APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-3342

Joseph S. McGreal,
Plaintiff,
v.
Village of Orland Park, et al.,
Defendants-Appellees.

Appeal of: John P. DeRose, Counsel for Plaintiff,
Appellant.
Filed: June 26, 2019

Before Kanne, Sykes, and Brennan, Circuit Judges.

Kanne, Circuit Judge. The Village of Orland Park fired police officer Joseph McGreal in 2010. McGreal sued, alleging that the Village fired him in retaliation for remarks he made at a community board meeting. The district court granted summary judgment for the defendants, finding that McGreal had advanced only speculation to support his claims. We affirmed and also remarked on the dearth of evidence to support McGreal's allegations.

After we affirmed summary judgment, the district court granted the defendants' motion for attorney fees and directed John P. DeRose—McGreal's attorney—to pay $66,191.75 to the defendants. DeRose now appeals that order. Because the district court did not abuse its discretion, we affirm.

I. BACKGROUND

Our 2017 opinion provides a summary of McGreal's suit. *See McGreal v. Vill. of Orland Park*, 850 F.3d 308, 310 (7th Cir. 2017). Suffice to say, the Village of Orland Park fired McGreal from the police force after he spoke at a November 2009 village board meeting. At the meeting, he suggested several solutions to a budgetary shortfall facing the Village. McGreal's recommendations would have protected junior officers from layoffs by eliminating benefits enjoyed by more senior officers. McGreal believes that these suggestions motivated his June 2010 termination. But the Village contends that it fired McGreal because he repeatedly engaged in misconduct during late 2009 and early 2010.

McGreal contested his termination through arbitration. The arbitrator sustained 75 of the 76 disciplinary charges in McGreal's record and concluded that the Village fired McGreal for just cause.

In June of 2012, McGreal commenced a federal lawsuit, *pro se*, against the Village and several members of the police department. On October 19, 2012, attorney John DeRose appeared as plaintiff's counsel. He promptly filed an amended complaint on McGreal's behalf. After the defendants filed a motion to dismiss, the court dismissed most claims but permitted several (significantly narrowed) claims to proceed.

DeRose aggressively pursued discovery: he took twelve depositions, made 294 document requests, and filed three motions to compel. During discovery, defense counsel asked DeRose on multiple occasions to end the litigation. On February 3, 2014, defense counsel sent DeRose an email requesting dismissal of several individual defendants because discovery had revealed no evidence to support the claims against them. Then in July 2014, defense counsel sent DeRose a letter advanc-

ing similar arguments. Defense counsel threatened Rule 11 sanctions in both communications.

After discovery, McGreal voluntarily dismissed six defendants but defended against summary judgment on the remaining four defendants. The district court granted judgment for defendants. The court began by noting that DeRose's summary judgment filings did not comply with Northern District of Illinois Local Rule 56.1 (which provides guidelines for submitting a statement of facts at summary judgment). "[T]he motion could have been granted by simply rejecting plaintiff's Local Rule 56.1 submissions," but the court opted to resolve the summary judgment motion on its merits. The court explained that the defendants had offered evidence to support their theories of defense, and McGreal's arguments and evidence to the contrary were speculative.

On June 6, 2016, McGreal appealed. Several weeks later, the defendants filed a motion for attorney fees. The defendants spent most of the motion arguing that the court should award fees under the 42 U.S.C. § 1988 fee-shifting provision. They also argued that the court should sanction DeRose pursuant to Federal Rule of Civil Procedure 11.

On March 6, 2017, we affirmed the judgment for the defendants. 850 F.3d 308. Like the district court, we found that McGreal had "offered no admissible evidence showing that he [was] entitled to relief." *Id.* at 310. Several months later, the district court granted the defendants' motion for fees. Instead of relying on § 1988 fee-shifting, the court concluded that "under Rule 11, McGreal's counsel's summary judgment filings were not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Ultimately, the court ordered

DeRose to pay $66,191.75 in fees (the amount defendants incurred in preparing their Rule 11 letters, seeking summary judgment, and requesting attorney fees). DeRose promptly appealed.

II. ANALYSIS

We review the imposition of Rule 11 sanctions for abuse of discretion. *N. Illinois Telecom, Inc. v. PNC Bank, N.A.*, 850 F.3d 880, 883 (7th Cir. 2017). "An abuse of discretion may be established if the district court based its decision on an erroneous view of the law or a clearly erroneous evaluation of evidence." *Id.* Rule 11 requires attorneys to certify that every court filing advances arguments warranted by existing law or a nonfrivolous argument for extending the law. Fed. R. Civ. P. 11(b)(2). Similarly, the factual contentions attorneys advance must have evidentiary support or be likely to have evidentiary support after a reasonable opportunity for further investigation. *Id.* at 11(b)(3).

In his brief on appeal, DeRose first argues that the defendants did not follow the Rule 11 procedures for seeking sanctions. Specifically, Rule 11(c)(2) specifies that a party may file a "motion for sanctions," "but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." In other words, Rule 11(c)(2) creates a safe-harbor. The moving party must serve the motion on the alleged violator and permit twenty-one days to remedy the violation.

DeRose correctly notes that defense counsel never served him with a motion before seeking sanctions. Rather, they sent him letters and emails raising their concerns and threatening sanctions. A letter is not a motion, and, under the law of eight circuits, these informal

communications would not satisfy the Rule 11(c)(2) requirements. *See Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 764, 768 (6th Cir. 2014) (explaining that the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits all require strict compliance). The Seventh Circuit, however, interprets Rule 11(c)(2) differently.

In *Nisenbaum v. Milwaukee Cty.*, we held that the defendants "complied substantially" with Rule 11(c) when they sent opposing counsel "a 'letter' or 'demand' rather than a 'motion.'" 333 F.3d 804, 808 (7th Cir. 2003). We are the sole circuit to adopt this "substantial compliance" theory, and other circuits have subsequently criticized our analysis as cursory and atextual. *See, e.g.*, *In re Pratt*, 524 F.3d 580, 588 (5th Cir. 2008) ("[T]he Seventh Circuit provided little analysis and cited no authority for its holding."); *Roth v. Green*, 466 F.3d 1179, 1193 (10th Cir. 2006) (similar); *see also Manrique v. United States*, —— U.S. ——, 137 S. Ct. 1266, 1272, 197 L.Ed.2d 599 (2017) (indicating that, if properly raised, mandatory claim-processing rules are "unalterable" (citation omitted)); *In re Wade*, No. 18-2564, 926 F.3d 447, 450–51, 2019 WL 2482413, at *3 (7th Cir. June 14, 2019) (applying *Manrique* to claim-processing rules in bankruptcy cases).

DeRose's argument that the defendants should have served him with their Rule 11 motion—not just emails and letters—is directly foreclosed by our holding in *Nisenbaum*. And DeRose does not ask us to overrule *Nisenbaum*—he repeatedly disavowed that argument at oral argument. Even if DeRose did advance this argument, he's waived it. He didn't argue before the district court that the defendants failed to comply with Rule 11(c)(2) until his motion for reconsideration of the order imposing sanctions. (*Laserage Tech. Corp. v.*

Laserage Labs., Inc., 972 F.2d 799, 804 (7th Cir. 1992) (explaining that raising issues or arguments for the first time in a motion for reconsideration do not preserve them for appeal) (citing *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 404 (7th Cir. 1986))). Accordingly, we leave any reconsideration of *Nisenbaum* for another day. *See also N. Ill. Telecom, Inc.*, 850 F.3d at 887–88.

DeRose also argues that the district court abused its discretion because he agreed to represent McGreal in good faith and after careful consideration. That argument is inadequate for two reasons. First, the district court sanctioned DeRose for his decision to defend against summary judgment. The court didn't question DeRose's decision to represent McGreal or seek discovery. The sanctionable behavior was DeRose's decision to continue litigating after discovery revealed no evidence to support McGreal's claims.

Second, "Rule 11 requires counsel to study the law before representing its contents to a federal court. An empty head but a pure heart is no defense." *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986). The test is objective. An attorney cannot avoid sanctions by claiming subjective good faith if a reasonable inquiry into the facts and law would have revealed the frivolity of the position. *Cuna Mut. Ins. Soc. v. Office & Prof'l Emp. Int'l Union, Local 39*, 443 F.3d 556, 560 (7th Cir. 2006); *Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs., Inc.*, 9 F.3d 1263, 1270 (7th Cir. 1993).

In other words, DeRose's duty to conduct a reasonable investigation into the law and facts supporting McGreal's claims did not end after he chose to represent McGreal. That duty renews at each stage of the litigation, including summary judgment. In fact, the duty compounds. An attorney might reasonably believe that discovery will reveal evidentiary support. After discov-

ery, an attorney may proceed only if that hypothetical evidence has materialized.

And the district court did not abuse its discretion when it found that DeRose violated Rule 11 by opposing summary judgment. The district court found that McGreal lacked evidence to support at least one element of each claim. And we agreed, finding that McGreal hadn't produced *any* admissible evidence on the claims he appealed. 850 F.3d at 310.

DeRose didn't just disregard the complete lack of evidence. The district court found that DeRose's "responses to defendants' statements of material facts were laden with disingenuous and misleading statements." And, as already mentioned, DeRose's statement of facts did not comply with the Local Rule 56.1 standards.[1] Viewed in totality, DeRose's summary judgment submissions fell short of the Rule 11 requirements. The district court did not abuse its discretion by imposing sanctions.

III. CONCLUSION

Attorneys must satisfy Rule 11's requirements during the entire pendency of the litigation. Discovery revealed an utter lack of evidentiary support for McGreal's claims, but DeRose defended against summary judgment anyway. Accordingly, we AFFIRM the district court's sanctions against DeRose.

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[1] That failure is particularly difficult to understand because the district court, in its standing order, directs counsel to read *Malec v. Sanford*, 191 F.R.D. 581 (N.D. Ill. 2000), before submitting statements of fact under Local Rule 56.1. And the court in *Malec* admonished DeRose *himself* for failure to comply with the same local rule. *Id.* at 582–87.

APPENDIX B

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

No. 12-cv-5135
Joseph S. McGreal,

Plaintiff,

v.

Village of Orland Park, et al.,

Defendants.

OPINION AND ORDER

Plaintiff Joseph McGreal filed a first amended complaint against defendants the Village of Orland Park ("the Village"), and Timothy McCarthy, Thomas Kenealy, Patrick Duggan, Joseph Mitchell, Anthony Farrell, Scott Malmborg, Timothy McCormick, and James Bianchi (collectively, the "individual defendants"), members of the Orland Park Police Department (the "Police Department").[1] In his ten-count first amended complaint, McGreal alleges that he was terminated without due process in violation of the Fourteenth Amendment and that he was retaliated against in violation of the First Amendment. He also has alleged state law claims for tortious interference with advantageous business relations, breach of contract, and intentional infliction of emotional distress. McGreal

[1] The court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. Venue is proper under 28 U.S.C. § 1391.

seeks a declaratory judgment regarding the construction of a collective bargaining agreement and the conduct of the arbitration hearing and seeks recovery from the Village under theories of *respondeat superior* and indemnification. Before the court is defendants' motion to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the following reasons, their motion [# 59] is granted in part and denied in part.

LEGAL STANDARD

Rule 12(b)(1) provides that a case will be dismissed if the court lacks the authority to hear and decide the dispute. The standard of review for a Rule 12(b)(1) motion to dismiss depends on the purpose of the motion. *See United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (en banc). If subject matter jurisdiction is not evident from the face of the complaint, the court analyzes the motion to dismiss under Rule 12(b) (1) as any other motion to dismiss and assumes for purposes of the motion that the allegations in the complaint are true. *Id.* Where, as here, however, "the complaint is formally sufficient but the contention is that there is *in fact* no subject matter jurisdiction, the movant may use affidavits and other materials to support the motion." *Id.*

A motion to dismiss under Rule 12(b)(6) challenges a complaint for failure to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997). In reviewing a Rule 12(b)(6) motion, the court takes as true all facts in the complaint and draws all reasonable inferences in favor of the plaintiff. *Dixon v. Page*, 291 F.3d 485, 486–87 (7th Cir.

2002). To survive a Rule 12(b)(6) motion, the complaint must not only provide the defendant with fair notice of the claim's basis but must also establish that the requested relief is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The allegations in the complaint must be "enough to raise a right of relief above the speculative level." *Twombly*, 550 U.S. at 555. At the same time, the plaintiff need not plead legal theories. *Hatmaker v. Mem.'l Med. Ctr.*, 619 F.3d 741, 742–43 (7th Cir. 2010). Rather, it is the facts that count.

BACKGROUND[2]

McGreal began working as a full-time, sworn Orland Park police officer on January 10, 2005 after graduating from the Chicago Police Academy as the valedictorian of his class. McGreal's performance evaluations consistently indicated that he met or exceeded the Police Department's standards.

At some point after he began working for the Police Department, McGreal was elected secretary of the Metropolitan Alliance of Police # 159 ("M.A.P.159"), the union representing the Village's police officers. As a M.A.P. 159 member, McGreal represented union members during disciplinary proceedings, filed union griev-

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[2] The following facts are taken from the first amended complaint and attached exhibits and are presumed true for the purpose of resolving the present motion. *See Barnes v. Briley*, 420 F.3d 673, 677 (7th Cir. 2005). The court may consider the arbitrator's decision in deciding defendants' Rule 12(b)(1) motion. *See United Phosphorous*, 322 F.3d at 946. The court takes judicial notice of the filings defendants have attached to their motion to dismiss and reply, as these are matters of public record. *See Ennenga v. Starns*, 677 F.3d 766, 773 (7th Cir. 2012).

ances to resolve contract disputes with the Village, and attended Village meetings on the union's behalf. On November 2, 2009, McGreal attended a Village board meeting during which, as both a M.A.P. 159 representative and a private citizen, he spoke against the Village's plan to lay off up to seven police officers in an attempt to eliminate the Village's 2010 budget operating shortfall. Although no police officers were permanently laid off, budget cuts were instated and the Police Department supervisors' salaries and benefits were reduced.

After these salary reductions, McCarthy, the police chief, directed the other individual defendants, all Police Department supervisors, to interrogate McGreal. McGreal was accused without substantiation of violating departmental policies. Police Department policies were also enforced inequitably against him in comparison to other similarly situated employees. McGreal responded by filing two formal complaints that he was being subjected to a hostile work environment. McCarthy and Stephana Przybylski, the Village's human resources director, received the complaints. Duggan was initially ordered to investigate McGreal's complaint, but that order was rescinded. The Village then conducted an investigation and found no misconduct. McGreal filed a FOIA request to review the investigation, which the Village denied. McGreal appealed the denial to the Public Access Counselor of the Office of the Illinois Attorney General. The Village was thereafter ordered to comply with McGreal's FOIA request but it nonetheless refused to release the documents.

On December 22, 2009, M.A.P. 159 filed an unfair labor practice charge against the Village on McGreal's behalf, alleging twelve violations of the Illinois Public

Labor Relations Act as well as disparate treatment. Subsequently, on January 21, 2010, the Village conducted a formal interrogation of McGreal without alleging or advising him of any violations. McGreal's counsel was not allowed access to documents related to the Village's investigation prior to the interrogation. On March 5, 2010, McCarthy ordered that McGreal be interrogated again and also placed him on administrative leave. The second interrogation, led by McCarthy, Duggan, and Thomas Melody, an attorney, occurred on March 24, 2010. On April 9, 2010, McCarthy then offered McGreal three or four years of salary and benefits if McGreal agreed to resign as a police officer. Another meeting occurred on April 28, 2010, with Kenealy, Duggan, McGreal, and McGreal's counsel in attendance. No allegations or charges were discussed at that time, nor was any discovery provided to McGreal.

On June 3, 2010, McCarthy ordered McGreal to submit a report detailing the alleged acts of misconduct the individual defendants committed, and McGreal provided an eight-page report the following day. McGreal then received a list of charges alleging seventy-six acts of misconduct he had committed over the past eleven months. The charges were also presented to the Village Board of Fire and Police Commissioners on June 5, 2010. The Board was to hold a hearing within thirty days, but before that could take place, McGreal filed a grievance contesting the charges and, on June 25, 2010, invoked his right to arbitrate the charges under the collective bargaining agreement ("CBA") between M.A.P. 159 and the Village. McGreal was terminated on June 28, 2010.

Under the CBA, if the union and Village did not agree to an arbitrator within five days of the arbitration request, a list of arbitrators was to be provided by the Federal Mediation and Conciliation Service. The potential arbitrators were to be members of the National Academy of Arbitrators in the Midwest region. Dennis Stoia, who McGreal later learned was not a member of the National Academy of Arbitrators, was selected as the arbitrator for McGreal's hearing from this list. The arbitration hearing began on January 26, 2011. Testimony was heard on seventeen days over a course of fourteen months. The defendant officers testified, providing false testimony and fabricating new allegations of misconduct. Before the second day of testimony, on February 8, 2011, Stoia met with counsel for both sides and informed them that he believed McGreal was a liar, despite the fact that McGreal had not yet testified or offered any evidence in his defense. Stoia also met with McGreal and his union counsel that day, repeating that he believed McGreal was a liar and stating that McGreal would not get his job back.

As the hearing continued, McGreal received a signed affidavit from Thomas Antkiewicz, another member of the Police Department, in which Antkiewicz asserted that the Village attorney, through M.A.P.'s chief counsel, offered that if Antkiewicz testified falsely at the hearing against McGreal, the Village would not investigate a disciplinary complaint pending against Antkiewicz. This bribery attempt was brought to Stoia's attention, but Stoia did not allow Antkiewicz to testify to the issue.

On January 6, 2012, McGreal learned that Stoia was not a member of the National Academy of Arbitrators.

McGreal then filed a *pro se* motion to stay arbitration, claiming that because Stoia did not meet the CBA's requirements for arbitrators, he lacked subject matter jurisdiction to conduct the hearing. Stoia refused to acknowledge or rule on the motion to stay arbitration. A decision was ultimately rendered on November 14, 2012, in which Stoia found by a preponderance of the evidence that there was just and sufficient cause for McGreal's termination.

In addition to pursuing the arbitration hearing, McGreal applied for jobs with various other area police departments. The Arlington Heights and Villa Park police departments rejected his applications out of hand due to his termination from the Police Department. Although ranked first on Mokena's eligibility list when there was at least one vacancy, McGreal was not selected after reaching the final step because he failed a background check. McGreal remains unemployed.

ANALYSIS

I. Mootness

Under Article III of the United States Constitution, federal courts have jurisdiction over live cases and controversies. A case becomes moot, however, "when the dispute between the parties no longer rages, or when one of the parties loses his personal interest in the outcome of the suit." *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994). Defendants argue that McGreal's claims that he was improperly terminated without the hearing to which he was entitled and without a finding of just cause are moot because McGreal received the arbitration hearing that he requested and the arbitrator rendered a finding that McGreal was

terminated with just cause.[3] This decision renders a request for an injunction ordering such relief moot. *See Medlock v. Trs. of Indiana Univ.*, 683 F.3d 880, 882 (7th Cir. 2012). But McGreal is not seeking an injunction but rather damages for the alleged deprivation of procedural due process.[4] McGreal's damages request is not mooted by the conclusion of the arbitration hearing or the arbitrator's finding that McGreal was terminated with just cause. *See Witvoet ex rel. Witvoet v. Herscher Cmty. Unit Sch. Dist. No. 2*, No. 97–CV–2243, 1998 WL 1562916, at *2 (C.D.Ill. May 27, 1998) (where plaintiff seeks monetary compensation for due process violation, "mootness argument is simply without merit since these damages clearly still exist"); *cf. Cent. Soya Co., Inc. v. Consolidated Rail Corp.*, 614 F. 2d 684, 686–87 & n. 4 (7th Cir.1980) (request for preliminary injunction moot where dispute ended and no incidental damage claims were left to be adjudicated).

McGreal's damages request is limited by the arbitrator's decision. He cannot recover damages for injuries caused by his termination where it has been determined that he would have been terminated had a proper hearing been held prior to that termination. *See Carey v. Piphus*, 435 U.S. 247, 260, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978). McGreal may, however, be awarded damages for any injury caused by the alleged denial of due process if he can demonstrate that such injury actually

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[3] These claims are asserted in counts I, IV, and V.

[4] McGreal's request for a declaration in count IV that he could not be terminated without a finding of just cause "by a statutorily authorized trier of fact" is not moot, for this request is not just for a finding but for a finding by an arbitrator authorized by the CBA to make that finding.

was caused by the denial. *Carey*, 435 U .S. at 264; *Alston v. King*, 231 F.3d 383, 386 (7th Cir. 2000). For example, McGreal may be entitled to lost pay for the period from which he was terminated through the time when he would have been terminated had proper procedures been followed. *See Nalls v. Bd. of Trs. of Ill. Cmty. Coll. Dist. No. 508*, 2007 WL 1031155, at *5 (N.D.Ill. Mar. 29, 2007) (citing *Patterson v. Portch*, 853 F. 2d 1399, 1408 (7th Cir. 1988)). At the least, he is entitled to nominal damages for any procedural due process violation. *Carey*, 435 U.S. at 266–67; *see also Prato v. Bd. of Educ. of City of Chicago*, 202 F.3d 274 (Table) (7th Cir. 1999) (if sought, nominal damages for procedural errors are available after final discharge decision made); *Dudgeon v. Frank*, No. 06–C–0563–C, 2006 WL 3754796, at *3 (W.D.Wis. Dec.7, 2006) (plaintiff could proceed with procedural due process claim even though hearing had occurred, as nominal damages remained available).

McGreal argues that he was entitled to a hearing prior to being terminated and that the just cause finding must have been made prior to termination. Although he has now been afforded process, he retains the ability to argue that he was entitled to that process prior to the deprivation. On the other hand, defendants may have a defense to McGreal's claims that he was entitled to a pre-termination hearing if they demonstrate exigent circumstances that justified immediate termination. *See Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("[W]here a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."). But that determination cannot be made on a motion to dismiss. Thus, because

McGreal may be entitled to damages for any procedural due process violations, his claims related to the need for a hearing and finding of just cause before termination are not moot.

II. Statute of Limitations

Defendants next argue that the statute of limitations bars all allegations of § 1983 violations that occurred prior to McGreal's termination on June 28, 2010. Although § 1983 does not impose an express statute of limitations, § 1983 claims are governed by the forum state's statute of limitations for personal injury claims. *Henderson v. Bolanda*, 253 F.3d 928, 931 (7th Cir. 2001). Under Illinois law, that time period is two years. 735 Ill. Comp. Stat. 5/13–202. McGreal filed suit on June 27, 2012, making any alleged § 1983 violations that occurred prior to June 28, 2010 time-barred.

McGreal argues that his claims regarding actions that took place prior to his termination are not time-barred under the continuing violation doctrine. Under the continuing violation doctrine, where a series of events injures a plaintiff, he can "reach back" to the beginning of the wrong "even if that beginning lies outside the statutory limitations period, when it would be unreasonable to require or even permit him to sue separately over every incident of the defendant's unlawful conduct." *Heard v. Sheahan*, 253 F.3d 316, 319 (7th Cir. 2001). The continuing violation doctrine does not apply to "a series of discrete acts, each of which is independently actionable, even if those acts form an overall pattern of wrongdoing." *Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 435 (7th Cir. 2009); *Pruitt v. City of Chicago, Illinois*, 472 F.3d 925, 927 (7th Cir. 2006) ("That

discrete acts may have been mixed with a hostile environment does not extend the time....").

McGreal argues that the continuing violation doctrine applies because he was subjected to a hostile work environment. But McGreal has not brought a hostile work environment claim, instead asserting only retaliation claims. "[E]ach retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.' " *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). McGreal's complaint pinpoints the dates of the allegedly retaliatory actions. The continuing violation doctrine applies to a series of acts "only if their character was not apparent when they were committed but became so when viewed in light of the later acts." *McDonough v. City of Chicago*, 743 F.Supp. 2d 961, 970 (N.D.Ill. 2010) (citation omitted) (internal quotation marks omitted) (where evidence showed that plaintiff was aware of retaliatory nature of defendants' actions at the time they occurred, continuing violation doctrine did not apply to time-barred actions). McGreal recognized these actions as retaliatory at the time they occurred, even filing two formal complaints that he was being subjected to a hostile work environment in addition to an unfair labor practices charge in December 2009. *See Tinner v. United Ins. Co. of Am.*, 308 F.3d 697, 708 (7th Cir. 2002) ("[I]f the employee knew, or with the exercise of reasonable diligence should have known, that each act, once completed, was discriminatory, the employee must sue upon that act within the relevant statutory period.").

Thus, only McGreal's claim of retaliatory termination—which defendants acknowledge falls within the statute of limitations—is viable. *See Thompson v.*

White, 67 F. App'x 355, 357 (7th Cir. 2003) ("[T]he continuing violation doctrine does not apply to discrete acts of discrimination that can be pinpointed to a particular day. Thompson could have sued for the allegedly retaliatory employment references when they occurred; he did not need to wait for a pattern of retaliation to unfold." (citation omitted)). Acts that occurred outside the statutory time frame, however, may still be used as background evidence in support of McGreal's timely claim. *Morgan*, 536 U.S. at 113. Thus, although McGreal may only pursue his retaliation claims with respect to his termination and any subsequent events, the court will not strike allegations of events that occurred prior to June 28, 2010, for they may be considered in evaluating McGreal's retaliation and other claims.

III. Immunity for Testimony Given Under Oath During the Arbitration Hearing

The individual defendants argue that they are entitled to absolute immunity for any statements they made under oath during the arbitration hearing. It is well established that a witness has absolute immunity from civil liability for the giving of his testimony at trial. *Briscoe v. LaHue*, 460 U.S. 325, 332–33 (1983). The *Briscoe* court, over dissents by Justices Blackmun, Brennan, and Marshall, refused to recognize an exception for police officer witnesses. *Id.* at 335–36.

