CASE NO. 22-15485

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD HITTLE,

Plaintiff-Appellant,

v.

CITY OF STOCKTON, CALIFORNIA; ROBERT DEIS; LAURIE MONTES,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Case No. 2:12-cv-00766-TLN-KJN

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INTRODUCTION

The City concedes the key fact that resolves this appeal: Chief Hittle was fired at least in part because he attended a religious conference. This is enough to conclude that religion was at least a motivating factor in his termination, preclude summary judgment for the City, and necessitate a remand for trial.

Because it is inescapable that Chief Hittle's attendance at the Summit was a reason for his termination, the City now attempts to paint its objection to the Summit as something other than an objection to its religious character. The cornerstone of the City's brief is its factual assertion that Deputy City Manager Laurie Montes directed Chief Hittle to attend "public sector" leadership training, and Chief Hittle did not follow that directive. Yet that factual assertion finds no support in the Notice of Investigation, the Largent Report, the Removal Notice, or even in the City's summary judgment briefing before the district court. Indeed, the sole place that supposed fact appears is in Montes's declaration in support of the City's motion for summary judgment, filed ten years later. By contrast, the record is littered with the City's objections to the religious character of the Summit. *See, e.g.*, 2-ER-233, 296. Because the Court must consider the facts in the light most favorable to Chief Hittle in evaluating summary judgment, the City's alleged fact must be disregarded. And the City's inclusion of this new explanation on appeal only further exposes the pretextual nature of its proffered explanations for terminating Chief Hittle.

Despite the City's ever-changing reasoning, it is clear that Chief Hittle was fired because of his attendance at the Summit. Defendants admitted that Chief Hittle was terminated for "us[ing] City time and resources to attend a religious leadership event." 2-ER-233. And the supervisors who made the decision to terminate Chief Hittle criticized him for being a part of a "Christian coalition" and a "church clique." Accordingly, Chief Hittle is entitled to partial summary judgment on liability because religious discrimination was a motivating factor for his termination. At a minimum, Chief Hittle presented direct and circumstantial evidence that easily overcomes the very low burden to create a genuine issue of fact as to discrimination, and summary judgment in favor of the City should be reversed.

ARGUMENT

I. The facts must be construed in the light most favorable to Chief Hittle.

The City devotes the first half of its brief to fighting and misconstruing the facts. That alone confirms there are factual disputes that should have precluded summary judgment. In any event, for the City to defend summary judgment, it must prevail with the facts considered in the light most favorable to Chief Hittle. *Lindahl v. Air France*, 930 F.2d 1434, 1437 (9th Cir. 1991). To avoid a complete repetition of the factual background recited in Appellant's Opening Brief, this Reply corrects only the five most important factual misstatements.

First is the allegation that Montes directed Chief Hittle to obtain public sector leadership training. Resp. Br. 6-7. Chief Hittle stated that Montes directed him to "obtain leadership training." 2-ER-212. Chief Hittle never testified to any restrictions that Montes placed on the leadership training. In fact, Chief Hittle testified that Montes "never gave any specific examples of faults in [his] leadership, or where she thought [he] needed improvement." 2-ER-212–13. In her deposition, Montes admitted that she gave Chief Hittle no specific direction as to the type of leadership training to obtain. *See* 2-ER-40–41 ("Q. Did you put that in writing to Mr. Hittle, that you would only accept training from certain entities? . . . A: I don't believe I ever said anything or put anything in writing that I wouldn't accept something other than the type of training we talked about frequently.").

Reflecting its absence from the factual record, Montes's alleged direction to obtain public sector leadership training is glaringly absent from the City's summary judgment briefing. *See, e.g.*, FER-007, 14–15. Nor does it appear in the Notice of Investigation, Largent Report, or Removal Notice. The absence of that alleged fact is particularly noticeable in the Largent Report, which relays Montes's version of events. The Largent Report simply states, "Montes told Hittle that while she encouraged him to attend leadership training[,] she did not mean religious leadership training." 2-ER-264. Thus, Montes' initial statements revealed her animus toward

Chief Hittle's beliefs, and her current attempts to recast that testimony in religion-neutral terms fall short.

Montes's alleged instruction to Chief Hittle to obtain public sector leadership training appears for the first (and only) time ten years later: in Montes' self-serving (and likely counsel-drafted) declaration in support of the City's motion for summary judgment. 6-ER-1384. Because the facts should be construed in the light most favorable to Chief Hittle, the Court should disregard this latebreaking assertion and accept as true that Montes directed Chief Hittle to obtain leadership training, but did not give any further specifications.

Second, the City claims that Chief Hittle admitted that the Summit did not provide "training specific to fire chiefs and [he] did not report any training specific to public agency managers, as directed by Montes." Resp. Br. 27. Even assuming that Montes gave Chief Hittle that direction, which she did not, the City's statement is incorrect and omits relevant facts. While Chief Hittle stated that there were no trainings "specific to firefighters" at the Summit, 6-ER-1286, he testified that at that time, the only available training specific to fire departments was out of state and would have been "extremely costly" to attend. 5-ER-1077. Attending would have been difficult, if not impossible, due to the City's budget crisis. *See* 5-ER-1080. Chief Hittle also testified that he had been to fire service trainings in the past, and the training they provide is "very generic in some aspects" and focuses on "managing

people . . . bringing unity amongst your team, goal setting, that type of thing." 5-ER-1078.

Moreover, testimony from multiple parties demonstrated that the Summit provided training relevant to public agency managers. The City claims that Montes "provided specific examples of the types of training that would be appropriate" and "identified the League of California Cities and the International City/County Management Association as potential training providers." Resp. Br. 7. Paul Willette, who attended the Summit with Chief Hittle, testified that "a number of the speakers at the leadership summit also were individual speakers at ICMA, the International Association of City, County Managers Association conferences. So those folks paid three, $400 maybe more to hear one of those people at a conference. We went to a conference and heard three of them for less than half that." 2-ER-172. Chief Hittle also told Largent that the Summit and ICMA shared a speaker. 2-ER-252. Matt Duaime, one of the attendees, even testified that a Fire Chief from another county attended the Summit in uniform. 2-ER-177; 5-ER-1162–63. Consequently, there is evidence that Chief Hittle obtained precisely the type of leadership training the City now claims Montes required, revealing Montes's claimed motivation for firing Hittle to be a pretext.

Third, the City unsuccessfully tries to explain away the discriminatory comments Montes made. The City denies that Montes originated the term "Christian

Coalition." Resp. Br. 7 n.1, 56. The record is unclear as to where the term originated. Chief Hittle stated he believed the term came from an anonymous letter, 2-ER-293–94, while Montes claimed it came from a specific Fire Department Manager. 6-ER-1396. Regardless, what is clear—and what matters—is that Montes adopted the discriminatory term and used it multiple times. The first time Montes mentioned that term to Chief Hittle, she informed him "that there was a rumor going around that [he] was leading or heading up some type of Christian coalition." 5-ER-1074. Chief Hittle viewed this as "more of a statement by [Montes]. [She] [b]asically said you shouldn't be a part of anything like that as the fire chief, and you should refrain from doing any of those type of activities." 5-ER-1074; *see* 2-ER-211–12. Montes brought up the "Christian Coalition" criticism again after the Summit, this time accusing Chief Hittle of being a part of it and ordering him not to do so. 2-ER-215. She used the term "in a pejorative way, making it clear this was wrong and distasteful to her." *Id.* Montes additionally used the term "church clique" in her interview with Trudy Largent in April 2011, and there is no indication that term came from someone else. 5-ER-1140. Montes claimed that "when I told Ron to go get some leadership training he asked if he would use George Liepart and I told him no, he's one of the church clique." 5-ER-1140. This comment also demonstrates Montes's animus towards religious training.

Montes's repeated usage of those terms is relevant because it demonstrates her animus towards Chief Hittle's faith.[1] Nor were these stray remarks: Montes used both terms in connection with discussing the religious nature of leadership training—the very reason Chief Hittle was fired. *Cf. infra* 16-18 (further discussing discriminatory comments by City officials).

Fourth, the City claims that Chief Hittle selected the other Fire Department members who attended the conference based on their religious affiliation. Resp. Br. 55. In reality, Matt Duaime obtained the tickets. 6-ER-1282. Duaime was the division chief in charge of fire protection, and he chose to give a ticket to a subordinate in his department, Jonathan Smith. 6-ER-1282–83; 2-ER-176; FER-065–066, 103. Chief Hittle obtained the other two tickets from Duaime, and Chief Hittle selected one of his deputies, Paul Willette, who was Duaime's supervisor. 6-ER-1283; 2-ER-176; FER-066–067. There is no evidence that these deputies were selected because of their religion. Chief Hittle told Largent that he did not even know Duaime's religion at that time. FER-067. There is also no evidence that any

[1] Animus is dispositive of discrimination, but is not necessary to support a discrimination claim under Title VII. Discriminatory treatment against religion is a violation of Title VII whether or not it is accompanied by animus. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.").

other leaders in the Fire Department were excluded from this event because they were not Christian.

Fifth, the City claims Chief Hittle was unable to identify the benefits the City derived from his attendance at the Summit. Resp. Br. 11, 27. This is false. During the investigation, Largent sent Chief Hittle a written request asking how the Summit "specifically benefited" the City. SER-054. Chief Hittle responded and explained the type of leadership training he received and how he was applying that training in the Fire Department. *See* SER-056–57. Largent noted this response in her report. 2-ER-261–62. The Largent Report did not state that Chief Hittle's response failed to identify benefits to the City, only that it was unclear whether Chief Hittle "shared [the information he learned] with other Department managers." 2-ER-262. Duaime also testified that he implemented techniques learned at the Summit, including having monthly team meetings. 5-ER-1157–58. Instead of acknowledging the benefits the City received from the Summit, the City chose to ignore them due to the Summit's religious affiliation.

At a minimum, there are material factual disputes that require reversal of summary judgment and a remand to the district court.

II. The City conflates the disparate treatment and failure to accommodate theories of discrimination.

The City focuses on whether Chief Hittle's faith compelled him to attend the Summit or whether his attendance was a "secular preference[]." Resp. Br. 46-49.

These arguments completely miss the mark. Whether Chief Hittle's religion compelled him to attend the Summit would matter to a discrimination claim only under a failure to accommodate theory. *See Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 680-81 (9th Cir. 1998) (bringing Title VII claims for "failure to make reasonable accommodation of her religious beliefs"). But this appeal raises only a disparate treatment theory of discrimination, not a failure to accommodate theory.

The fact that Chief Hittle was not *required* by his faith to attend a Christian rather than a secular conference is irrelevant to the disparate treatment analysis. Title VII disparate treatment claims focus on the employer's motivation for its employment decisions. *See Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) ("A disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986 (1988))).

Title VII is not limited to discrimination against outward religious exercises that are compelled by an individual's faith. It also protects individuals from discrimination based on membership in a protected class, affiliation with a protected class, or religious activities in general. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772 (2015) ("The disparate-treatment provision forbids employers to: (1) [discharge an individual] (2) 'because of' (3) 'such individual's . . . religion' (which includes his religious practice)."). Title VII defines religion

broadly to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j).

The City discriminated against Chief Hittle because of his religion—whether in terms of his religious affiliation or his activity of attending religious leadership training (which was motivated in part by his faith). The City's contemporaneous documents expressly state he was fired for attending "religious" leadership training. *See infra* 12-13. Surely, the City would not argue that a person fired for attending "black" leadership training because he attended an NAACP conference had failed to raise a fact issue as to race discrimination. Essentially, the City argues that the Summit was too religious to provide legitimate leadership training, yet not religious enough to merit Title VII protection. But the precise degree of religious content compared with secular content at the Summit is beside the point. The City's own admissions make clear that Chief Hittle was terminated for attending what the City *perceived* to be a religious event.[2] The Removal Notice expressly states that Chief Hittle was terminated for "us[ing] City time and resources to attend a religious leadership event" and "approv[ing] the attendance on City time of Deputy Chief Paul

[2] It was the religious nature of the Summit that Montes and other City officials objected to and used as grounds for terminating Chief Hittle. *See, e.g.*, 2-ER-269 ("Montes told Hittle that while she encouraged him to attend leadership training[,] she did not mean religious leadership training."). The City's brief argues that the stated purpose of the Summit was to "transform Christian leaders for the sake of the local church," and it was therefore too religious to use City funds for travel. Resp. Br. at 10 (citing 6-ER-1391, 1414).

