summary judgment on this disputed issue.

6 The second factor is not disputed. Plaintiff spoke as a private citizen and not
7 within the scope of his official duties as a public employee.

8 On the third factor, it is undisputed Plaintiff suffered an adverse employment action
9 -- he was terminated. Defendant disputes whether Pool's statement concerning President
10 Obama was a substantial or motivating factor. Plaintiff relies on White's testimony that if
11 not for the statement and gesture: "There would have been no discussion of termination."
12 (ECF No. 24-2, White Depo. p. 18). White also testified the statement "led to the
13 decision" but there were other factors. (*Id.*). White submitted a Declaration in support of
14 his Response which states he would have terminated Plaintiff for violation of the
15 workplace violence policy regardless of whether President Obama was identified as the
16 intended victim. (ECF No. 27, ¶ 5-6). He states if Plaintiff "had made the threat against a
17 co-worker, a family member or a perfect stranger I would have reached the same
18 conclusion and taken the same action." (*Id.* at ¶ 6). It would appear there is no genuine
19 issue of material fact that Plaintiff's statement was a substantial or motivating factor in his
20 termination.

21 Plaintiff has arguably submitted sufficient evidence on the first three factors to
22 support a prima facie case, but this is Plaintiff's Summary Judgment Motion, and Plaintiff
23 has not established the three factors as a matter of law. Even if Plaintiff had established
24 an undisputed case on the first three elements, questions of fact on step four preclude
25 summary judgment for Plaintiff.

26 On the fourth step, balancing the state's legitimate interests with the employee's
27 protected speech, Plaintiff argues there was no disruption to the workplace. Plaintiff
28 claims: "His comment and statement caused no disruption in the work place, and did not

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interfere in any fashion with any employee's ability to do his/her work." (ECF No. 22, p.
2 11). This ignores the evidence of record. Ms. Pritchard testified to the immediate
3 disruptive effect on her ability to focus at work, and she then took subsequent leave for
4 anxiety. Whitehead, the Human Resources Manager, also testified concerning the
5 "inherently disruptive" nature of the incident and significant impact of Pritchard's
6 absence. Pritchard emailed her supervisor that she was having panic attacks from the
7 incident and obtained a FMLA certification from a physician supporting her need to take
8 medical leave for anxiety. (ECF No. 29). The evidence in the summary judgment record
9 supports a conclusion Plaintiff's actions did create a disruption in the workplace. The
10 Ninth Circuit has stated, "we have long given public employers significant discretion to
11 discipline employees if their conduct disrupts the workplace." *Nichols v. Dancer*, 657
12 F.3d 929, 931 (9th Cir. 2011). "The employer need not establish that the employee's
13 conduct actually disrupted the workplace--reasonable predictions of disruption are
14 sufficient." *Id.* at 933. Further, "in striking the *Pickering* balance, we must give public
15 employers wide discretion and control over the management of their personnel and
16 internal affairs including the prerogative to remove employees whose conduct hinders
17 efficient operation and to do so with dispatch." *Id.*

18 Plaintiff's Statement of Fact (ECF No. 23), at Paragraph 13, states: "There is no
19 evidence that Mr. Pool's 'gun simulation conduct' disrupted the DOT workplace in any
20 fashion." Paragraph 13 cites to pages 28 and 29 of Mr. White's deposition testimony.
21 Those pages do not support the Plaintiff's statement. Mr. White was asked if he was
22 aware of disruptive conduct "other than Ms. Pritchard claiming she couldn't come to work
23 because she had anxiety". He stated he believed that was the only event. (ECF No. 24-2,
24 White Depo. p. 28). Mr. White was asked if Pool's conduct prohibited Ms. Pritchard from
25 doing her work on the day it occurred, and White responded: "I would say yes, it did,
26 because she got upset and left the workplace." (*Id.*) White was then asked if he had "any
27 evidence" Pritchard was disrupted on the day in question and he responded, "no". (*Id.* at
28 28-29). White was then asked again if he has any evidence other than Ms. Pritchard

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2 being unable to come to work due to anxiety to support the claim the workplace was
3 disrupted, and he replies he doesn't recall any other disruption. (*Id.* at 29).

4 White's testimony may be somewhat ambiguous, but the overall impression of the
5 two-pages is Mr. White was unaware of disruption in the workplace other than Ms.
6 Pritchard becoming upset that day and missing work due to anxiety. Ms. Pritchard's own
7 sworn testimony supports the claim that after the incident she was unable to focus and
8 perform her job duties for the remaining 90-minutes of her shift. (ECF No. 28-3, Pritchard
9 Depo. p. 53). Pritchard later obtained a FMLA certification to miss work due to anxiety.
10 Ms. Whitehead, the H.R. manager, also testified about the "inherently disruptive" nature
11 of the incident and subsequent investigation. Thus Plaintiff's statement there is "no
12 evidence" of a disruption in the workplace is not supported by the record.

13 The defendant need only establish the fourth or fifth step to prevail. As to the fifth
14 *Pickering* issue, whether the Defendant would have discharged Plaintiff even absent the
15 protected speech, Plaintiff again relies on the testimony of White that the statement and
16 gesture precipitated the discharge. As discussed at step three, it does not appear
17 Defendant could establish Plaintiff would have been discharged in the absence of the
18 threat and simulated rifle shooting gesture.

19 **IV. Conclusion**

20 Plaintiff is not entitled to summary judgment. There are genuine disputes of fact
21 concerning the context in which the statement was made. There is also a dispute of fact
22 concerning exactly what was said. Plaintiff has not established as a matter of law that he
23 spoke on a matter of public concern. The evidence in the summary judgment record also
24 reflects the statement had a disruptive impact on the workplace, particularly in regard to
25 Ms. Pritchard missing work due to anxiety, and the jury could so find.

26 **IT IS HEREBY ORDERED:**

- 27 1. Plaintiff's Motion for Partial Summary Judgment (ECF No. 22) is **DENIED**.
- 28 2. The matter remains set for final Pretrial Conference on **June 23, 2017**, at 9:30
a.m. and for jury trial on **July 10, 2017**, at 9:00 a.m.

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3. Trial briefs, requested jury instructions, and requested jury voir dire were due on or before **June 1, 2017**.

4. Counsel are reminded of the provisions regarding Local Rule 16.1(b). The parties are required to confer in good faith in an attempt to formulate a pretrial order. If the parties cannot agree on a pretrial order, each shall prepare a proposed pretrial order, to be served and filed no later than **June 16, 2017**.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 5th day of June, 2017.

s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE