UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IVAN HERNANDEZ, ROBERTO RODRIGUEZ, BILL JONES, GENE MICHNO, MARVIN BAILEY AND RICHARD DAVIS,

Plaintiffs,

v.

COOK COUNTY SHERIFF'S OFFICE,

Defendant.

No. 07 C 855

Judge Thomas M. Durkin

FINDINGS OF FACT & CONCLUSIONS OF LAW

Six correctional officers with the Cook County Sheriff's Office, Department of Corrections ("DOC"), (namely, Ivan Hernandez, Roberto Rodriguez, Bill Jones, Gene Michno, Marvin Bailey, and Richard Davis (collectively "Plaintiffs")), allege that the Sheriff's Office violated the First Amendment when policy makers for the Sheriff's Office discriminated and retaliated against Plaintiffs for their support of a certain candidate in the election for sheriff, by investigating and disciplining Plaintiffs in connection with an escape from the Cook County Jail (the "Jail"). R. 55. The case proceeded to a bench trial on August 1, 2016, which completed on August 19, 2016. Post-trial briefing was completed on December 13, 2016. This opinion sets forth the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a). These findings are based on the documentary evidence and trial testimony. They are also the result of the Court's credibility determinations after observing each of the witnesses testify at trial. This opinion also addresses the

Sheriff's Office's motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, which was initially made orally on August 18, 2016, and later briefed. *See* R. 617 at 212-13 (2776:5–2777:3)). In light of the Court's factual findings and conclusions of law, the Court denies the Sheriff's Office motion for judgment as a matter of law, but finds in favor of the Sheriff's Office on the merits and will enter judgment against Plaintiffs.

Findings of Fact

A. Plaintiffs' Political Activity

Plaintiffs were assigned to the Special Operations Response Team ("SORT"), which was responsible for guarding the most dangerous inmates in the Jail, who were housed in the Abnormal Behavioral Observation Unit (the "ABO"). *See* R. 616 at 53 (2339:2-8); R. 607 at 192-93; R. 611 at 161, 166; R. 612 at 195; R. 610 at 95, 103-05; R. 605 at 255. SORT's Superintendent was Richard Remus. Plaintiffs actively supported Remus in his campaign for Cook County Sheriff leading up to the March 21, 2006 Democrat primary election against Tom Dart—the chief of staff to then Sheriff Sheahan—who Sheahan supported. *See* R. 609 at 19; R. 611 at 162; R. 612 at 149; R. 610 at 99; R. 605 at 251. Two Sheriff's Office officials, namely Scott Kurtovich, the Acting Executive Director of the DOC, and Dennis Andrews, the Director of External Operations of the DOC, testified that it was generally known in the Sheriff's Office that SORT officers were politically affiliated with Remus. *See* R. 606

at 149 (424:4-21); R. 605 at 59 (59:9-25).[1] Andrews and Kurtovich also testified that they, specifically, were aware of Plaintiffs' political affiliation with Remus, stemming from at least two circumstances. Andrews testified that he directed plaintiff Hernandez to move his car containing Remus campaign signs out of a parking lot, *see* R. 606 at 98, and Kurtovich testified that he was aware of this incident. *See* R. 605 at 61. Plaintiffs testified that they signed petitions to place Remus's name on the primary ballot for sheriff, *see* R. 611 at 162; R. 610 at 100; R. 605 at 251, and Kurtovich testified that he reviewed the signatures on those petitions. *See* R. 605 at 62.

B. The Escape

On February 11, 2006, just before midnight, six inmates escaped from the ABO. Plaintiffs Bailey and Davis were assigned to be on duty in the ABO at the time, along with another SORT officer, Darin Gater. *See* R. 611 at 179-80 (1553:20–1554:6). However, Davis was in the bathroom at the time of the escape, *see id.* at 175-77 (1549:2–1551:1), and Bailey had left the Jail entirely to go to a convenience store to get an energy drink. *See* R. 609 at 41 (1030:2-12). This left Gater as the only guard actually in the ABO at the time of the escape. *See* R. 611 at 175 (1549:19-23); R. 614 at 14 (1942:15-17). From initial appearances, and according to the story Gater

[1] As Acting Executive Director, Kurtovich was the third ranking official in the DOC administrative hierarchy, below only the Sheriff and the Undersheriff. *See* Plaintiff's Trial Exhibit 93. Kurtovich testified that External Operations, the department Andrews was responsible for, "is a branch of the [DOC] that oversees or umbrellas all the outlying operations, such as hospitals, the courts, the outside perimeters," and "[i]n regards to this case, special movement by SORT for high-risk detainees." R. 605 at 56 (56:9-13).

first told investigators, he was lured into the ABO shower area by an inmate who shackled himself to the shower. *See* R. 614 at 14 (1942:18-25). When Gater entered the shower—impermissibly bringing his jail keys with him into the ABO—the inmate threw a powdered substance in Gater's face, threatened Gater with a shank, handcuffed Gater to the cell doors, and used Gater's keys to free other inmates. *See id.* at 15 (1943:1-5); *id.* at 16 (1944:6-11). The inmates then set fires in the ABO. *See id.* at 174 (2102:9). Exiting the ABO required the door to be unlocked by non-SORT guards outside the ABO. *See id.* at 175 (2103:11-14). One of the inmates dressed in Gater's uniform looked through the window of the ABO door. *See id.* at 174 (2102:14-16). With smoke from the fires obscuring the view, the non-SORT guards opened the door and were overpowered by the inmates. *See id.* (2102:7-24). The inmates eventually escaped the Jail entirely through a garage door that was not properly secured.

C. Plaintiffs Are Implicated in the Escape

Five witnesses, including plaintiffs Bailey and Davis, testified that shortly after the escape, in the early morning of February 12, another Sheriff's Office official, namely Timothy Kaufmann, the Director of Internal Affairs for the Sheriff's Office,[2] arrived at the Jail and screamed the following statements: "this smells of Remus"; "this is a Remus set up"; "these fucking jail guards"; "you fucking jail guards, you'll pay for this"; "Remus written all over it"; "this smells like Remus's shit." *See* R. 609 at

[2] Kurtovich testified that as Director of Internal Affairs, Kaufmann reported to the Inspector General, who reported directly to the Sheriff. See R. 605 at 206-08 (206:24–208:3).

46 (1035:12-20); R. 611 at 192-93 (1566:19–1567:21); R. 616 at 4-5 (2290:24–2291:10); R. 616 at 26 (2312:7-20); R. 616 at 39 (2325:5-21); R. 615 at 35-36 (2147:18–2148:5). An investigation into the escape was initiated that involved investigators from the Cook County Sheriff's Police and the Cook County Sheriff's Office Internal Affairs, both ultimately reporting to Kaufmann. *See* R. 614 at 141-42 (2069:20–2070:6). Davis and Bailey both testified that they were interviewed by investigators in the early morning of February 12, and the investigators asked them about their political affiliation in the course of interviewing them about the escape. *See* R. 609 at 60 (1049:3-5); R. 611 at 203 (1577:5-10).

After being transported from the Internal Affairs offices to the Sheriff's Police offices later in the afternoon on February 12 (both offices are on or near the Jail grounds), Gater confessed to being complicit in the escape. *See* R. 630-5 at 99-102; R. 635-12 (Gater began his written statement at 4:45 p.m. on February 12.). Gater also directly implicated plaintiffs Rodriguez, Jones, and Michno, and stated they were motivated to help Remus in his campaign to be elected sheriff by discrediting Sheriff Sheahan and Dart. *See* R. 635-12 at 4. Gater stated further that prior to the escape, one of the inmates asked him who he was "working with" that night. *Id.* at 5. When Gater responded that he was working with Bailey and Davis, the inmate stated that the escape was going to happen that night. *Id.* Gater was not concerned that the inmates would hurt Bailey or Davis because they "were also cool with the inmates meaning that they also allowed the inmates to do things the inmates were not supposed to do." *Id.* at 6. Although Gater made these statements to an Assistant

State's Attorney and Sheriff's Police officers, Internal Affairs officers were present in the building at the time and participating in the investigation by interviewing other witnesses. *See* R. 616 at 122 (2408:2-9).

Gater was criminally charged in state court. At his trial, he argued that his confession was coerced. But the state court rejected this argument. *See* R. 312-4 at 5-6. The Seventh Circuit found that Gater's statement provided the Sheriff's Office with probable cause to investigate all the plaintiffs except Hernandez, who Gater did not mention. *See Hernandez v. Sheahan*, 711 F.3d 816, 817-18 (7th Cir. 2013).

Although Gater did not mention Hernandez, he was described by Sheriff's Police reports as a "person of interest" as early as February 13, 2006. *See* R. 635-19 at 6. Apparently, this was because he was on duty in the ABO the shift prior to the escape, R. 612 at 78 (1676:17-20), and was responsible for ensuring that all the guards assigned to the shift following his were present. *See* R. 635-19 at 6. He admitted that he did not conduct a "formal" roll call and only confirmed by sight Gater's and Davis's presence in the building. *Id.* Hernandez never saw Bailey in the building before he left. *Id.*

D. Plaintiffs Are Suspended and De-Deputized

One of the officers assigned to investigate the escape, Robert Fitzgerald of the Cook County Sheriff's Police, testified that he told Kaufmann that Gater had confessed and had implicated "other officers" within 45 minutes of Gater making this statement the afternoon of February 12. *See* R. 616 at 87 (2373:9-14), 90 (2376:7-20). The next day, on February 13, 2006, Plaintiffs, with the exception of Rodriguez, were

suspended pending the investigation into the jail break. *See* R. 630-4 at 12-16. Plaintiffs' suspensions were signed by Kurtovich. *Id.* Plaintiffs, again with the exception of Rodriguez, were also de-deputized pending the investigation. *Id.* at 18-22, 24-28. Kaufmann and Kurtovich signed the order de-deputizing Plaintiffs. *Id.* at 24-28. Being "de-deputized" means that the officer is not permitted to carry a weapon, and by extension cannot be assigned duties requiring a weapon. *See* R. 606 at 126 (401:2-7). On February 14, 2006, Andrews also "signed off" on negligence complaints against Gater, Davis, Bailey, and Hernandez. *See* R. 630-4 at 30. Plaintiffs remained employed and paid despite being suspended and de-deputized.

Kurtovich testified that Plaintiffs were suspended at Kaufmann's direction because Plaintiffs were being investigated by Internal Affairs. *See* R. 605 at 175 (175:14-21), 209 (209:3-9). Andrews testified that he signed the complaints against Plaintiffs at the direction of Stanley Augustyniak, an investigator with Internal Affairs. *See* R. 606 at 116 (391:3-25). Augustyniak testified that although Kaufmann "gave him the case" to investigate on February 14, 2006, *see* R. 614 at 143-44 (2071:3–2072:4), he reported to Kaufmann who had ultimate authority to bring charges, and Kaufmann made recommendations to Kurtovich regarding discipline in light of ongoing investigations. *See* R. 615 at 50-51 (2162:15–2163:19), 57 (2169:2-4). Andrews testified that Kaufmann "was the head investigator." R. 606 at 116 (391:24-25). Andrews testified that he was not involved in the investigation. *See* R. 606 at 140 (415:2-5); 142 (417:12-18). Kurtovich also testified that he did not

participate in the investigation. *See* R. 605 at 175 (175:14-21), 176 (176:20-25), 208 (208:15-23). Kaufmann died before he could be deposed in this case.

Many other non-SORT officers working at the jail the night of the escape were not investigated or disciplined. These included the guards outside the ABO who ultimately opened the door to let inmates escape, and guards at the next station down the hall. *See* R. 606 at 120-21 (395:18–396:3); R. 615 at 46 (2158:7-10); R. 614 at 175-78 (2103:11–2106:25). It also included the external operations guards who failed to properly secure the back gate of the Jail through which the inmates ultimately exited the Jail. *See* R. 605 at 138 (138:1-17), 141 (141:24–142:4); R. 615 at 46 (2158:7-10).

Over the course of February 14 and 15, the investigation also revealed that Hernandez was notified during his shift that a Chicago Police Officer had been informed that an inmate in the ABO—who it turned out was one of the inmates who escaped—was in possession of a shank. R. 635-18 at 2. Initial reports stated that Hernandez had been told that this particular inmate was planning to escape. *Id.* Hernandez testified only that he was told there might be an inmate in the ABO in possession of a shank on the night the escape occurred. *See* R. 612 at 141 (1739:14-15). Hernandez also testified he decided not to tell other ABO guards about the report of a shank, or take any other action such as searching the ABO inmates, because he did not believe the information was "credible." *Id.* at 199 (1797:8-13).

E. Plaintiffs Are Reinstated from Suspension, but Continue to be Investigated and to be De-Deputized

On February 23, 2006, Plaintiffs (with the exception of Rodriguez who had not been suspended or de-deputized) were "reinstated from 'Suspension with Pay' . . . to 'Active' duty with De-Deputized status. . . . [and were] transferred [out of SORT]." R. 630-4 at 37-42. Bailey and Jones testified that when Andrews informed them of their reinstatements and reassignments he told them the investigations were "political." R. 609 at 76-77 (1065:19–1066:15); R. 611 at 39-40 (1413:20–1414:19). Specifically, Bailey testified that Andrews told him and Michno, "You guys, don't worry about it. It's political. It will all—it will all be over soon." R. 609 at 77 (1066:2-4). Jones testified that Andrews told him, "It's going to be all right. It's going to all go away. You know, it's all political. It will go away." R. 611 at 40 (1414:16-18).

After the reinstatements of February 23, 2006, Plaintiffs' cases took varied courses. Four days after Hernandez's reinstatement, on February 27, 2006, Augustyniak submitted an investigation report finding that Hernandez was negligent in failing to perform a roll call and failing to conduct a search of the Jail after he received word that an inmate might be in possession of a shank. *See* R. 630-5 at 104-06. Several months later, on September 19, 2006, Augustyniak addressed a letter to Hernandez stating that "the criminal investigation pertaining to the jail escape in February has been completed," Augustyniak had "been assigned to handle the administrative end of the investigation," and he needed to interview Hernandez. R. 630-5 at 40. On November 2, 2006, Internal Affairs, of which Kaufmann was the head, brought administrative negligence charges against Hernandez, which were

signed by Andrews. *See* R. 630-4 at 106-08. On March 6, 2007, Kaufmann signed a memorandum suspending Hernandez for five days. *See* R. 630-4 at 56. Hernandez took leave after his reinstatement on February 23, 2006, and has never returned to work for the Sheriff's Office. *See* R. 612 at 126-27 (1724:2–1725:6), 159-60 (1757:10–1758:1).[3]

In his investigation report of February 27, 2006, Augustyniak also found that Davis and Bailey deserted their posts the night of the escape. *See* R. 630-5 at 104, 109. On March 7, 2007, Kaufmann signed a memorandum recommending Davis's termination. *See* R. 630-4 at 52. Davis testified that on July 26, 2007, he was suspended without pay pending an administrative hearing on the charges against him. *See* R. 611 at 223 (1597:16-22). On October 6, 2008, the Cook County Sheriff's Merit Board overturned the investigation's findings with regard to Davis, and he was "returned to his duties." *See* R. 630-4 at 64-67.

On August 24, 2006, Bailey was charged by Internal Affairs based on a complaint by Kaufmann in connection with Bailey leaving the Jail to get an energy drink on the night of the escape. *See* R. 630-4 at 44. Based on these charges, on March 6, 2007, Kaufmann recommended that Bailey be terminated. *See* R. 630-4 at 54. The Sheriff's Office terminated Bailed on February 5, 2009. Bailey's termination was upheld after several rounds of appeal. *See Bailey v. Dart*, 2012 WL 6951971 (Ill. App. Ct. 1st Dist. Jan. 17, 2012).

[3] Hernandez first took paid vacation, then unpaid FMLA leave, and continues to seek paid disability leave.

Jones, Michno, and Rodriguez were administratively charged by Internal Affairs on October 26, 2006, based on a complaint by Andrews. *See* R. 630-4 at 95-97; R. 630-5 at 58-60, 64-66. The investigation found insufficient evidence to sustain the charges against them, and on February 27, 2007, the charges were dismissed. *See* R. 630-5 at 113, 117. Jones and Rodriguez continue to be Sheriff's Office deputies, while Michno has not returned to work for health reasons that Plaintiffs argue are a consequence of the stress and anxiety he suffered from this incident.

In the midst of the continuing administrative investigations regarding Plaintiffs' conduct, the Sheriff's Office disbanded SORT in the fall of 2006. A federal jury found that this was an act of political retaliation. *See Burruss v. Cook County Sheriff's Office*, 2013 WL 3754006 (N.D. Ill. July 15, 2013). Kurtovich was found individually liable in that case, and two witnesses in this case testified that Kurtovich angrily stated prior to the election in March 2006 that he wanted to "get rid of SORT." R. 608 at 11 (749:1-9); R. 613 at 74 (1904:8-20). The Sheriff's Office did not take any disciplinary action against Kurtovich based on this verdict. *See* R. 605 at 186-87 (186:11–187:22).

Augustyniak testified that his investigation was not influenced by Kaufmann. *See* R. 615 at 162-63 (2274:7–2275:6). He also testified that his recommendation that charges be brought against Hernandez, Davis, and Bailey were based on his findings that they had neglected their duties. *See* R. 615 at 101-02 (2213:6–2214:5). Assistant State's Attorney Bonnie Greenstein, who also participated in the investigation, testified that the investigation was not influenced by Kaufmann, Kurtovich, or

Andrews. *See* R. 617 at 145-46 (2709:19–2710:4). Fitzgerald also testified that the investigation was not influenced by Kaufmann, Kurtovich, or Andrews. *See* R. 616 at 81 (2367:1-4).

Conclusions of Law

"To prove a First Amendment employment retaliation claim under 42 U.S.C. § 1983, a plaintiff must establish three primary elements." *Graber v. Clarke*, 763 F.3d 888, 894 (7th Cir. 2014). "First, the plaintiff must show that his speech was constitutionally protected." *Id.* "Second, the plaintiff must prove that he suffered an adverse employment action as a result of his protected speech that was sufficiently adverse so as to deter the exercise of the free speech." *Id.* "And third, the plaintiff must present evidence to establish that a reasonable jury could find that his speech was a 'substantial' or 'motivating' factor for his adverse employment action." *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). Once a plaintiff shows "that a violation of his First Amendment rights was a 'motivating factor' of the harm he's complaining of, . . . the burden shifts to the defendant to show that the harm would have occurred anyway." *Thayer v. Chiczewski*, 705 F.3d 237, 251-52 (7th Cir. 2012). In other words, "but-for causation must be shown," but "the burden of proof relating to causation is divided between the parties in First Amendment [retaliation] tort cases." *Greene v. Doruff*, 660 F.3d 975, 980-81 (7th Cir. 2011); *see also McGeal v. Village of Orland Park*, 850 F.3d 308, 312 (7th Cir. 2017) ("[I]n First Amendment retaliation cases, the burden of proof for causation is divided and shifts between the parties."); *Hartman v. Moore*, 547 U.S. 250, 260 (2006) ("It is

clear, moreover, that the causation is understood to be but-for causation, without which the adverse action would not have been taken; we say that upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of (such as firing the employee)."); *Mt. Healthy*, 429 U.S. at 287 ("Initially, in this case, the burden was properly placed upon [the plaintiff] to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. [The plaintiff] having carried that burden, however, the District Court should have gone on to determine whether the [defendant] had shown by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff's] reemployment even in the absence of the protected conduct.").

In this case, Plaintiffs must prove by a preponderance of the evidence that their support for Richard Remus in the election for sheriff was a motivating factor in the Sheriff's Office's decision to investigate and suspend them in connection with the escape from the Jail. If the Plaintiffs cannot prove that, the Court must find for the Sheriff's Office. If Plaintiffs can prove that, however, the burden shifts to the Sheriff's Office to prove by a preponderance of the evidence that it would have investigated and suspended Plaintiffs anyway even if they had not supported Remus. If the Sheriff's Office cannot prove that, then the Court must find for Plaintiffs. If the

Sheriff's Office can prove that, then the Court must find for it and against Plaintiffs. *See* Seventh Circuit Pattern Jury Instruction 6.01.[4]

I. *Monell* Liability

As an initial matter, for the Sheriff's Office to be liable for First Amendment retaliation, the retaliatory acts must have been "caused by (1) an express municipal policy; (2) a widespread, though unwritten, custom or practice; or (3) a decision by a municipal agent with final policymaking authority." *Kristofek v. Village of Orland Hills*, 832 F.3d 785, 799 (7th Cir. 2016) (citing *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658 (1978)). Plaintiffs argue that Kurtovich, Kaufmann, and Andrews were policymakers whose decisions carried the authority of the Sheriff's Office for purposes of liability in this case. The Court agrees. Kurtovich signed Plaintiffs' suspension orders. Kurtovich and Kaufmann signed the de-deputization orders. Andrews signed-off on complaints against Plaintiffs. Additionally, Kurtovich testified that he and Andrews are policymakers for Jail personnel, *see* R. 605 at 49-50 (49:17–50:7), 58 (58:16-22), and that the suspensions and other discipline they issued were based on Kaufmann's investigations and recommendations. Augustyniak testified that Kaufmann was ultimately responsible for the investigation and that he made recommendations to Kurtovich regarding discipline in light of the investigations. Based on this evidence, the Court finds that Kurtovich, Kaufmann,

[4] To the extent that the Court's pre-trial decision of May 25, 2016, R. 569, is contrary to this recitation of the applicable law regarding causation and the burden of proof, that ruling is vacated.

and Andrews were policymakers for purposes of Plaintiffs' claims against the Sheriff's Office.[5]

II. Whether Plaintiffs' Political Affiliation was a Motivating Factor in the Sheriff's Office's Decision to Investigate and Discipline Plaintiffs

A. Constitutionally Protected Speech

Plaintiffs also must prove that their support of Remus was constitutionally protected speech. The Sheriff's Office does not argue otherwise. This is likely because there is no question that political affiliation is activity protected by the First Amendment. *See Hagan v. Quinn*, 867 F.3d 816, 824 (7th Cir. 2017) ("In *Elrod v. Burns* and *Branti v. Finkel*, the Supreme Court prohibited government employers from dismissing most public employees on the basis of partisan affiliation, holding that the age-old practice of patronage firings violated the First Amendment." (citing *Elrod*, 427 U.S. 347 (1976), and *Branti*, 445 U.S. 507 (1980))); *see also Yahnke v. Kane County*, 823 F.3d 1066, 1070 (7th Cir. 2016) ("to prevail in a First Amendment retaliation claim, it is sufficient for the plaintiffs to prove that they were dismissed solely for the reason that they were not affiliated with or sponsored by a particular political party" (citing *Branti*, 445 U.S. at 516-17)).

The Sheriff's Office argues that Plaintiffs' political affiliation could not have motivated the suspensions and the investigations into their conduct because

[5] Plaintiffs also argue that the jury finding in *Burruss* that SORT was disbanded for political reasons is sufficient evidence to "establish[] a long standing and widespread pattern, practice, or custom" of political retaliation in the Sheriff's Office. R. 650 at 9. It is unnecessary for the Court to make a finding on this issue since the Court has found that Plaintiffs' investigation and discipline were caused by Sheriff's Office policymakers.

Plaintiffs have failed to prove that any Sheriff's Office policymaker "knew [Plaintiffs] supported Remus or that Plaintiffs were even perceived to be Remus supports." R. 635 at 9.[6] The Court disagrees. Plaintiffs signed petitions in support of Remus, and Kurtovich testified that he reviewed these petitions. Kurtovich also testified that he knew plaintiff Hernandez had Remus campaign signs in his car. Kurtovich and Andrews testified they knew SORT officers supported Remus. Andrews also testified he believed the disbanding of SORT was political. R. 606 at 153 (428: 11-13). And Plaintiffs testified they talked openly about their support for Remus in front of supervisors. Based on this evidence, the Court finds the Sheriff's Office believed Plaintiffs, like virtually all SORT officers, were politically affiliated with Remus.

B. Adverse Action

Additionally, Plaintiffs are required to prove that they suffered an adverse action that presented a "danger of deterring or chilling [their] exercise of free speech." *Graber*, 763 F.3d at 899. To determine whether the evidence demonstrates a deterring or chilling effect, the Court asks whether "a reasonable employee . . . would be dissuaded from engaging in the protected activity." *Bagwe v. Sedgwick Claims Mgmt. Servs., Inc.*, 811 F.3d 866, 889 (7th Cir. 2016). This standard for First

[6] Plaintiffs do not have to prove that they actually supported Remus. Rather, it is sufficient for Plaintiffs to prove that the Sheriff's Office believed (mistakenly or not) that Plaintiffs supported Remus. *See Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016) ("[T]he government's reason for demoting [the plaintiff] is what counts here. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.").

Amendment *retaliation* claims is "considered more lenient than the Title VII counterpart of adverse action" for *discrimination* claims, *see Hobgood v. Illinois Gaming Bd.*, 731 F.3d 635, 643 (7th Cir. 2013), because it is not limited to actions that "alter[] the terms or conditions of . . . employment. . . . [and is not] even limited to employment." *Power v. Summers*, 226 F.3d 815, 820 (7th Cir. 2000); *see also Hutchins v. Clarke*, 661 F.3d 947, 956 (7th Cir. 2011) ("A § 1983 retaliation claim does not require an adverse employment action within the same meaning as other anti-discrimination statutes."). "Any deprivation" can suffice "if . . . the circumstances are such as to make such a [deprivation] an effective deterrent to the exercise of a fragile liberty." *Power*, 226 F.3d at 820. The Seventh Circuit has "recognized that the question is often fact-specific and that sometimes even modest deprivations or threats can be sufficient to deter protected speech." *Swetlik v. Crawford*, 738 F.3d 818, 825 n.2 (7th Cir. 2013) (citing cases). The Supreme Court, quoting from the Seventh Circuit case it was reviewing, has noted that the First Amendment provides protection "from even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when [the act is] intended to punish [the employee] for exercising her free speech." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 n.8 (1990) (quoting 868 F.2d 943, 954 n.4 (7th Cir. 1989)).

Neither the Supreme Court nor the Seventh Circuit has addressed whether a retaliatory investigation can form the basis for a First Amendment violation. *See Hartman*, 547 U.S. at 262 n.9 ("Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as

a distinct constitutional violation is not before us."); *Swetlik*, 738 F.3d at 825 n.2 ("Because [whether the plaintiff suffered a deprivation likely to deter speech] is not disputed here, we assume without deciding that the defendants' actions in bringing formal, public charges that (a) caused plaintiff's immediate suspension with pay and (b) could have led to his termination were sufficient to deter protected speech."); *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988) (stating in dictum that a retaliatory investigation could be actionable under § 1983 but not analyzing the issue because "[t]he officers [did] not argue[ ] that the amendment [was] inapplicable"). But a number of other circuit courts have found that a retaliatory investigation can violate the First Amendment. *See Lacey v. Maricopa County*, 649 F.3d 1118, 1132 (9th Cir. 2011) (stating that "an extremely intrusive investigation that did not culminate in an arrest—even when conducted pursuant to a valid mandate—could chill the exercise of First Amendment rights"); *Gomez v. City of Los Angeles*, 314 Fed. App'x 928, 930 (9th Cir. 2009) ("[The defendant] contends that the failed initiation of a criminal investigation cannot qualify as an adverse employment action. We disagree. To defeat [the defendant's] motion for summary judgment, [the plaintiff] need offer—and has offered—only evidence that raises a triable issue of fact that [the defendant's] attempt to open a criminal investigation was designed to retaliate against [the plaintiff], and would be reasonably likely to deter [a person] from engaging in protected activity under the First Amendment."); *Wrobel v. City of Erie*, 211 Fed. App'x 71, 73 (2d Cir. 2007) ("A factfinder might well conclude that defendants' monitoring of [the plaintiff's] phone calls, transfer of [the plaintiff] to a

faraway location, initiation of a criminal investigation against [the plaintiff], and other adverse actions alleged in the amended complaint—if proven true—would be sufficient to dissuade a reasonable worker from asserting his First Amendment rights."); *Izen v. Catalina*, 382 F.3d 566, 572 (5th Cir. 2004) (recognizing a First Amendment retaliation claim where defendants "undertook an investigation with the substantial motivation of retaliating against" plaintiff for protected speech); *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) ("[A]ny form of official retaliation for exercising one's freedom of speech, including . . . bad faith investigation . . . constitutes an infringement of [First Amendment] freedom."); *Pendleton v. St. Louis County*, 178 F.3d 1007, 1011 (8th Cir. 1999) (concluding that "[d]efendants could not have reasonably believed that their actions comported with clearly established law" when they allegedly conducted a retaliatory criminal investigation); *but see Rehberg v. Paulk*, 611 F.3d 828, 850 n. 24 (11th Cir. 2010) ("No § 1983 liability can attach merely because the government initiated a criminal investigation.").[7]

[7] Courts in this district have come out on both sides. *Compare Evans v. City of Chicago*, 2017 WL 1954544, at *6 (N.D. Ill. May 11, 2017) ("At most, [the plaintiff] alleges that [the defendants] reopened the . . . investigation . . . and requested [the plaintiff] appear for a second interview (which was not yet scheduled). But [the plaintiff] cites no case law suggesting that a retaliatory investigation, alone, is a sufficient deprivation to support a First Amendment retaliation claim. . . . [The plaintiff's] arguments that the reopened . . . investigation was harassing and jeopardized his employment are conclusory, undeveloped, and not reflected in his complaint. [The plaintiff] does not argue or allege that the investigation was conducted in a harassing manner, only that reopening the investigation constituted harassment. . . . He has not shown any authority suggesting that a mere investigation or the mere possibility of disciplinary recommendation are deprivations sufficient to support a First Amendment retaliation claim."); *Barren v. Ne. Ill. Reg'l*

Considering this persuasive authority from the courts of appeals and the lenient nature of the standard, the Court finds that the Sheriff's Office's decision to suspend Plaintiffs with pay and initiate an investigation (whether criminal or with criminal implications) into their involvement in the escape would dissuade a reasonable person from exercising their political rights. This is especially true considering the fact that Plaintiffs are jail guards for whom the prospect of incarceration is particularly frightening. Moreover, these investigations had the potential to result in Plaintiffs' terminations, as was ultimately the case for Bailey, and the prospect of termination is certainly sufficient to chill speech. The Sheriff's Office has not argued otherwise.[8]

Commuter R.R. Corp., 2016 WL 861183, at *7 (N.D. Ill. Mar. 7, 2016) ("But even with the more generous standard governing retaliation claims, most of the alleged acts fail to meet the adverse employment action standard. First, the fact that Metra initiated formal investigations is insufficient to make a prima facie retaliation case, especially in light of Metra's legitimate explanation for commencing the investigations."); *with Flanagan v. Office of Chief Judge of Circuit Court of Cook Cty., Ill.*, 2007 WL 2875726, at *11 (N.D. Ill. Sept. 28, 2007) ("The trial testimony permits a reasonable inference that Flanagan was investigated with particular vigor, suggesting a search for an excuse to justify punishing her with desk duty. The court concludes that, although the evidence may not be overwhelming, it was sufficient to permit the jury to conclude that the scrutiny of Flanagan's work as well as her reassignment to desk duty adversely impacted her.").

[8] With respect to the suspension element of Plaintiffs' claims, the Court notes that the Seventh Circuit has held that "paid administrative leave pending the results of [the plaintiff's] fitness-for-duty psychological examinations did not constitute a materially adverse action" for purposes of a First Amendment retaliation claim. *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 787 (7th Cir. 2007). While this case was decided after the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 52 (2006) (which held that the standard for adverse actions in retaliation claims is more lenient than that for discrimination claims), the Seventh Circuit did not cite it and relied on a number of pre-*Burlington Northern* decisions from other circuits that explicitly applied the stricter standard used for adverse actions in discrimination claims. *Nichols's* reliance on outdated authority

C. Motivating Factor

In the context of First Amendment retaliation claims, a "motivating factor" is one that is a "sufficient condition" to cause an adverse action. *Greene*, 660 F.3d at 978. "A sufficient condition is something that, if it is present, something else is bound to happen[.]" *Id.* To succeed on such a claim, a plaintiff must prove that the alleged impermissible motive was "sufficient" to have caused the adverse action. If the plaintiff can prove that the impermissible motive has a sufficient causal relationship to the adverse action to be a "sufficient condition," the burden shifts to the defendant to prove that the impermissible motive, although a sufficient condition, was not the necessary condition or "but for" cause.

To meet his burden, however, a plaintiff does not have to show that that alleged impermissible motive was a "necessary condition" to cause the adverse action. *Id.* In other words, it is not a plaintiff's burden to prove that the alleged impermissible motive was the "but for" cause of the adverse action. "A 'motivating factor,' as the term is used in [First Amendment retaliation] cases, is a sufficient condition, but never a necessary one; if it were necessary, and thus a 'but for' cause . . . the inquiry into causation would be at an end." *Id.*

Applying these principles to this case, Plaintiffs have the initial burden to prove that their political affiliation is a "sufficient condition" for the Sheriff's Office's investigation and discipline of their conduct. In other words, they have to show that

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calls into question the continuing validity of that decision. In any event, the investigation of Plaintiffs in this case is the primary adverse action, and the Court has found that the investigation is sufficient to prove that Plaintiffs' speech was chilled.

their political affiliation was sufficient to cause their investigations and suspensions in the context of a jail break from the section of the jail for which they were responsible.

There is no evidence that on a normal day at the Jail, Plaintiffs' political affiliation with Remus was sufficient to cause the Sheriff's Office to investigate and suspend them. *See Hall v. Babb*, 389 F.3d 758, 762 (7th Cir. 2004) ("[I]t is not enough to show only that the plaintiff was of a different political persuasion than the decision makers[.]"); *Nekolny v. Painter*, 653 F.2d 1164, 1168 (7th Cir. 1981) ("A disgruntled employee fired for legitimate reasons would not be able to satisfy his burden merely by showing that he carried the political card of the opposition party or that he favored the defendant's opponents in the election."). That would amount to a purge of Remus supporters from the Sheriff's Office, which Plaintiffs do no allege. But this case is not about a normal day at the Jail. Rather, it is about a day on which six inmates escaped from the section of the Jail for which Plaintiffs, known Remus-supporters, were responsible. The question here, then, is whether Sheriff's Office policy makers harbored political animus against Plaintiffs because of their affiliation with Remus and opposition to the current administration (and its support for Remus's opponent Dart) that was sufficient to cause Plaintiffs' investigations and suspensions.

Plaintiffs have met their burden based on the following evidence: (1) the fact that the decisions to investigate and suspend Plaintiffs took place just weeks before the primary election for sheriff between Remus and Dart, the current Sherriff's favored candidate; (2) the statements of political animus directed at SORT and

Remus made by Kurtovich and Kaufmann; (3) Davis's and Bailey's testimony that they were questioned about their political affiliation before Gater identified that as a potential motive; (4) the fact that a previous jury found political animus motivated the decision to disband SORT; (5) the fact that a jury found Kurtovich personally liable for the decision to disband SORT, yet he was not disciplined for it despite the Sheriff's Office's policy against political retaliation; and (6) the fact that Plaintiffs—SORT guards and Remus supporters who were stationed on the inside of the ABO tier—were investigated and suspended, but the non-SORT guards who were stationed outside the ABO tier and opened the door to let the inmates escape were not.

Taken together, these facts show a division within the Sheriff's Office between supporters of Remus and supporters of the candidate backed by the current Sheriff. There is also evidence that the SORT officers were strongly associated with Remus. For this reason, there was animosity towards SORT among the current administration, ultimately culminating in SORT's dissolution at the hands of Kurtovich and the current administration. This bias against the current Sheriff's opponents is further demonstrated by the fact the Kurtovich was found liable for political retaliation in connection with his participation in the decision to disband SORT, but he faced no discipline for violating the Sheriff's Office's policies against political retaliation.

Unfortunately for Plaintiffs, the jail break landed squarely on this political fault line because it originated in the Jail's ABO tier, which was guarded by SORT.

Clearly these circumstances were on Kaufmann's mind when he was informed of the escape because he said as much when he arrived at the Jail. Moreover, Kaufmann put his stated animus into practice when deciding who was immediately investigated and suspended. The non-SORT guards were not investigated or suspended despite the fact that they opened the ABO tier door and let the inmates escape. So too the guards who failed to secure the bay door and exterior area where the inmates exited the Jail complex. For these reasons, the Court finds that Plaintiffs have proven that their political affiliation was a motivating factor in the decisions to investigate and suspend them.

II. Whether the Sheriff's Office Would Have Investigated and Disciplined Plaintiffs Despite their Political Affiliation

Once a plaintiff has proven that his political affiliation motivated the adverse action taken against him, the burden shifts to the defendant to demonstrate that another "sufficient condition" exists. If the defendant meets this burden and proves another sufficient condition exists, the plaintiff's claim fails for lack of causation because the motivating factor proven by the plaintiff cannot be a "necessary condition" or "but for" cause of the adverse action. The Seventh Circuit explained this logic using the example of dropping a lighted match into a bucket of gasoline. *See Greene*, 660 F.3d at 978. That action is a *sufficient* condition to start a fire, but it is not a *necessary* condition because there are other sufficient conditions for starting a fire, such as rubbing two sticks together. *Id.* In a First Amendment retaliation case where there are two sufficient conditions of an adverse action, neither is a necessary condition or "but for" cause, because the adverse action would have taken place in

either event. Thus, if the defendant can prove that an alternative sufficient condition exists, the defendant has demonstrated that the motivating factor was not the but-for cause of the adverse action, and the defendant is not liable.

The Sheriff's Office has met that burden here. Although Plaintiffs have proven that their political affiliation was on the minds of Sheriff's Office policymakers when they made the decisions to investigate and suspend Plaintiffs, Gater's confession—coupled with the fact that Plaintiffs were responsible for guarding the section of the Jail from which the escape originated—was a sufficient condition for the investigations and suspensions. The evidence the Sheriff's Office has produced that political affiliation was *not* the but-for cause of Plaintiffs' discipline, is far stronger than the evidence Plaintiffs produced showing that political affiliation was a motivating factor. It was eminently reasonable for Kaufmann to initiate an investigation against Bailey and Davis, because they were assigned to guard the ABO during the escape. Similarly, Hernandez failed to properly ensure that Bailey and Davis were at their posts for the shift during which the escape occurred. Even prior to Gater's statement, these circumstances would be a sufficient basis to investigate whether Bailey, Davis, and Hernandez were negligent and suspend them pending that investigation. Once Gater confessed, his statement indirectly implicating Bailey and Davis served to bolster the case against them. Gater's statement directly implicating Jones, Rodriguez, and Michno was certainly a sufficient condition for the investigations into their conduct and their suspensions—both those that occurred immediately after the escape, and those that

occurred in the months that followed. There is no reasonable argument to the contrary. The escape happened either through negligence or complicity. So investigation and some discipline of those who were clearly negligent and implicated as being complicit was entirely appropriate.

A. Pretext regarding Bailey, Davis, and Hernandez

The real question in this case is whether, as Plaintiffs argue, the same evidence demonstrating that Plaintiffs' political affiliation was a motivating factor also demonstrates that the Sheriff's Office's explanation for the investigations and suspensions is pretextual. This argument fails with respect to Bailey, Davis, and Hernandez.

Plaintiffs argue that the Court's finding that an atmosphere of political animosity existed between Remus supporters and those who supported the incumbent administration is sufficient to demonstrate pretext. But the Seventh Circuit held in reversing an denial of qualified immunity to the Sheriff's Office policy-makers rendered earlier in this case, "a jailbreak of multiple dangerous prisoners from a special unit would raise suspicion of inside assistance and trigger an internal investigation. . . . While Kaufmann and others may have expressed negative opinions regarding [Plaintiffs'] support of Remus, we find it objectively reasonable to investigate officers implicated in a multi-felon jailbreak." *Hernandez*, 711 F.3d at 818. That reasoning serves to counter Plaintiffs' pretext argument here. In light of Bailey, Davis, and Hernandez's responsibility for the section of the Jail from which the escape originated, a politically charged atmosphere, even one verbally expressed

by Kaufmann, is not enough evidence to prove that the political affiliation of these three plaintiffs caused their suspensions and investigations.

Plaintiffs also point out that although Bailey, Davis, and Hernandez had responsibility for the ABO on the night of the escape, the non-SORT guards who opened the ABO door and failed to properly secure the Jail's garage exit were not investigated or suspended. Plaintiffs argue that this discrepancy establishes that Plaintiffs' political affiliation, and not their duty assignments, was the real reason they were investigated and suspended. But there is no disputing that the non-SORT guards upon whom Plaintiffs base their argument had no responsibility for the ABO itself. The decision to make this distinction among the guards is not so objectively unreasonable that the Court must conclude it is inherently pretextual, as Plaintiffs contend.

Plaintiffs spent an inordinate amount of time at trial focusing on the perceived inadequacy of the various investigations. A poor investigation (and the Court is not finding that a poor investigation took place) does not mean it was caused by Plaintiffs' political affiliations. Every investigation can be done differently in hind sight. And the fact that certain people were not investigated or were not disciplined does not mean that those who were did not deserve to be.

Bailey in particular testified that he was acting within workplace rules to leave the Jail to get an energy drink, and that the investigation of his conduct on this basis was pretextual. That is ludicrous. The fact is that he left his post. People sometimes do things on their jobs that are irresponsible or negligent, but, lucky for

them, cause no harm. Unfortunately for Bailey, he left to get an energy drink at the worst possible time—when a massive jailbreak occurred.

B. Pretext regarding Jones and Michno

The cause of the initiation of investigations of Jones and Michno requires further analysis, however, because Plaintiffs argue that Kaufmann was not aware of Gater's statement implicating them at the time he initiated their investigations and recommended their suspensions.[9] Unlike Bailey, Davis, and Hernandez, who had responsibility for the ABO on the night of the escape, Jones and Michno were not on duty at that time. Thus, Gater's statement was the only reason to investigate and suspend them. Gater confessed on February 12, and Plaintiffs were not suspended until February 13 (with Jones and Michno not being suspended until 10:00 or 11:00 p.m. that day, *see* R. 611 at 27 (1401:17); R. 627-4 at 1). But Plaintiffs argue that Kaufmann—who initiated the investigations, and on that basis sought suspension orders from Kurtovich and Andrews—did not know that Gater had implicated Jones and Michno *specifically* when he made his decisions. Plaintiffs make this argument on the basis of Fitzgerald's testimony that he told Kaufman "that it sounded as if this was a conspiracy and that several *other officers* were involved." Plaintiffs argue that Kaufman's knowledge that Gater implicated "other officers" in general was an insufficient basis to suspend Plaintiffs in particular.

The Court disagrees. Plaintiffs' argument relies on an unreasonably literal understanding of this testimony. Fitzgerald did not testify that he *withheld* the

[9] Rodriguez was not suspended until months later, at which point there is no question that Kaufmann, Kurtovich, and Andrews were aware of Gater's statement.

names of the officers Gater implicated. And he was never asked at trial whether he told Kaufmann the names of the particular officers Gater implicated. Absent evidence that Fitzgerald actively withheld that information, or that Kaufmann never received that information before he recommended the suspensions, it is not reasonable to believe that Fitzgerald would have failed to pass along the particular names. Even if Fitzgerald had failed to do so, it is more probably true than not true that Kaufmann would have learned the names as the investigation progressed over the next 18 hours between Gater's statement implicating Jones and Michno and the time they were informed of their suspensions. Although Gater made his statement to the Sheriff's Police, Kaufmann was the head of Internal Affairs, and Augustyniak testified that the Sheriff's Police would ultimately report to Kaufmann regarding their investigation. Additionally, Fitzgerald's testimony demonstrates that he was updating Kaufmann regarding the investigation, and there were also Internal Affairs investigators in the building where Gater was being questioned, who were also participating in the investigation. At bottom, the Court finds that the evidence permits the reasonable inference that Kaufmann knew Gater had implicated Jones and Michno by the time he recommended their suspensions.

Plaintiffs argue that if Gater's statement was the basis for Jones's and Michno's suspension, Rodriguez would have been suspended as well since Gater also implicated him. Kurtovich testified that he could not explain why Kaufmann did not seek Rodriguez's suspension because "the investigation was done by Internal Affairs," and he "had nothing to do with it." R. 605 at 176 (176:18-21). Of course,

Kaufmann died before he could be deposed in this case, so he was not available to explain his decision. This mystery does not change the fact, however, that Gater's statement was a sufficient basis to suspend Jones and Michno. The fact that Kaufmann did not suspend Rodriguez on February 13, whatever the reason, does not undermine the force of Gater's statement. Perhaps if there was evidence that Rodriguez was not as strong a supporter of Remus as Jones and Michno, the fact that he was not suspended would carry greater weight. But there is no such evidence.

Additionally, there was a suggestion throughout the trial by Plaintiffs that Kaufmann somehow caused Gater to implicate some of them, forcing a coerced confession. Of course, the state courts found otherwise. But if Plaintiffs still wished to pursue this theory, they could have called Gater as a witness. They chose not to.

Plaintiffs argue that regardless of the circumstances creating a reasonable suspicion about their culpability—whether negligent or intentional—for the escape, Bailey's and Jones's testimony that Andrews told them that the investigations were "political" days after Gater's confession demonstrates that legitimate investigatory concerns were not the Sheriff's Office's true motivation. In denying summary judgment, the Court similarly reasoned that "[s]ince Andrews stated that the investigation was politically motivated after Gater confessed, Andrews's statement is evidence that [the Sheriff's Office decisionmakers] themselves did not put much stock in Gater's confession and that [their] true motivation was . . . retaliatory." R. 445 at 11 (*Hernandez v. Cook Cty. Sheriff's Office*, 2014 WL 3805734, at *5 (N.D. Ill. July 31, 2014)). The trial testimony, however, does not support this reasoning. Andrews

testified that he does not remember making this statement. *See* R. 606 at 132 (407:1-4). Had Andrews made this such a statement with the meaning Plaintiffs ascribe to it, he would certainly remember it, especially since Gater had directly accused Davis, Rodriguez, and Michno of assisting the escape for *political* reasons. Additionally, the Court finds that Andrews testimony was generally credible, and notes that if anything Andrews was biased in favor of Plaintiffs as he testified that Plaintiffs were good officers and that he did not agree with the decision to transfer them out of SORT. *See* R. 606 at 130 (405:1-22).

Bailey's testimony was filled with speculation about the causes of events in his life that amount to unfounded conspiracy theories, such as his odd belief that Illinois state court judges affirmed the administrative decision terminating his employment at the behest of the Sheriff Office. *See* R. 610 at 38-40 (1276:2–1278:3). His testimony was also contradictory. He blamed the escape on short-staffing of the midnight shift, emphasizing that he complained about this circumstance. *See* R. 610 at 82 (1320:4-24). Yet he took an unauthorized break from that shift to leave the Jail and go to a convenience store to get an energy drink without even telling Gater or Davis he was leaving. *See* R. 609 at 41 (1030:14-16). Bailey's testimony was so non-credible in many respects that the Courts finds Andrews's testimony that he does not recall stating that the investigations and suspensions were "political" more credible.

The Court found Jones's testimony to be generally credible. But his testimony regarding Andrews's statement in particular was meaningfully impeached as inconsistent with his deposition testimony. *See* R. 611 at 111-12 (1485:16–1486:19).

Jones testified both at his deposition and at trial about a conversation he had with Andrews regarding his reinstatement, but he failed to testify at his deposition that Andrews described the investigations and suspensions as "political." At his deposition, Jones testified as follows:

> Q: Have you spoken to Director Andrews at any time since the time where you reported Superintendent Snooks?
> A: I've [run] into him on occasion. The first time he called me and told me that I was being reinstated, I had to report to his office to get my assignment back to the jail. Then the time when I came in he shook my hand and hugged me and [said] he was sorry about everything that happened and I had nothing to worry about.
> And I told him, . . . you called me down to your office to have a meeting with me and then you left and left me down there with an internal investigator, and you tell me I had nothing to worry about? And he was pretty much saying that no, he had nothing to do with it. That's not his call . . . .

R. 400-8 at 32 (121:5-23). It was not until trial that Jones mentioned that Andrews also told him the investigation was "political":

> Q: Before February 23rd, did you have a conversation with Director Andrews about you – did you have a conversation with Director Andrews?
> A: Yes. He had called me on the phone and he said he had orders to get me back to work and I had to come back to work.
> And I told him, "Sir, last time you called me in, I was being held." And I didn't trust him, so I pretty much hung up the phone. So I didn't – I didn't want to talk to him no more.
> Q: Okay. And did you talk to him again over the phone, or did you see him in person after that?
> A: Yeah, he had called me – he called me I think twice more after that, and then I just decided to come on in.
> Q: Did you meet with him when you came in?
> A: Yes, I did.

> Q: Okay. And at any point, did he have a conversation with you in which he asked you about – or had a conversation with you about you being transferred?
> A: Yes. When I got to his office, he – he hugged me. I kind of pushed him back and said, "I can't believe you – you would do this to me."
> And he said that, "It's going to be all right. It's going to all go away. You know, it's all political. It will go away."

R. 611 at 39-40 (1413:20–1414:18). Jones's description of the circumstances—i.e., reinstatement, the hug, Jones's expression of disgust at being betrayed by Andrews—indicate that Jones was testifying about the same conversation at both his deposition and at trial. Yet, Jones failed to mention at his deposition that Andrews told him that his suspension and the investigation were "political." Considering that this is the central issue in the case, it is hard to believe that Jones would forget to mention Andrews's statement at his deposition. For this reason, the Court discounts Jones's trial testimony that Andrews made this statement.

There is also nothing about Davis's or Jones's testimony that requires Andrews's comment to have the meaning Plaintiffs ascribe to it. Rather than suggesting the Court infer that Andrews meant to reveal that Davis's and Jones's support for Remus was the cause of the investigations and suspensions, the statement—as related by Davis and Jones—is entirely ambiguous. Andrews might have used the word "political" to refer to Bailey's and Jones's affiliation with Remus. But Andrews could just as easily have been referring to the mechanizations of a bureaucratic investigation generally. A jailbreak requires immediate decisions regarding who might have helped the inmates escape and ensuring that any such individuals are separated from the Jail environment. A deliberate investigation then

ensues to determine whether the initial appearances were accurate, and it can take days or weeks to sort things out. It is more likely that Andrews's comment, if he actually said it, was referring to that process generally, and not Plaintiffs' affiliation with Remus in particular. Andrews was directly asked by Plaintiffs' counsel whether "he [saw] decisions being made by top command staff based on people's perceived or political affiliation," and he testified that he did not "know of" any such instances. *Id.* at 157-58 (432:23–433:7). This is particularly compelling testimony coming from a witness who was not reluctant to call out political discrimination where he saw it, namely with respect to the dissolution of SORT. *See* R. 606 at 154-56 (429:18–431:9). For these reasons, and taking the testimony at trial as a whole, the Court finds that Andrews did not believe or know that Plaintiffs' suspensions and the investigations into their conduct were motivated by their affiliation with Remus, and he would not have said so to Bailey and Davis.

* * * *

Many of the plaintiffs testified to being treated unfairly by the Sheriff's Officer. Very few people who are investigated think it is a fair investigation. Anyone who is falsely accused especially feels that way. For the most part, the Court does not in any way minimize Plaintiffs' testimony about the emotional impact the investigations had on them. Everyone who is innocent, yet is investigated, feels fear, insecurity, resentment, and betrayal. It is tragic that some of the plaintiffs were extraordinarily impacted by this investigation, especially those with otherwise

exemplary records. But there was nothing more the investigators could do other than follow up on the leads they had.

Those who feel others were just as culpable but escaped investigation and discipline will also feel they were unfairly treated. But the perspective that is important is not the perspective of the person falsely accused. It is instead the perspectives of the investigators and whether their investigation was politically motivated. Notably, to Jones's credit, he admitted that if Gater implicated him (which Gater did), it would have been reasonable for Jones to be questioned.

At bottom, the Court finds it is more probably true than not true that Gater's confession and Plaintiffs' responsibility for the point of escape (i.e., the ABO) was the but-for cause of the Sheriff's Office's decisions to investigate and suspend them.[10] Although the Court has found that Plaintiffs' political affiliation was a "motivating factor" in their investigations and suspensions, the Court uses that term strictly in its legal sense. There is no evidence that Plaintiffs' political affiliation was the reason

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[10] Plaintiffs also argue that the investigations into their conduct and suspensions that occurred in the months following the escape were politically motivated. *See* R. 627 at 2. But for the reasons already explained, Plaintiffs' conduct (in the cases of Bailey, Davis, and Hernandez), and Gater's statement (in the case of Jones, Rodriguez, and Michno) are sufficient causes of these actions by the Sheriff's Office.

For instance, when Hernandez learned that there might be a shank in the ABO, he needed to conduct a search and/or notify the guards in the next shift. Hernandez testified that he did not find the information about a shank credible. But at least notifying the guards on the next shift would have been eminently reasonable and makes such common sense that anyone saying otherwise is just not credible. Hernandez's failure to act reasonably in these circumstances was sufficient to cause the five-day suspension without pay he was given in 2007.

Additionally, the Court found Augustyniak's testimony that the decision whether to sustain charges or not was his, and his alone, to be credible. Nothing about his investigation was based on Plaintiffs' political affiliation.

they were investigated and suspended, and eventually fired in Bailey's case. Rather, the only reasonable conclusion the evidence permits is that Plaintiffs were investigated and suspended because they were on duty at the ABO the night of the escape (in the cases of Bailey, Davis, and Hernandez), in which case they more than deserved to be investigated and disciplined; or were implicated by Gater (in the cases of Jones, Rodriguez, and Michno), in which case they were simply unlucky and have Gater to blame for their troubles if his statement was false. But in all six cases, the evidence does not come close to permitting a finding that the Sheriff's Office took action against Plaintiffs because of their political affiliation.

Conclusion

For the foregoing reasons, the Court denies the Sheriff's Office's motion for judgment as a matter of law, and finds in favor of the Sheriff's Office, and against Plaintiffs, on the merits of the case.

ENTERED:

Thomas M Durkin

Honorable Thomas M. Durkin
United States District Judge

Dated: September 25, 2017