Willette, Division Chief Matt Duaime, and Fire Marshal Jonathan Smith at the same religious leadership event." 2-ER-233. Chief Hittle was therefore fired because of his religion under Title VII.

III. Chief Hittle presented ample direct evidence of discrimination.

The City's failure to engage with Chief Hittle's strongest direct evidence of discrimination speaks volumes. It does not dispute that the City's own formal documents reflecting its investigation and termination process repeatedly attest that Chief Hittle was fired for attending a "religious event." 3-ER-508 (Notice of Investigation); 2-ER-233 (Removal Notice); 2-ER-249 (Largent Report); *see* App. Br. 10, 12-14. The City claims that the references to the Summit being religious are "irrelevant to the ultimate decision to discipline Hittle." Resp. Br. 53. But Montes's self-serving declaration claiming that the religious nature of the Summit was not the issue, 6-ER-1392, cannot retroactively change the City's improper motivation. The investigation-and-termination documents do not say that he was fired for attending "inappropriate leadership training" or disregarding instructions as to the type of training he should receive. They say he was fired for attending (and taking others to) a "religious event." That at least creates a fact issue defeating summary judgment.

Indeed, Chief Hittle is simply taking the City at its word that he was terminated for attending a religious event. Montes herself testified that the issue

with the Summit was that "Hittle had attended an activity which was religious based on City time and used a City vehicle." 2-ER-250. The Notice of Investigation listed Chief Hittle's "use of City time and City vehicle to attend religious event" and "potentially approving on-duty attendance at religious event by Fire Department managers" as key issues for investigation. 3-ER-508. The Notice claimed that "the purpose of the seminar was building leadership skills to promote the growth of one or more religious institutions," and that "employees—and certainly managers—may not be paid or utilize City equipment to participate in such [religious] activities." 3-ER-508.

The Removal Notice also demonstrates that the religious affiliation of the Summit was the problem. The first two items listed as conduct supporting Chief Hittle's termination are:

> 1) On August 5 and 6, 2010, you used City time and resources to attend a *religious* leadership event. This conduct violated City Manager Directive No. FIN-08 and Article C, Section 11 of the Fire Department Procedures Manual. 2) On August 5 and 6, 2010, you approved the attendance on City time of Deputy Chief Paul Willette, Division Chief Matt Duaime, and Fire Marshal Jonathan Smith at the same *religious* leadership event. This conduct violated City Manager Directive No. FIN-08 and Article C, Section 11 of the Fire Department Procedures Manual.

2-ER-233 (emphases added).

Chief Hittle's attendance at the Summit allegedly violated City policy because it was not for the benefit of the City. But the City's explanations for why the Summit

did not benefit the City revolve entirely around the religious affiliation of the Summit, even though the City had no policy against employees attending religious events while on duty.[3] 5-ER-1160–61. The Largent Report makes the importance of the Summit's religious affiliation abundantly clear:

- The Summit "was a religious event for [Chief Hittle's] own religious and personal gratification." 2-ER-296.
- "[S]urely when he arrived at the Summit location on August 5, 2010 and observed where it was being held this should have alerted Hittle that his participation and that of his managers would not be appropriate. This is because the Summit in Livermore was not held at a hotel or convention center or a secular location. The Summit was held at Cornerstone Fellowship of Livermore, a church." 2-ER-260.
- "[B]ased on all of the evidence, the Global Leadership Summit was a Christian faith based event, and it was promoted as such. Hittle, however, chose to focus on the term 'leadership' to downplay the clear religious message in order to justify his participation." 2-ER-270.
- "Hittle never disclosed to Montes material information, specifically that [the Summit] was sponsored by a church and that the conference was actually held at a church." 2-ER-260–61.
- Deis's "concerns about Hittle attending this event on City time were that 'you cannot use public funds to attend religious events; even if under the guise of leadership development." 2-ER-250.

[3] Contrary to the City's contentions, *see* Resp. Br. 57-59, Chief Hittle's opening brief cites the City's statements about its policies to show evidence of religious discrimination in their application. App. Br. 7. It is evidence of religious discrimination to point to baseless, "phantom" Establishment Clause concerns as an excuse to discriminate against religious public employees. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2411 (2022) (holding that government entity's concerns about phantom constitutional violations do not justify actual violations of an individual's First Amendment rights).

