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 of Stockton, California ("City") ordered Fire Chief Ronald Hittle to attend leadership training and then fired him because he attended a religious, rather than secular, leadership conference while on the clock. It is undisputed that the City lists his attendance at this conference as a reason for his termination. Therefore, because religion, which is defined to include all aspects of religious belief and practice, was a motivating factor in his termination, Chief Hittle is entitled to summary judgment on his discrimination claims under Title VII.

In the alternative, Chief Hittle presented sufficient evidence to survive the City's motion for summary judgment and deserves to present his Title VII and California Fair Employment and Housing Act claims to a jury. "[W]hen a court too readily grants summary judgment, it runs the risk of providing a protective shield for discriminatory behavior that our society has determined must be extirpated." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004). The district court did just that. Chief Hittle presented ample direct and circumstantial evidence that religious discrimination was a cause of his termination. Both decisionmakers in Chief Hittle's termination made discriminatory comments about Chief Hittle's religion, claiming he was part of a "Christian Coalition" or "church clique." Attendance at the so-called "religious event" was specifically mentioned in the notice of termination issued by the City, and the City's investigator determined it

was one of Chief Hittle's most serious acts of alleged misconduct. Chief Hittle also presented evidence that undermined the City's other stated reasons for his termination, indicating that those reasons were invented to cover up the City's discrimination.

Despite this evidence, the district court ignored the numerous statements from this Court that a plaintiff bears a very low burden on summary judgment to create a triable issue as to discrimination and instead granted summary judgment in favor of the City on all claims. Discrimination claims are inherently fact-bound. This Court "zealously guard[s] an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses." *Id.* Chief Hittle presented sufficient evidence to merit partial summary judgment on his discrimination claims, or, in the alternative, he deserves the opportunity to fully present his claims at trial.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. On March 2, 2022, the district court entered a final order granting the City's motion for summary judgment and denying Chief Hittle's motion for summary judgment, 1-ER-3–24, and entered judgment in favor of the City. 1-ER-2. Chief Hittle filed a notice of appeal on March 31, 2022. 7-ER-1689–90. The appeal is timely under 28

U.S.C. § 2107 and Fed. R. App. P. 4(a). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether Chief Hittle is entitled to partial summary judgment because it is undisputed that his termination was motivated at least in part by his attendance at a religious conference.

2. Whether Chief Hittle presented direct evidence of discrimination, which is alone sufficient to defeat summary judgment on his discrimination claims.

3. Whether Chief Hittle presented sufficient circumstantial evidence to create a triable issue as to whether the City possessed discriminatory intent.

4. Whether Chief Hittle has created an issue of fact as to discrimination such that summary judgment on his failure to prevent discrimination claim should be reversed.

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)(1)

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(m)

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e(j)

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Cal. Gov't Code § 12940(a)

It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person, to refuse to hire or

employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

STATEMENT OF THE CASE

I. Background

Ronald Hittle served in the City of Stockton's fire department ("Fire Department") for 24 years, beginning in 1987. 2-ER-210. He is also a devout Christian. 2-ER-210. Chief Hittle was promoted to Battalion Chief in 2001 and became Fire Chief in 2005. 2-ER-210. Defendant Laurie Montes became Deputy City Manager in 2008. 1-ER-4. Chief Hittle reported directly to the former City Manager until his retirement in 2009, when Chief Hittle began reporting to Montes. 2-ER-210.

In May 2010, the City received an unsubstantiated, anonymous letter claiming to be from a Fire Department employee that called for Chief Hittle's termination and attacked him as a "religious fanatic who should not be allowed to continue as the Fire Chief of Stockton." 5-ER-1002. Roughly one month later, Montes accused Chief Hittle of being part of a "Christian Coalition" in a pejorative tone, raising her voice. 2-ER-211, 215. Montes told Chief Hittle that "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. She also interrogated Chief Hittle about his off-duty religious activities. 2-ER-212.

Bob Deis became City Manager on July 1, 2010. 1-ER-4. At Chief Hittle's and Deis's first meeting, Chief Hittle expressed to Deis that "honesty and integrity are extremely important" to him, and that he is a Christian. 2-ER-212. Deis responded with a "blank stare" and "long pause" that made Chief Hittle very uncomfortable, and Chief Hittle felt Deis's "coldness and rejection" because Chief Hittle had expressed that he is a Christian. 2-ER-212. Deis gave Chief Hittle "the distinct impression that [Deis's] mind was already made up about [Chief Hittle]." 2-ER-212.

Around that same time, Montes told Chief Hittle that he should obtain leadership training. 2-ER-212. There is no evidence that a City policy against employees attending religious events on duty existed prior to litigation, or that Montes told Chief Hittle that leadership training with a religious affiliation was off limits. Indeed, the City had previously approved employees attending religious events while on duty. For example, the City permitted employees to attend the Mayor's prayer breakfast because it provided networking opportunities. 7-ER-1463; 6-ER-1397. The City also allowed employees to attend the annual Blue Mass event put on by the St. Mary's School "if it does not interfere with their duties." 6-ER-1397.

While Montes later claimed that "[t]he City is not permitted to further religious activities," 6-ER-1386, and the Notice of Investigation claimed that "[t]he City is legally prohibited from contributing to or participating in activities in furtherance of religion," 3-ER-508, the City has produced no such policy during this litigation, nor has it alleged the existence of such a policy. Several City employees testified that there was no City policy against attending religious programs. 5-ER-1060, 1161.

After Montes directed him to obtain leadership training, Chief Hittle searched for leadership training programs, but found no good options as most events were out of state and came with a price tag the Fire Department could not afford due to budget cuts. 2-ER-212-13. During this search, Hittle learned that George Liepart, a former pastor whom Chief Hittle had met while serving on a church school board prior to becoming Chief, had four tickets to the Global Leadership Summit ("Summit"). 2-ER-213.

The Summit is an internationally renowned program that assembles leaders from the business world, academia, and the religious community. 4-ER-679–85, 696–98; 5-ER-1050–1054. It has featured many high-profile speakers, including former Presidents Bill Clinton and Jimmy Carter, former Secretary of State Colin Powell, Jack Welch (the former CEO of General Electric), Carly Fiorina (the former CEO of Hewlett-Packard), and the musician Bono. 2-ER-258. Fast Company, the

business magazine, referred to the Summit as "learning from the business world's best." 4-ER-696. The Summit is broadcast to sites around the world, making attendance affordable for the more than 120,000 people who attend each year. 2-ER-213; 5-ER-1052. Chief Hittle and Deputy Chief Paul Willette, Division Chief Matt Duaime, and Fire Marshal Jonathan Smith attended the Summit on August 5 and 6, 2010. 7-ER-1676. They paid for the tickets with their own money and did not use City funds because "we were in a budget crisis." 5-ER-1080; 2-ER-163–64. As head of the Fire Department, Chief Hittle was not required to seek approval to attend the conference, but he logged the conference on his work calendar and told Montes he was going to a leadership seminar, and she raised no objections. 2-ER-256, 266; 7-ER-1645–46.

All four fire officials carpooled to the Summit using Chief Hittle's car, which the City directed him to drive at all times so he could respond to emergency incidents. 2-ER-266; 2-ER-223; 5-ER-1080–81 (Chief Hittle testified that he "needed to take [his] code 3 vehicle there so [he] could respond back"). During the conference, Chief Hittle and his colleagues stayed in communication with the Fire Department by answering phone calls and emails. 2-ER-255, 264 (Montes told investigator that "Hittle's availability to the City while attending the conference was not a concern by the City"). Chief Hittle also reported to work as soon as the conference finished each day at 4:00 pm. 2-ER-255. Montes's statement in the

investigation report made clear that "[t]he City was not concerned that he was away from the Department for two days," but only that he "attended an activity which was religious." 2-ER-249–50. Smith, Duaime, and Chief Hittle all testified about tangible benefits of the practical leadership training they received. 2-ER-169–70; 5-ER-1059–60 (Smith learned "how to motivate your team and get them to follow your leadership . . . . [P]eople would follow your leadership when they knew you were committed to their success"); 2-ER-171; 5-ER-1158–61 (Duaime initiated monthly team meetings as a result of what he learned at the Summit); 2-ER-170–71 (Chief Hittle learned about "development of your staff in utilizing their ideas and making them part of your team;" "I also learned that as leaders we must be more disciplined in our daily routine" and "continue to provide leadership, vision casting and mentorship to all our members").

The City received a second anonymous letter on September 3, 2010 informing it that Chief Hittle and three other Fire Department employees had attended "a religious function on city time" using "a city vehicle." 2-ER-214. The letter was filled with false statements, including that "no one in the fire department was advised" about the conference and that this was a "gross misuse of city finances," even though the employees paid for the conference themselves. 6-ER-1411–12. Despite the letter's inaccuracies and repeated pejorative statements about Chief Hittle, Deis and Montes did not question its credibility. Instead, they questioned

Chief Hittle about the religious nature of the leadership training he attended. 7-ER-1479-50 (Deis testified that "[a]fter I learned the details about the Leadership Summit" from the anonymous complaint, he asked Montes to investigate and they concluded that Hittle's attendance was improper). Deis told Chief Hittle that it was "not acceptable" for him to "use public funds to attend religious events; even if under the guise of leadership development." 2-ER-250. In October 2010, Montes again raised the subject of the "Christian Coalition" within the fire department to Chief Hittle. 2-ER-211, 215. It was clear that Montes believed Chief Hittle's involvement in the so-called "Christian Coalition" was "wrong and distasteful." 2-ER-211, 215. Deis also reiterated "his understanding that there is a 'clique' in the Fire Department that is associated with religion and that members of this 'clique' attended the Global Leadership Summit." 2-ER-250.

On November 1, 2010, the City issued a Notice of Investigation to Chief Hittle identifying five issues: (1) the effectiveness of Chief Hittle's supervision and leadership of the Fire Department, his judgment as a department head, his contributions to the management team, and the extent to which he has maintained proper discipline and order within the Department; (2) use of City time and a City vehicle to attend a religious event, failure to properly report time off, potentially approving on-duty attendance at a religious event by Fire Department managers, potential favoritism; (3) apparent endorsement of a private consultant's business; (4)

compliance with management directions and capability in respect to budget development; and (5) potentially conflicting loyalties. 3-ER-505–09.

Chief Hittle was told he could avoid investigation of the allegations if he accepted a demotion to Battalion Chief. 2-ER-217. When Chief Hittle refused to accept the demotion, Deis became angry and threatened to fire Chief Hittle, drag his name through the mud, and ruin his reputation and that of his family if he did not accept the demotion. 2-ER-218. Deis told Chief Hittle that if he did not accept the demotion, he would never work in fire service again, and although he would "probably win a long, expensive legal battle," his reputation would be irreparably harmed. 2-ER-218.

The City subsequently retained Trudy Largent to investigate Chief Hittle's conduct. 2-ER-132; 6-ER-1382–85. In the investigation, Largent made no attempt to contact the Summit or investigate whether the Summit provided high quality leadership training that would satisfy Montes's directive to Chief Hittle to pursue leadership training. 2-ER-134; 2-ER-221; 2-ER-257-60. Largent conducted interviews as part of the investigation, but she did not contact any witnesses Chief Hittle identified as people who could corroborate his account of events. 2-ER-221. During Largent's interview of Montes, Montes claimed that Chief Hittle had requested to receive training from George Liepart, but Montes refused because she did not want Chief Hittle to attend a leadership training conducted by someone in

the "church clique."[1] 1-ER-14. Montes also told the investigator that Chief Hittle's positive feedback about the Summit "shows very poor judgment" and that "he should see that there is a perception issue." 6-ER-1429. The investigator interrogated Chief Hittle about his religious activities and relationships, asking him about "a religious covenant in the Department" or a "religious clique" and accusing him of "protect[ing] those individuals who were part of your church or your faith." 2-ER-294.

On March 25, 2011, while the investigation was ongoing, a local newspaper published an article about Chief Hittle's attendance at the Summit, citing its religious nature and questioning whether it was proper for taxpayers to pay for the fire officials' time while at the Summit. 5-ER-996. Chief Hittle was placed on administrative leave just five days later. 2-ER-221.

Largent submitted her investigation report ("Largent Report") on August 5, 2011. 1-ER-4–5; 2-ER-237. Largent determined that Chief Hittle's "most serious acts of misconduct" were: (1) "Inappropriate use of City time and a City vehicle to attend a religious event"; (2) "Favoritism by Chief Hittle regarding certain employees of the department in approving their inappropriate attendance on City

[1] Contrary to Montes's assertion, Hittle did not ask to receive training from Liepart. 2-ER-212. And it is undisputed that Hittle did not receive leadership training from Liepart; he instead attended the Summit with tickets purchased with his own money because of the city's budget crisis. 2-ER167; 5-ER-1080.

time of a religious event"; (3) "Conflict of interest based on an undisclosed personal relationship and financial interest by Chief Hittle regarding consultant George Liepart"; and (4) "Failure by Chief Hittle to disclose to the City Manager his financial relationship with the President of the Firefighters Local 456." 2-ER-248. Largent's report illustrated that the religious nature of the Summit was key to her conclusions, finding that "it is clear that the primary mission of the Global Leadership Summit was to specifically provide for the benefit of those of a particular religion, Christianity." 2-ER-259. She even concluded that when Chief Hittle "arrived at the Summit location . . . and observed where it was being held [a church] this should have alerted Hittle that his participation and that of his managers would not be appropriate." 2-ER-260. Thus, the investigator's first two most serious allegations—and reasons for recommending that Chief Hittle lose his job—related directly to his attendance at a "religious" event.

The City issued Chief Hittle a Notice of Intent to Remove from City Service ("Removal Notice") on August 24, 2011. 2-ER-232. The Removal Notice listed ten charges of misconduct as the basis for Chief Hittle's termination. The first two charges were that Chief Hittle "used City time and resources to attend a religious leadership event" and that he "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." 2-ER-233. The Removal Notice also included

several issues that were not in the Notice of Investigation, including (1) the failure to disclose a "personal relationship" with George Liepart or the fact that Chief Hittle and Liepart "were engaged in a project to build a church school" and the failure to investigate complaints that Liepart was soliciting donations from Fire Department employees; (2) a failure to investigate improper reporting of compensatory time by Matt Duaime; and (3) telling Internal Affairs investigator Mark Lujan that firefighters were upset with him for publicly displaying a "Yes on Measure H" sign. 2-ER-232–35; 2-ER-222.

Chief Hittle had no opportunity to defend himself during these proceedings. He was given a sham "hearing" to which his attorney objected on the record, and in which he was not permitted to call witnesses, nor was he given the opportunity to obtain evidence to refute the charges. 2-ER-221–22. The City sent Chief Hittle a formal notice of his termination on September 30, 2011, and his termination became effective as of October 3, 2011. 1-ER-6.

II. Procedural History

After his termination by the City, Chief Hittle filed a lawsuit alleging that, among other things, the City fired him on the basis of his religion in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2(a)(1), and California's Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code

§ 12940(a), and that the City had failed to prevent discrimination in violation of FEHA, Cal. Gov't Code § 12940(k).[2] 1-ER-6.

The parties filed cross-motions for summary judgment. 6-ER-1439–41; 2-ER121–23. The district court granted the City's motion for summary judgment as to all claims, denied Chief Hittle's motion for summary judgment, and entered judgment in favor of the City. 1-ER-24. As to the disparate treatment theory of Chief Hittle's discrimination claims under Title VII and FEHA, the court held that Chief Hittle's direct evidence of discrimination was insufficient to defeat summary judgment standing alone, so it applied the *McDonnell Douglas* framework. 1-ER-15. The district court held that Chief Hittle had not made out a prima facie case of discrimination because it believed that Montes's comments about a "Christian Coalition" and "church clique" were merely "stray remarks" and not "egregious and bigoted insult[s] . . . that constitute[] evidence of discriminatory animus." 1-ER-16 (quoting *Chuang v. Univ. of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1128 (9th Cir. 2000) (alterations in original)). It also concluded that termination for attending what the City considered to be a "religious event" was insufficient "to

[2] In his Second Amended Complaint, Hittle also brought claims for retaliation in violation of Title VII, 42 U.S.C. § 2000e-3(a) and FEHA, Cal. Gov't Code § 12945(h) against the City of Stockton and violation of his constitutional rights, pursuant to 42 U.S.C. § 1983, against Deis and Montes. 1-ER-6. Hittle does not appeal the dismissal of these claims, nor does he urge the failure to accommodate theory of his discrimination claims on appeal.

create a triable issue of material fact that Defendants held discriminatory animus toward [Chief Hittle's] specific faith." 1-ER-16. Finally, the district court stated that there was no evidence that Deis's reaction during an argument with Chief Hittle related to the investigation "was motivated by discriminatory animus." 1-ER-16.

The court also held that, even assuming Chief Hittle established a prima facie case of discrimination, the City "show[ed] multiple legitimate, nondiscriminatory reasons for Plaintiff's termination and Plaintiff has not shown sufficient evidence of pretext to survive summary judgment." 1-ER-16. It cited the City's Removal Notice, which stated the City was removing Chief Hittle "because of incompatibility of management styles, change in administration, and [Plaintiff's] apparent inability and/or unwillingness to implement City goals and policies, as indicated by the findings in the confidential investigative report." 1-ER-18. It also cited the fact that the Removal Notice "summarized at least ten instances of Plaintiff's misconduct 'that support[ed] the City's conclusion.'" 1-ER-18. The district court noted that the City offered Chief Hittle the opportunity to respond to the removal allegations at a hearing, but he "failed to refute any allegations from the investigation report." 1-ER-18.

Addressing Chief Hittle's evidence of pretext, the court held Chief Hittle's arguments as to pretext were "largely conclusory statements with little legal analysis or support." 1-ER-18. It stated that Chief Hittle had not presented evidence that

Montes knew of his co-ownership of a vacation property with his subordinates, which was included among the acts that the City claimed revealed Chief Hittle's potentially conflicting loyalties, and that Chief Hittle had not told investigator Largent about this co-ownership. 1-ER-20. The district court also held that Chief Hittle's contention that he was disciplined for off-duty union conduct that he had little control over was not evidence of pretext because "the notice of removal clearly cites on-duty union activities." 1-ER-20. The district court concluded that none of Chief Hittle's assertions were evidence from which a reasonable factfinder could infer Defendants' proffered explanations were pretextual. 1-ER-20.

SUMMARY OF ARGUMENT

Chief Hittle is entitled to partial summary judgment on his Title VII discrimination claim because he was fired for attending a religious, rather than secular, leadership conference. The Removal Notice explicitly listed his attendance at a "religious leadership event" and his approval of others to attend the "religious leadership event" as the first two reasons for his termination. This conclusively establishes that Chief Hittle's religion was at least a "motivating factor" in his termination.

Even if this Court does not grant summary judgment in favor of Chief Hittle on his Title VII claim, he clearly exceeded his minimal burden to defeat summary judgment on both his Title VII and FEHA claims. The plaintiff's burden to defeat

summary judgment on a discrimination claim is low. Where the plaintiff presents direct evidence of discrimination—even a single statement that reflects illicit animus—that alone is sufficient to create a triable issue as to the employer's motivation for termination. Chief Hittle presented direct evidence in the form of repeated discriminatory statements made by the decisionmakers in his termination, Deis and Montes. Montes pejoratively referred to a "Christian Coalition," and Montes and Deis both accused Chief Hittle of being part of a "church clique" in the fire department. Chief Hittle presented further direct evidence of discrimination in the form of the Largent Report and Removal Notice, both of which explicitly referenced Chief Hittle's attendance at a "religious" leadership conference while on duty as an act of misconduct. The Largent Report even called attendance at the "religious" conference one of Chief Hittle's "most serious acts of misconduct." Any one of these pieces of direct evidence standing alone is sufficient to meet Chief Hittle's burden to defeat summary judgment. And taken together, this evidence shows that a reasonable factfinder could determine that Chief Hittle was terminated because of his religion.

Chief Hittle also presented circumstantial evidence of discrimination in the form of various incidents that related to the investigation, including the temporal proximity between an article about Chief Hittle's attendance at the Summit and the City's decision to place Chief Hittle on leave, Deis's comment that Chief Hittle

would "probably win a long, expensive legal battle" related to his termination, and the fact that the City terminated Chief Hittle for attending the Summit instead of allowing him to charge his time to personal leave, as it did with two other employees who attended the Summit with Chief Hittle. Additionally, Chief Hittle offered evidence that the City's other stated reasons for his termination are unworthy of credence. This circumstantial evidence provides another basis on which this Court may reverse the summary judgment in favor of the City. Finally, this Court should also reverse on the failure to prevent discrimination claim because the district court's ruling on that claim was premised on its discrimination ruling.

STANDARD OF REVIEW

This Court reviews a district court's ruling on summary judgment de novo. *Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008). The Court "determine[s], viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011).

ARGUMENT

I. This Court should grant partial summary judgment to Chief Hittle on his Title VII discrimination claim because religion was a motivating factor in his termination.

The City ordered Chief Hittle to attend leadership training and then fired him because he attended a religious, rather than a secular, leadership conference while

on the clock. It is undisputed that the Notice of Investigation lists his attendance at a "religious event" as one of the issues to be investigated. 3-ER-508; 6-ER-1372–73, 1378. It is undisputed that the City listed his attendance at a "religious leadership event" in his termination letter. 2-ER-233. The Removal Notice lists Chief Hittle's attendance at a "religious leadership event" and his approval of others to attend the "religious leadership event" as the first and second reasons for his termination. 2-ER-233 The undisputed facts show that religion was at least a motivating factor in, if not a but-for cause of, his termination. Therefore, Chief Hittle is entitled to partial summary judgment on liability under 42 U.S.C. § 2000e-2(m).[3]

Under Title VII, it is "an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). Religion is broadly defined to include "all aspects of religious observance and practice, as well as belief." *Id.* § 2000e(j). "[R]eligious practice is one of the protected characteristics that cannot be accorded disparate treatment." *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S 768, 774-75 (2015). California's FEHA similarly provides that "it is an unlawful employment practice . . . [f]or an employer, because of the . . . religious creed . . . of any person . . . to

[3] The case should be remanded for trial on damages as well as on the issue of whether religion was also a but-for cause of the termination. These questions involve disputed issues of material fact appropriate for a jury, as explained in the next sections of the brief.

discharge the person from employment." Cal. Gov't Code § 12940(a). As the Supreme Court makes clear, Title VII demands more than "mere neutrality with regard to religious practices" but requires "favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual . . . because of such individual's 'religious observance and practice.'" *Abercrombie*, 575 U.S. at 775.

In a disparate treatment case, a Title VII plaintiff may prove liability either by establishing that discrimination was a but-for cause of the adverse employment action or that discrimination was a "motivating factor" in the employment decision, even though other factors also motivated the decision. 42 U.S.C. § 2000e-2(m). Both standards recognize that discrimination need not be the sole cause of the adverse employment action.

Under the but-for standard, "[s]o 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., Georgia*, 140 S. Ct. 1731, 1739 (2020) (emphasis added). This is because "events [can] have multiple but-for causes. . . . When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision." *Id.*

The motivating-factor standard is even "more forgiving," permitting an employer to be held liable "even if [religion] *wasn't* a but-for cause of the employer's challenged decision." *Id.* at 1740. In other words, Title VII relaxes the but-for causation standard "to prohibit even making a protected characteristic a 'motivating factor' in an employment decision." *Abercrombie*, 575 U.S. at 772. Therefore, employers are liable under 42 U.S.C. § 2000e-2(m) if a protected characteristic, such as religion, was a motivating factor in the employment action, "even if the employer also had other, lawful motives that were causative in the employer's decision." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013).

Here, the City's own undisputed documents and admissions make clear that religion was, at the very least, a motivating factor in Chief Hittle's termination. The City's Notice of Investigation listed Chief Hittle's attendance at a "religious event" as one of four reasons for the investigation. 3-ER-508. The Largent Report lists his attendance at the "religious event" on City time using a City vehicle and approving others to attend as two of the four "most serious acts of misconduct." 2-ER-248. Montes's statement in the Largent Report reads, "[t]he City was not concerned that he was away from the Department for two days," but only that he "attended an activity which was religious." 2-ER-248–49. Finally, the first two charges that the City listed in its Removal Notice were that he "attend[ed] a religious leadership

event" and that he approved the attendance of others. 2-ER-233. Even if this Court looks only at the City's undisputed documents, it is clear that attending a religious, rather than a secular, leadership conference was at least a motivating factor in his termination.

Because religion was a motivating factor in his termination, Chief Hittle is entitled to partial summary judgment on his Title VII discrimination claim under 42 U.S.C. § 2000e-2(m).[4]

II. This Court should reverse because Chief Hittle's religious discrimination claims should proceed to trial.

Even if this Court does not grant summary judgment in favor of Chief Hittle on his Title VII discrimination claim, Chief Hittle presented sufficient evidence to defeat the City's motion for summary judgment as to both his Title VII and FEHA discrimination claims and deserves to present his case before a jury.

A. Chief Hittle exceeded his low threshold burden to defeat summary judgment on his Title VII and FEHA discrimination claims.

The district court analyzed Chief Hittle's Title VII and FEHA claims together. 1-ER-9. Because "California law under the FEHA mirrors federal law under Title

[4] Although the FEHA largely mirrors Title VII, it differs in that the FEHA requires "a plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor." *See Harris v. City of Santa Monica*, 294 P.3d 49, 66 (Cal. 2013) (emphasis in original). Because it would be necessary for a factfinder to determine whether religion was a *substantial* motivating factor in Chief Hittle's termination, the arguments in this section go to only his Title VII discrimination claim, and not his FEHA discrimination claim.

VII," *Sheikh-Hassan v. United Airlines, Inc.*, 172 F.3d 876 (9th Cir. 1999), this Court should do the same. *See Dyson v. California*, 80 Fed. App'x 1, 2 (9th Cir. 2003) (stating, in the context of a religious discrimination claim, that "Title VII and FEHA claims are subject to [the] same analysis" (citing *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000)).

This Court "ha[s] repeatedly held that it should not take much for a plaintiff in a discrimination case to overcome a summary judgment motion." *France v. Johnson*, 795 F.3d 1170, 1175 (9th Cir. 2015) (collecting cases), *as amended on reh'g* (Oct. 14, 2015). "[B]ecause of the inherently factual nature of the inquiry, the plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact." *Lindahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir. 1991). In explaining the plaintiff's low burden on summary judgment, this Court has "emphasized the importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses." *McGinest*, 360 F.3d at 1112.

At the summary judgment stage, Chief Hittle was permitted to present his discrimination case by "produc[ing] direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the City or by "using the *McDonnell Douglas* framework." *Id.* at 1122. Chief Hittle chose to first present

his case through direct and circumstantial evidence, 6-ER-1243–44, and in the alternative through the *McDonnell Douglas* framework. 6-ER-1245–49.

"[I]t is not particularly significant whether [Chief Hittle] relies on the *McDonnell Douglas* presumption or, whether he relies on direct or circumstantial evidence of discriminatory intent to meet his burden."[5] *McGinest*, 360 F.3d at 1123. Under either approach, Chief Hittle's burden is to "produce some evidence suggesting" that his termination "was due in part or whole to discriminatory intent." *Id.* "Once a prima facie case is established either by the introduction of actual evidence or reliance on the *McDonnell Douglas* presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the 'elusive factual question of intentional discrimination.'" *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1985) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981)), *amended*, 784 F.2d 1407 (9th Cir. 1986). Because Chief Hittle met this burden by producing both direct and circumstantial evidence, summary judgment in favor of the City on Chief Hittle's discrimination claim should be reversed.

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[5] However, "[t]he *McDonnell Douglas* test does not apply to mixed-motive cases under the FEHA. Instead, 'the plaintiff in a mixed-motives case bears an initial burden of showing that discrimination 'was a substantial factor motivating his or her termination.'" *Lawson v. PPG Architectural Finishes, Inc.*, 503 P.3d 659, 665 (Cal. 2022) (quoting *Harris*, 294 P.3d at 52). Because Chief Hittle has presented direct and circumstantial evidence of discrimination rather than invoking the *McDonnell Douglas* test, this difference between Title VII and the FEHA is irrelevant.

B. Chief Hittle presented direct evidence of discrimination, which is sufficient by itself to defeat summary judgment.

"Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (quoting *Davis v. Chevron, U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir. 1994)) (alterations in original), *as amended* (Aug. 11, 1998). "Direct evidence . . . standing alone can defeat summary judgment . . . ." *France*, 795 F.3d at 1173. "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. As [this Court] said in *Lindahl*," the quantum of direct evidence "need be 'very little'" to defeat summary judgment. *Godwin*, 150 F.3d at 1221 (quoting *Lindahl*, 930 F.2d at 1438); *see also Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274, 1280 (9th Cir. 2017) ("Direct evidence need not be 'specific and substantial.'" (quoting *Dominguez–Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1038 (9th Cir. 2005)).

The Ninth Circuit has "repeatedly held that *a single* discriminatory comment by a plaintiff's supervisor or decisionmaker is sufficient to preclude summary judgment for the employer." *Dominguez-Curry*, 424 F.3d at 1039 (emphasis added) (first citing *Chuang*, 225 F.3d at 1128, and then citing *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1149 (9th Cir. 1997)).

1. The Removal Notice and Largent Report provided direct evidence of discrimination.

The City's stated reasons for Chief Hittle's removal provide direct evidence of religious discrimination. The Removal Notice issued by the City explicitly references Chief Hittle's religion in the first two instances that "support[] the City's conclusion" to remove Chief Hittle. 2-ER-233. First, the Notice concludes that Chief Hittle "used City time and resources to attend a religious leadership event," and second, that Chief Hittle "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." 2-ER-233. These were identified in the Largent Report as two of the four "most serious acts of misconduct." 2-ER-248.

This provides direct evidence that Chief Hittle was terminated because of his attendance at a religious event and, under these circumstances, that is religious discrimination. Montes instructed Chief Hittle to obtain leadership training for himself and his staff members, and there is no evidence that prior to the Summit, Montes told Chief Hittle not to obtain leadership training with a religious affiliation. 2-ER-212. Chief Hittle told inspector Trudy Largent that he did not believe the religious aspect of the leadership training "would be an issue" for Montes. 2-ER-255. The Summit undisputedly provided leadership training, featuring respected speakers such as Jack Welch, the former CEO of General Electric. 2-ER-162; 2-ER-258. Previous speakers included former Presidents Bill Clinton and Jimmy Carter,

former Secretary of State Colin Powell, former UK Prime Minister Tony Blair, former Hewlett-Packard CEO Carly Fiorina, and the musician Bono. 2-ER-258; 5-ER-1052. Fast Company, the business magazine, referred to the Summit as "learning from the business world's best." 4-ER-696. The district court ignored this information, simply declaring without analysis that "the fact that Defendants considered the leadership summit to be a 'religious event' and cited Plaintiff's attendance at the event on City time as a basis for termination is not sufficient to create a triable issue of material fact that Defendants held discriminatory animus toward Plaintiff's specific faith." 1-ER-16.

The Largent investigation similarly did not inquire into whether the Summit provided bona fide leadership training, refusing to contact any witnesses from the Summit and evaluating only whether the Summit was a "religious event." 2-ER-134; 2-ER-257–60. Indeed, the Largent Report states that 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-249. The Largent Report did not identify any rule or law prohibiting Chief Hittle from attending an event with a religious affiliation while on duty, nor has any such policy surfaced during this litigation. Largent testified that she did not know whether it was impermissible for a public employee to receive leadership training from a Christian provider. 6-ER-1211–12. In fact, the Largent Report states, "Montes told Hittle that

while she encouraged him to attend leadership training[,] she did not mean religious leadership training." 2-ER-264. In other words, the City admittedly fired Hittle for attending leadership training that had a religious perspective during duty hours, while it was undisputed that attending a non-religious leadership event of the same caliber while on duty would have been permissible.

Chief Hittle followed his supervisor's instruction to pursue leadership training, only to find himself terminated precisely because he selected a well-respected, mainstream conference with a Christian affiliation. The City's express reason for firing Chief Hittle is thus direct evidence of discriminatory animus toward religion. To see why, one need only imagine the same facts with an Indian-American fire chief who was fired for attending an "Indian event" when he attended a leadership conference sponsored by the Indian-American Chamber of Commerce or a female fire chief who was fired for attending a "women's event" when she attended the California Conference for Women.

2. Montes's and Deis's statements were direct evidence of discrimination.

Chief Hittle also presented direct evidence in the form of discriminatory statements by Montes and Deis, which alone were sufficient to create a triable issue as to the City's motivation for Chief Hittle's termination. Montes twice accused Chief Hittle of being part of a "Christian Coalition" and told him that he should not be associated with that. 2-ER-211–12, 215. Montes's meaning can be determined

by the "context" of the statement, as well as Montes's "inflection" and "tone of voice." *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006). Montes used the term "Christian Coalition" for the first time roughly a month after the City received a letter attacking Chief Hittle as a religious fanatic, and for the second time during a meeting between Chief Hittle and Montes in October 2010, roughly two months after the leadership training. 2-ER-211–12, 215. In both instances, Montes used the statement to criticize Chief Hittle's religious associations, and Montes instructed Chief Hittle not to be involved with the "Christian Coalition." Additionally, based on Montes's tone, Chief Hittle understood the term "Christian Coalition" to be pejorative and perceived that Montes believed being part of that group was "wrong and distasteful." 2-ER-215.

Montes likely borrowed the term "Christian Coalition" from the Christian political advocacy group of the same name, which was prominent throughout the 1990s.[6] Referring to Chief Hittle and the other Christians with whom he associated as the "Christian Coalition" is akin to calling a group of African American employees the "NAACP" or a group of older employees the "AARP." The term

[6] *See* Michael Isikoff, *Christian Coalition Steps Boldly Into Politics*, WASH. POST, (Sept. 10, 1992), https://perma.cc/4F4T-P9WY. In 1997, Fortune Magazine ranked the Christian Coalition as the 7th most powerful lobbying organization in the United States. Jeffrey H. Birnbaum, *Washington's Power 25*, FORTUNE, (December 8, 1997), https://perma.cc/PV48-LQW4.

"Christian Coalition," in context, was a discriminatory statement that revealed the decisionmakers' animus towards Chief Hittle's religion.

Montes made several other discriminatory statements about Chief Hittle's religion. In her interview with investigator Trudy Largent, Montes stated that she told Chief Hittle he could not receive leadership training from George Liepart because Liepart, a former pastor, was part of Chief Hittle's "church clique." 5-ER-1140. Deis also stated that "it is his understanding that there is a 'clique' in the Fire Department that is associated with religion and that members of this 'clique' attended the Global Leadership Summit." 2-ER-249. The term "clique" has a negative connotation and is associated with "a narrow exclusive circle." *Clique*, Merriam-Webster's Collegiate Dictionary (11th ed. 2020). This is further supported by Montes's comment that "you were either inside the clique or outside the clique." 2-ER-32. Referring to Chief Hittle as being part of a religious or church clique is direct evidence of discriminatory animus. In addition to criticizing Hittle's choice to attend the Summit, Montes continued to criticize him for "defend[ing] his attendance there" and for "suggest[ing] that I attend when it comes back to Northern California this year," painting these statements as "very poor judgment," and concluding that "he should see that there is a perception issue." 6-ER-1429.

The district court incorrectly characterized the above comments as "stray remarks" that did not provide evidence of discrimination. 1-ER-16. That

characterization was erroneous because Montes and Deis were the decisionmakers in Chief Hittle's termination. 7-ER-1458. "Where a decisionmaker makes a discriminatory remark against a member of the plaintiff's class, a reasonable factfinder may conclude that discriminatory animus played a role in the challenged decision." *Dominguez-Curry*, 424 F.3d at 1038. In *Dominguez-Curry*, this Court rejected the argument that sexist comments, even though they were not targeted directly towards the plaintiff, were stray comments unrelated to the decisional process because the person who made the remarks "was one of two decisionmakers." *Id.* When uttered by decisionmakers, discriminatory remarks need not be so obvious as, "I'm firing you because you are too [religious]," to be sufficiently tied to the decisional process. *E.E.O.C. v. Pape Lift, Inc.*, 115 F.3d 676, 684 (9th Cir. 1997). Here, it was more than sufficient that both decisionmakers made discriminatory remarks about Chief Hittle's religion in the context of reprimanding him. A reasonable factfinder could infer that these comments criticized Chief Hittle's religion and therefore revealed a discriminatory motive for his firing, and that inference must be drawn in favor of Chief Hittle on summary judgment. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1092 n.7 (9th Cir. 2008).

Furthermore, declarations by Montes and Deis during litigation only serve to underscore their animus, rather than explaining it away. Montes states in no uncertain terms: "It was improper for Chief Hittle to attend a religious training event

on City time using City property because the City is not permitted to further religious activities—and in particular the City cannot favor one religion over another." 6-ER-1386. Largent echoed Montes's animosity by accusing Chief Hittle of "downplay[ing] the clear religious message in order to justify his participation." 2-ER-270. To Montes, because "[t]he stated purpose of this Willow Creek Conference is to 'transform Christian leaders . . . for the sake of the local church," it could not possibly provide "a specific benefit to the City," despite the world-class quality of the Summit and the tangible benefits that Chief Hittle and his colleagues gained and implemented in the Fire Department. 6-ER-1391; 2-ER169–70; 5-ER-1059–60.

For his part, Deis characterizes Chief Hittle's attendance at the Summit as "poor judgment," "inappropriate activity," "for his own personal interests," and as part of "the Fire Department cultural problem." 7-ER-1480. Deis asserted that the religious nature of the Summit was irrelevant to his opinion because it would have been improper for Chief Hittle to "attend[] any kind of event for his own personal interests (regardless of those interests) on City time and using a City vehicle." 7-ER-1479–80. But Deis admitted that he recommended an investigation only after he "learned the details about the Leadership Summit," specifically its religious nature, from the same anonymous complaint as Montes. 7-ER-1479–80. Thus, the decisionmakers have both doubled down on their positions that Hittle's choice to

attend leadership training was "inappropriate" and worthy of termination all because of its religious nature.[7]

Any one of the above pieces of direct evidence of discrimination is sufficient to create "a triable issue as to the actual motivation of the employer" and preclude summary judgment for the City. *Godwin*, 150 F.3d at 1221. Together, they far surpass the "very little" amount of direct evidence needed to raise a genuine issue of fact. *Lindahl*, 930 F.2d at 1438.

[7] These examples of hostile language from government officials, particularly from the decisionmakers regarding Chief Hittle's employment, reveal the same kind of animus toward religion that the Supreme Court has consistently found to violate the Free Exercise Clause of the First Amendment. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541 (1993) (holding city council member's accusation that worshippers were "violat[ing] . . . everything this country stands for" revealed unconstitutional targeting of religious beliefs as such); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729, 1732 (2018) (finding a Free Exercise violation where commissioner disparaged plaintiff's faith as "despicable" and "merely rhetorical" because the government's process of adjudicating the religious plaintiff's case demonstrated "a clear and impermissible hostility toward [his] sincere religious beliefs."); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (holding that the "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."). In all these cases, hostility from the very public figures charged with providing a fair decision regarding the religious plaintiffs led the Supreme Court to conclude that their Free Exercise rights were violated. Although Hittle's claims arise under Title VII and FEHA, Free Exercise cases are relevant to the Court's analysis of intentional religious discrimination in the context of a government employer.

C. Chief Hittle also presented circumstantial evidence of discrimination sufficient to survive summary judgment.

Although Chief Hittle met his summary judgment burden by providing direct evidence, he provided additional circumstantial evidence that was also sufficient to defeat summary judgment, especially when considered in conjunction with his direct evidence. The district court required that the circumstantial evidence be "specific" and "substantial" to create a genuine issue of material fact. 1-ER-20. But that standard's validity is an open question in the Ninth Circuit. *See France*, 795 F.3d at 1175 ("There is some question whether [the specific-and-substantial] distinction for circumstantial evidence is valid after the Supreme Court's *Costa* decision which placed direct and circumstantial evidence on an equal footing."); *Davis*, 520 F.3d at 1091 (stating the Ninth Circuit "has not clearly resolved this issue").

This Court has stated that "in the context of summary judgment, Title VII does not require a disparate treatment plaintiff relying on circumstantial evidence to produce more, or better, evidence than a plaintiff who relies on direct evidence." *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1030 (9th Cir. 2006). To the extent the "specific and substantial" standard still applies, it "is tempered by [this Court's] observation that a plaintiff's burden to raise a triable issue of pretext is hardly an onerous one." *France*, 795 F.3d at 1175 (quoting *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1113 (9th Cir. 2011)). Chief Hittle presented copious circumstantial evidence of discrimination, including evidence that the City's

proffered explanations for Chief Hittle's termination were not credible, and thus he has met this minimal burden.

1. The City's mishandling of the investigation and discipline is circumstantial evidence of discrimination.

The City issued a Notice of Investigation against Chief Hittle on November 1, 2010. 3-ER-505–11. That same day—before any investigation had occurred—Deis threatened Chief Hittle with termination and vowed that Deis would ruin Chief Hittle's reputation if he did not accept a demotion. 2-ER-133, 188. Deis told Chief Hittle that if he did not accept the demotion he would never work in fire service again, and although Chief Hittle would "probably win a long, expensive legal battle," his reputation would be irreparably harmed. 2-ER-188. A reasonable factfinder could infer that Deis admitted Chief Hittle would probably win a legal battle because Deis knew the City was threatening Chief Hittle with termination for an illegal discriminatory purpose. The timing of this threat also demonstrates pretext, showing that Deis had decided to take action against Chief Hittle even before the investigation was conducted.

Other timing evidence illustrates that religious animus was the cause for Chief Hittle's termination. On March 25, 2011, a local newspaper published an article about Chief Hittle's attendance at the Summit, citing its religious nature and questioning whether it was proper for taxpayers to pay for the fire officials' time while at the Summit. 5-ER-996. Chief Hittle was placed on administrative leave

just five days later. 2-ER-221. The temporal proximity of the article about Chief Hittle's attendance at the Summit and Chief Hittle's placement on administrative leave provides circumstantial evidence that Chief Hittle's termination was due primarily to his attendance at a religious event, and not for the other reasons offered by the City. *See Dawson v. Entek Int'l.*, 630 F.3d 928, 937 (9th Cir. 2011) ("[T]emporal proximity can by itself constitute sufficient circumstantial evidence of [discrimination] for purposes of both the prima facie case and the showing of pretext.").

The City's disproportionate response to Chief Hittle's attendance at the Summit provides further evidence of discrimination. The City listed attendance at the Summit as two of the four "most serious acts of misconduct" that led to Chief Hittle's termination. 2-ER-248. Yet there were steps short of termination that the City could have taken to remedy this alleged misconduct. If the City believed it was impermissible for Chief Hittle to attend the Summit while on duty, it could have requested that Chief Hittle charge the attendance at the Summit to personal leave. That is precisely the course the City pursued with Smith and Duaime, who attended with Chief Hittle. 2-ER-59. The City's singling out of Chief Hittle's attendance at the Summit as misconduct meriting termination further reveals the City's discriminatory animus.

2. The City's proffered reasons for Chief Hittle's termination are unworthy of credence.

Although not required to defeat summary judgment on his discrimination claims, Chief Hittle provided ample evidence that the City's explanations were not worthy of credence, which provides further circumstantial evidence of discrimination.[8] This is precisely the type of case where "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (quoting *Wright v. West*, 505 U.S. 277, 296 (1992); *see Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1228-29 (9th Cir. 2001) (quoting *Reeves* for the same proposition). Because an "arguably pretextual explanation" can be "affirmative evidence" of a discriminatory motivation, *Johnson*, 251 F.3d at 1228, and because Chief Hittle does

[8] Because Chief Hittle presented direct and circumstantial evidence of discrimination, rather than invoking the *McDonnell Douglas* framework, he was not required to separately address pretext or to negate the City's proffered reasons for his termination. This is because "a plaintiff 'may prove pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer or 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 North Star Borough School Dist.*, 323 F.3d 1185, 1196 (9th Cir. 2003)).

not need to prove that discrimination was the sole cause of his termination but merely a "motivating factor," *see supra* Part I.A, Chief Hittle was not required to show that *every* reason offered by the City was pretextual in order to defeat summary judgment. Even under a but-for theory of causation, 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." *Curley v. City of N. Las Vegas*, 772 F.3d 629, 633 n.3 (9th Cir. 2014) (quoting *Jaramillo v. Colorado Judicial Dep't*, 427 F.3d 1303, 1310 (10th Cir. 2005), *as modified on denial of reh'g* (Dec. 20, 2005)). "That is because the factfinder's rejection of some of the defendant's proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those remaining rationales in particular is available." *Fuentes v. Perskie*, 32 F.3d 759, 764 n.7 (3d Cir. 1994). Here, the district court should have inferred that the City's stated reasons were cover for discrimination.

In its motion for summary judgment, the City argued that Chief Hittle's termination was justified by the five issues listed in the Notice of Investigation.[9] 7-ER-1464. Chief Hittle produced evidence that several of these explanations were false or that they were themselves evidence of religious discrimination. The district court perfunctorily dismissed Chief Hittle's evidence as "unpersuasive," 1-ER-20, but, at minimum, the following proof of pretext provides "affirmative evidence" of the City's discriminatory motivation. *Johnson*, 251 F.3d at 1228.

Use of City Time and a City Vehicle to Attend a Religious Event. 3-ER-508. This was the true reason for Chief Hittle's termination and provides direct evidence of discrimination, especially alongside Montes's and Deis's comments about a "Christian Coalition," "church clique," and other criticisms of religious associations that starkly reveal their anti-Christian animus. *See supra* Part II.B.1.

Management of the Fire Department. 3-ER-505–07. The Largent Report determined that Chief Hittle's alleged failure to prevent certain union activity

[9] That the City's motion for summary judgment relied on the issues in the Notice of Investigation, rather than in the Removal Notice, provides further evidence of pretext. Although Chief Hittle's attendance at a "religious event" was listed in both the Notice of Investigation and the Removal Notice, certain other issues appear in one but not the other. *See supra* at 14; *infra* at 42-43. The City's shifting explanations for Chief Hittle's termination are further evidence of pretext. *See 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.").

reflected a conflict of interest and divided loyalty with the union. 3-ER-327. The Notice of Investigation, for instance, stated that certain off-duty fire department personnel engaged in union activities using union-owned fire trucks that resembled City fire trucks, while wearing union shirts that resembled shirts issued by the Fire Department. 3-ER-506. However, Chief Hittle was not involved in this incident, and firefighters had been using the union fire truck in this way for many years without any discipline. 2-ER-158. Moreover, the Removal Notice incorrectly referred to the incident involving the union fire truck as "on duty activity," whereas the Largent Report clearly stated otherwise. 2-ER-452.