- Both Deis and Montes believed it was impermissible for Chief Hittle to attend "an activity which was religious based, on City time, and us[ing] a City vehicle." 2-ER-250.

During the investigation, Largent "questioned [Hittle] extensively about [his] Christianity and about the Leadership conference." 2-ER-221. She also inquired into the religious affiliation of the others who attended the Summit. 2-ER-261. But Largent never inquired into whether the Summit provided bona fide leadership training, 2-ER-221, and she disregarded Chief Hittle's explanations of the benefits of the training he received. *See* 2-ER-260–62. Notably absent from the Largent Report is any mention of Montes's alleged direction to Chief Hittle to obtain public sector leadership training or any indication that Largent investigated whether the Summit provided public sector leadership training. The Largent Report is particularly important evidence of the City's motives because Deis admitted that he terminated Chief Hittle based on the findings of the Largent Report. 7-ER-1481.

In all of these documents, the City specifically criticized the religious nature of the Summit. And none of these contemporaneous documents state that Chief Hittle was fired for attending leadership unrelated to public sector management. *See Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998) (holding that a fact issue existed as to pretext where the proffered explanation did "not appear in the contemporaneous memorandum prepared at the time of the" employment action). The City determined that the Summit was unsuitable leadership training entirely due

to its Christian affiliation, despite the fact that Chief Hittle provided ample evidence of the valuable and relevant leadership training the Summit provided. *See* SER-56–57. In reality, the City made up its mind as soon as it knew that the Summit had a religious affiliation. Chief Hittle's supervisors did not ever seriously look into whether the Summit provided legitimate leadership training. They just assumed that the Summit was only for Chief Hittle's personal benefit due to its religious affiliation.

On these facts, the City cannot support its claim that the religious affiliation of the Summit was not the deciding factor in its determination that attendance at the Summit violated City policy. Chief Hittle's attendance at the Summit was unquestionably a major reason for his termination, as the Notice of Investigation, Removal Notice, Largent Report, and Montes' deposition make clear. 2-ER-233; 2-ER-250; 3-ER-508. Because the religious affiliation of the Summit was the reason the City determined it was not competent training, religious discrimination was a motivating factor in Chief Hittle's termination. Chief Hittle is thus entitled to partial summary judgment on liability under a motivating factor theory. Because a reasonable factfinder could—and indeed must—determine that attending a religious rather than secular leadership conference was a cause of Chief Hittle's termination, summary judgment in favor of the City should be reversed and the case should be remanded for trial.

IV. Discriminatory comments provide additional direct evidence of discrimination.

Because the City cannot explain away its multiple documents that plainly based the termination decision on the perceived religious nature of the Summit, the City instead attempts to characterize Chief Hittle's other direct evidence—the comments made by Montes and Deis—as stray remarks. However, the direct evidence discrimination cases the City relies on are distinguishable. In both *Merrick v. Farmers Insurance Group*, 892 F.2d 1434, 1438 (9th Cir. 1990), and *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1996), the purported direct evidence consisted of only a single remark. And although a single discriminatory remark can be sufficient to defeat summary judgment, *Dominguez–Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1038 (9th Cir. 2005), the remarks in those cases did not evince discriminatory intent. In *Merrick*, the reference to the applicant being "a bright, intelligent, knowledgeable young man" is a classic example of a "stray remark" and did not suggest that the employer was engaging in age discrimination. 892 F.2d at 1438. In *Nidds*, it was unclear whether the comment even referred to a protected class. 113 F.3d at 919.

In *Nesbit v. Pepsico, Inc.*, 994 F.2d 703 (9th Cir. 1993), the comment "[w]e don't necessarily like grey hair" was uttered in an ambivalent manner and was not tied directly to the plaintiff's termination. *Id.* at 705. It was therefore just circumstantial evidence of discriminatory animus. *Id.* The other statement, "We

don't want unpromotable fifty-year olds around," was very general and "did not relate in any way, directly or indirectly, to the terminations" in question. *Id.* In *Vasquez v. County of Los Angeles*, 349 F.3d 634 (9th Cir. 2003), the discriminatory statements were not direct evidence of discrimination because they were not made by the decisionmaker. *Id.* at 640.

The City also relies on two out-of-circuit religious discrimination cases that are readily distinguishable. In *Outlaw v. Regis Corp.*, 525 F. App'x 501 (7th Cir. 2013), the only comment referencing religion came *after* the plaintiff was terminated and was not connected to the termination decision. *Id.* at 503. And because the reference was positive—to Christians "want[ing] to do the right thing"—it also did not suggest discriminatory animus. *Id.* In *Evance v. Trumann Health Services, LLC*, 719 F.3d 673 (8th Cir. 2013), the only evidence of religious discrimination was the plaintiff's "uncorroborated speculation." *Id.* at 677.

The facts here differ from the above cases because the discriminatory statements were made by the decisionmakers, Montes and Deis. They repeated the "Christian coalition" and "church clique" criticisms multiple times, using a tone of voice and context that indicated animus. *See* App. Br. 29-30; 2-ER-211, 215, 220–21; 5-ER-1140; 6-ER-1396–97. The Supreme Court has recognized that tone of voice and context are relevant to determining whether the comment is evidence of animus. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) ("The speaker's

meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage.").

Moreover, at least one use of each comment was closely connected to a stated reason for Chief Hittle's termination—his choice of leadership training. Montes stated that she directed Chief Hittle not to obtain leadership training from a member of the "church clique." 5-ER-1140. And shortly after Chief Hittle attended the Summit, Montes chided him for being part of a "Christian Coalition." 2-ER-215.

Finally, in stark contrast to the cases on which the City relies, the comments here were accompanied by other direct evidence of discrimination, namely, the Notice of Investigation, Largent Report, and Removal Notice, all of which refer to the religious nature of the Summit and state in no uncertain terms that Chief Hittle was terminated for attending a religious event. *See supra* Part III.

The direct evidence here is more than sufficient to prove that religious discrimination was a motivating factor in Chief Hittle's termination, and Chief Hittle is entitled to partial summary judgment on his Title VII discrimination claim under a motivating factor analysis. But at minimum, Chief Hittle is entitled to a reversal of summary judgment on his discrimination claims, because this evidence far exceeds the "very little evidence of discriminatory motive" necessary to raise a genuine issue of fact. *Lindahl*, 930 F.2d at 1438.

V. Chief Hittle was not required to discount each of the City's proffered reasons for his termination to defeat summary judgment.

Chief Hittle cited evidence demonstrating that the bulk of the City's stated reasons for his termination were either unlawfully discriminatory or baseless and pretextual. App. Br. 38-45. He does not need to discount each and every non-religious reason proffered by the City to either prevail on summary judgment or defeat the City's motion for summary judgment—particularly in light of the City's continually shifting rationales.

Title VII plainly does not require a plaintiff to discount every proffered non-discriminatory reason under either but-for causation or motivating factor theories. For but-for causation, plaintiffs need only show that religion was a cause of the termination, not necessarily the sole cause. "So long as the plaintiff's [religion] was one but-for cause of that decision, that is enough to trigger the law." *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1739 (2020). For motivating factor claims, the statute states that "an unlawful employment practice is established when the complaining party demonstrates that . . . religion, . . . was a motivating factor for any employment practice, *even though other factors also motivated the practice*." 42 U.S.C. § 2000e-2(m) (emphasis added); *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 343 (2013) (holding liability can exist under a motivating

factor theory "even if the employer also had other, lawful motives that were causative in the employer's decision").[4]

Ignoring this statutory text, the City attempts to impose a new burden to prove discrimination, misreading *McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th Cir. 2004), to say that in all cases, the plaintiff must counter all of the employer's proffered explanations for the adverse employment action. *See* Resp. Br. 65. *McGinest* does not go that far. The City brackets the quotation from *McGinest* to suggest that it created a broad rule. *See id.* There, the plaintiff did not have direct evidence of discrimination related to his failure to promote claim—the evidence was all circumstantial. 360 F.3d at 1123-24. In response to this circumstantial evidence, the employer gave only one reason for failing to promote the plaintiff, which was that there was a hiring freeze in place. *Id.* at 1111. The court stated that "McGinest must produce some evidence suggesting that GTE's failure to promote him was due in part or whole to discriminatory intent, and so must counter GTE's explanation that a hiring freeze accounted for its failure to promote him." *Id.* at 1123. There was no broad statement that when a host of different reasons are proffered (including

[4] Contrary to the City's contentions, *see* Resp. Br. 46 n.16, Chief Hittle sufficiently argued motivating factor before the trial court. Chief Hittle alleged in his Second Amended Complaint that his attendance at the Summit was a "motivating factor[] for the adverse employment actions taken against [him]." 7-ER-1686. Chief Hittle moved for partial summary judgment under a motivating factor theory and 42 U.S.C. § 2000e-2(m) is mentioned in his motion for summary judgment. *See* FER-040–43.

new reasons given for the first time on appeal, more than a decade after the termination) each reason must be disproved specifically and in detail in order to establish discriminatory intent.

In fact, the other case relied upon by the City, *Curley v. City of North Las Vegas*, 772 F.3d 629 (9th Cir. 2014), makes clear that a plaintiff is not required to "discredit[] all of the employer's stated reasons" when "the employer offers a plethora of reasons, and the plaintiff raises substantial doubt about a number of them." *Id.* at 633 n.3 (quoting *Jaramillo v. Colo. Jud. Dep't*, 427 F.3d 1303, 1310 (10th Cir. 2005)). That is also true when, as here, "the employer has changed its explanation under circumstances that suggest dishonesty or bad faith." *Id.* (citing *Jaramillo*, 427 F.3d at 1310).

In *McGinest*, the plaintiff met his burden to defeat summary judgment "[b]ecause a number of factors cast doubt upon GTE's proffered explanation for its failure to promote McGinest, while providing support for his contention regarding racial discrimination." 360 F.3d at 1124. Therefore, even in the standard Title VII case that lacks direct evidence, "[p]roof that the defendant's explanation is unworthy of credence is [a] form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* at 1123-24 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000)).

Here, Chief Hittle's case is even stronger because he presents direct evidence, meaning that he did not also need to establish discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 743 (9th Cir. 2004) (quoting *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1196 (9th Cir. 2003)). Chief Hittle's direct and circumstantial evidence, standing alone, are sufficient to defeat summary judgment.

VI. Although not necessary to defeat summary judgment, Chief Hittle provided evidence of pretext.

The City first attempts to discount Chief Hittle's evidence of pretext by claiming it is based only on his subjective beliefs. In contrast to *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996), and *Buhl v. Abbott Laboratories*, 817 F. App'x 408, 411 (9th Cir. 2020), Chief Hittle did not solely provide his subjective beliefs about his performance. He provided specific instances in which Largent disregarded the facts to accuse him of wrongdoing. *See* App. Br. 41-44.

Chief Hittle cited the temporal proximity between the newspaper article criticizing Chief Hittle's attendance at the Summit and his placement on leave just five days later. The City suggests that the actual cause was Chief Hittle's proposal to avoid laying off firefighters. Resp. Br. 63. But the newspaper article focuses entirely on Chief Hittle's attendance at a "Christian leadership conference" and whether it was "appropriate" for taxpayers to pay for his time. 5-ER-996. It is unlikely that anything else prompted Chief Hittle's placement on leave, especially

because Largent investigated Chief Hittle's proposal to avoid layoffs and determined that "standing alone, this incident probably would not rise to a level of concern." 3-ER-338.

Moreover, the City's changing story on appeal provides additional evidence of pretext. The City's new explanation for Chief Hittle's termination, that Montes directed him to obtain public sector leadership training, indicates that the City is "dissembling to cover up a discriminatory purpose." *Reeves*, 530 U.S. at 147. Nowhere in its summary judgment briefing did the City mention Montes's alleged direction to obtain public sector leadership training. *See, e.g.*, FER-007, 14–15. Nor was this fact mentioned in the Notice of Investigation, Largent Report, or Removal Notice. By contrast, the City has emphasized the religious nature of the Summit throughout the investigation, termination, and district court litigation. *See supra* Part III.

The same goes for the discussion of the Accountability Improvement Project. The City attempts to include that as an additional reason leading to the termination decision. Resp. Br. 5. But the Accountability Improvement Project occurred more than three years before Chief Hittle's termination and was not part of the Largent Report or Removal Notice. *See* SER-189; 2-ER-232–35.

As for the other purported rationales for terminating Chief Hittle, record evidence shows that they are also pretextual:

- *Alleged lack of cooperation during City's financial crisis*: The Largent Report found this claim was "Not Sustained" and thus not a basis for his termination, 2-ER-248, so the only reason for the City to bring it up now is pretextual.

- *Advocacy of union interests*: This allegation is vague and unsubstantiated. The City cites only the actions of others and cannot point to any action by Chief Hittle that showed a policy violation or conflict of interest. 2-ER-157–58, 160–61.

- *Apparent endorsement of George Liepart's business*: Liepart and Chief Hittle both testified that Chief Hittle did not know about the endorsement and Chief Hittle asked Liepart to take it down once he found out. 2-ER-277–78; 5-ER-1134. Nor could the City point to any policy violation regarding the endorsement. 2-ER-178–79.

- *Co-ownership of a vacation home*: The city attorney told Chief Hittle he did not need to disclose this, 2-ER-80–87, and Montes admitted that she had known about it for "awhile" and raised no concerns. 2-ER-143; 5-ER-1141.

- *Lack of discipline for other employees' actions*: The appropriate level of discipline for Macedo and Duaime was not Chief Hittle's decision to make, 2-ER-139–140, 146–47; 5-ER-1105–06, and his alleged failure to discipline them was not listed in the Removal Notice. 2-ER-233–34.

Refuting these spurious allegations, numerous people who worked for the City or were otherwise involved in the discipline of Fire Department employees testified about Chief Hittle's excellent leadership, lack of favoritism, care for the community, and consistency with employee discipline. *See* 5-ER-1059 (Jonathan Smith: "I don't think we ever had a better chief. Chief Hittle was a top leader. He had a phenomenal ability to bring people together, to work as a team, and to develop a vision . . . . He was inclusive. He did what was right for the citizens and the fire service."); 2-ER-

87 (Michael Rishwain, Assistant City Attorney: "I observed [Chief Hittle] over the years, and I thought he was doing a good job."); FER-091–94 (Timothy Talbot, attorney who handled Fire Department disciplinary proceedings for Union members: "[Chief Hittle] was somewhat more strict with his enforcement of the rules and issuance of discipline than prior fire chiefs. . . . [I] didn't see Plaintiff Hittle as being soft on anyone, doing anyone any favors, or playing favorites."); FER-086, 088 (Dionysia Smith, Deputy Director of Human Resources: "I never saw Hittle being soft of anyone, doing anyone any favors, or playing favorites. If someone did something wrong, they were investigated and written up for what they had done."); FER-082, 84 (Mario McArn, Fire Department Division Chief for Training: "It has been my experience and observation that Chief Hittle displayed care for the community and led the organization in a fair, firm and consistent manner. He is highly respected by the majority of [Fire Department] members.").

Ignoring all this, the City's shifting explanations for Chief Hittle's termination raise questions as to pretext and create a genuine issue of fact as to the City's real motivation. *Washington v. Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1993) ("[F]undamentally different justifications for an employer's action would give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason"); *Payne v. Norwest Corp.*, 113 F.3d 1079, 1080 (9th Cir. 1997) ("A rational trier of fact could find that these

varying reasons show that the stated reason was pretextual, for one who tells the truth need not recite different versions of the supposedly same event."). Any weighing of evidence to determine whether the employer's shifting explanations are ultimately acceptable "is for a jury, not a judge." *Id.*

This evidence demonstrates that the City proffered pretextual reasons for Chief Hittle's termination, and, together with the other direct and circumstantial evidence provided, creates a genuine issue of fact as to the City's motives.

CONCLUSION

For the foregoing reasons, summary judgment in favor of the City should be reversed as to Chief Hittle's claims for religious discrimination and failure to prevent discrimination. The Court should grant partial summary judgment to Chief Hittle under a motivating-factor theory and allow his claims to proceed to trial under a but-for theory.

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CERTIFICATE OF COMPLIANCE

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FOR THE NINTH CIRCUIT

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On this 21st day of December, 2022 a true and correct copy of the foregoing was filed with the electronic case filing (ECF) system of the U.S. Court of Appeals for the Ninth Circuit, which currently provides electronic service on the counsel of record.

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