The district court ignored the improper and pretextual inclusion of this off-duty activity in the Removal Notice and focused only on the fact that the Removal Notice also cited other on-duty union activities. 1-ER-20. But this on-duty union activity was also improperly included, further showing pretext. For instance, Largent made various findings about Chief Hittle's alleged failure to maintain proper discipline among firefighters who cleaned the grounds of the Union Hall. 3-ER-439–40. But the Largent Report ignored the testimony of the hearing officer reviewing that incident who determined there had been no violation of City policy. 2-ER-161. The inclusion of these unfounded and false charges provides affirmative evidence that the City was "dissembling to cover up a discriminatory purpose." *Reeves*, 530 U.S. at 147; *see Henry v. Daytop Vill., Inc.*, 42 F.3d 89, 96 (2d Cir.

1994) (reversing summary judgment because employee had created a genuine dispute of fact as to whether the charge allegedly justifying her termination was false, which a rational jury could conclude was evidence of pretext for discrimination).

Apparent Endorsement of a Private Consultant's Business.[10] 3-ER-508. The Largent Report determined that Chief Hittle had "constructive notice" that his photograph and endorsement appeared on the website for George Liepart's consulting business and that it was improper for Chief Hittle to make such an endorsement. 2-ER-278–79. However, Largent never identified a City policy that was violated by Chief Hittle's apparent endorsement, Montes admitted there was no such policy, and the former City Attorney testified that he was unaware of such a

[10] Although not included in the Notice of Investigation, Largent also investigated an incident involving Liepart allegedly soliciting donations from two Fire Department employees to build a church school. 2-ER-281. The alleged incident occurred in 2005, before Chief Hittle was Fire Chief, and Liepart ceased being a consultant for the City in 2008. 2-ER-281, 285. The alleged incident came to light in a January 21, 2009 anonymous letter sent to the Fire Department regarding Liepart and other matters involving the Fire Department. 2-ER-281. Largent's investigation, which occurred in August 2011, inquired into whether Chief Hittle should have taken action against Liepart in early 2009 (after he had ceased providing consulting services to the City) for conduct that had occurred in 2005. Chief Hittle did take immediate action; he told Liepart "there are rules and practices against" soliciting donations and "you can't say those kinds of things." 6-ER-1307. However, Largent determined that in 2009, Chief Hittle should have sent "a formal written notice to Liepart that his conduct was inappropriate and that it would not be tolerated." 2-ER-289. The inclusion of such a stale and trivial complaint against Chief Hittle provides evidence that the City was searching for reasons to terminate Chief Hittle rather than investigating legitimate concerns.

policy, and could not recall anyone else being fired for a "tacit endorsement." 2-ER-178–79. Chief Hittle had never seen the endorsement until the Notice pointed it out, and he immediately asked Liepart to remove it. 2-ER-277–78. Largent was sufficiently disinterested in ascertaining the truth that she never asked Liepart whether he had permission to use Hittle's photograph and endorsement. 2-ER-178–79. Liepart later testified that he posted the endorsement "without [Hittle's] permission." 5-ER-1134.

Compliance with Management Directions and Capability in Respect to Budget Development. 3-ER-508. The Largent Report determined this claim was "Not Sustained," 2-ER-248, therefore it could not provide a basis for Chief Hittle's termination. This claim was not included in the Removal Notice. 2-ER-233–34.

Potentially Conflicting Loyalties. 3-ER-509. The Largent Report erroneously concluded that Chief Hittle was required to disclose a potential conflict of interest caused by co-ownership of a vacation property with two of his subordinates. 3-ER-333. Largent did not consult the Stockton Conflict of Interest Code to determine whether Chief Hittle had an actual duty to disclose the co-ownership. 2-ER-128, 144; 2-ER-289. In fact, Chief Hittle was not legally required to report the co-ownership of the property on a Conflict of Interest Form 700, and Largent appeared to acknowledge that fact in her report. 2-ER-128, 143; 5-ER-1005–57; 2-ER-289. Chief Hittle also asked the City Attorney's office whether he needed to disclose the

property, and the City Attorney told Chief Hittle he did not need to disclose it. 2-ER-80–87

The district court rejected Chief Hittle's arguments as to the pretextual nature of the charges related to the vacation property because Chief Hittle's "deposition testimony makes clear that he did not tell the investigator," Trudy Largent, about his co-ownership of the property. 1-ER-20. The court's statement is factually incorrect, as the deposition testimony cited by the court relates to Largent's questioning of Chief Hittle about whether he had thought it necessary to inform the City about the co-ownership. 6-ER-1321–22. Largent clearly knew about the co-ownership because it was listed in the Notice of Investigation. 3-ER-509.

The district court also erroneously stated that Chief Hittle presented no evidence that Montes knew of the property. 1-ER-20. On the contrary, Montes stated in an interview with Largent that she knew about Chief Hittle's co-ownership of the property for "awhile" before it became an issue. 2-ER-143; 5-ER-1141. Chief Hittle had also informed the two previous City Managers about this co-ownership even though "it has nothing to do with what we do at work." 2-ER-128; 6-ER-1314–15, 1322

In light of this evidence, it is highly doubtful that the City terminated Chief Hittle for an undisclosed conflict of interest, which did not exist, rendering that alleged reason for termination pretextual.

The above evidence is sufficient to raise a reasonable inference that the City's proffered reasons for Chief Hittle's termination were pretextual and that Chief Hittle was in fact terminated for a discriminatory reason. But even if one or more of the City's alleged non-religious reasons played some role in Chief Hittle's termination, Chief Hittle's direct and circumstantial evidence at least creates a fact issue that religious animus "was *one* but-for cause of that decision, [and] that is enough to trigger the law." *Bostock*, 140 S. Ct. at 1739 (emphasis added). After all, "a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision." *Id.* The same result follows even more readily under the "more forgiving" motivating-factor standard. *Univ. of Tex. Sw. Med. Ctr.*, 570 U.S. at 343 (employer is liable where "the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision"); *see also Abercrombie*, 575 U.S. at 772 (reversing summary judgment because Muslim applicant showed that religion was one motivating factor in employer's decision). By the City's own admission, attending a "religious event" was at least a motivating factor in the City's decision to terminate Chief Hittle.

For all of these reasons, summary judgment on Chief Hittle's discrimination claims should be reversed.

III. This Court should reverse because the City condoned discrimination against Chief Hittle instead of failing to prevent it.

The district court granted summary judgment in favor of the City on Chief Hittle's claim for failure to prevent discrimination in violation of Cal. Gov't Code § 12940(k) because it granted summary judgment in favor of the City of Chief Hittle's discrimination claims. 1-ER-21. That statute provides that it is unlawful for "an employer [] to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Cal. Govt. Code §12940(k). Because the City's sole basis for summary judgment on this claim was the alleged lack of discrimination, 7-ER-1468, this Court should also reverse as to Chief Hittle's claim for failure to prevent discrimination if it reverses as to the discrimination claims.

CONCLUSION

For the foregoing reasons, the 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 either grant partial summary judgment to Chief Hittle or, in the alternative, allow his claims to proceed to trial.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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On this 31st day of August, 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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