Witness immunity has been extended to testimony provided in quasi-judicial and administrative proceedings. *See Bilal v. Wolf*, No. 06 C 6978, 2009 WL 1871676, at *7 (N.D.Ill. June 25, 2009) (collecting cases); *Cichowski v. Hollenbeck*, No. 05–C–262–C, 2005 WL 1181957, at *2 (W.D.Wis. May 18, 2005) (absolute immunity for witnesses "extends to any hearing before a

tribunal which performs a judicial function" (quoting W. Prosser, Law of Torts § 94, pp. 826–27 (1941))). Arbitrations like that at issue here have been recognized as quasijudicial proceedings. *See Hartlep v. Torres*, 756 N.E. 2d 371, 373, 324 Ill.App.3d 817 (2001) (disciplinary hearing before board of fire and police commissioners was quasijudicial warranting application of absolute privilege); *Bushell v. Caterpillar, Inc.*, 683 N.E. 2d 1286, 1288, 291 Ill.App.3d 559 (1997) (arbitral tribunal convened pursuant to collective bargaining agreement was quasi-judicial in nature); *Rolon v. Henneman*, 517 F.3d 140, 145–46 (2d Cir. 2008) (extending absolute immunity to witnesses testifying at police disciplinary hearings and arbitrations that are "conducted in a manner equivalent to that of the judicial process"); *Lettis v. U.S. Postal Serv.*, 39 F.Supp. 2d 181, 206 (E.D.N.Y.1998) (collecting cases). Because the hearing was conducted in a manner equivalent to the judicial process and the witnesses testified under oath, the individual defendants are afforded absolute immunity for their testimony under oath during the arbitration hearing. *Rolon,* 517 F.3d at 146–47.

IV. Existence of Adequate Post-Deprivation Remedies for Due Process Violation

To state a claim for violation of procedural due process under the Fourteenth Amendment, a plaintiff must allege "(1) deprivation of a protected interest, and (2) insufficient procedural protections surrounding that deprivation." *Michalowicz v. Vill. of Bedford Park*, 528 F.3d 530, 534 (7th Cir. 2008). Defendants do not dispute that McGreal had a protected property interest, focusing instead on the second inquiry. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful matter.'

" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The right is "flexible, requiring different procedural protections depending upon the situation at hand." *Doyle v. Camelot Care Ctrs., Inc.*, 305 F.3d 603, 618 (7th Cir. 2002). Where the deprivation is random and unauthorized, there is no procedural due process violation if a meaningful post-deprivation remedy is available. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). McGreal does not dispute that he challenges the "random and unauthorized" actions of the defendants but argues that state law remedies are inadequate to address the alleged due process violations that occurred both before and after his termination. A state law remedy is not inadequate unless it "can readily be characterized as inadequate to the point that it is meaningless or nonexistent, and, thus, in no way can be said to provide the due process relief guaranteed by the fourteenth amendment." *Easter House v. Felder*, 910 F. 2d 1387, 1406 (7th Cir.1990) (en banc).

With respect to any post-termination claims, defendants argue that McGreal has at his disposal adequate state law remedies to review the arbitration hearing and the defendants' conduct during it. Specifically, they contend that the Uniform Arbitration Act, which McGreal is already making use of, provides for review of the arbitrator's decision. To the extent that McGreal is challenging decisions made by the arbitrator, and not by defendants, those challenges are not properly cognizable under § 1983 against the defendants in this case and must be made according to the

procedures set forth to vacate an arbitration award.[5]*See Papapetropoulous v. Milwaukee Transport Servs., Inc.*, 795 F. 2d 591, 596 (7th Cir.1986) (where independent arbitrator, and not defendant, made decisions that allegedly deprived plaintiff of his due process rights at the hearing, court was "at a loss to understand how the plaintiff can argue that [defendant] is the party responsible in a section 1983 action for the decisions of the independent arbitrator"); *Ewing v. City of Monmouth, Illinois*, No. 06–1164, 2007 WL 2680823, at *3 (C.D.Ill. July 18, 2007). As for McGreal's allegation that defendants withheld exculpatory evidence during the arbitration hearing, that is something that also should have been raised in a motion to vacate the arbitration award. An arbitration award may be vacated if it "was procured by corruption, fraud or other undue means." 710 Ill. Comp. Stat. 5/12. If the award is vacated on the basis that defendants withheld evidence, McGreal will have the right to a new hearing to determine whether there was just cause for his termination in which he could use any such exculpatory evidence. Because this would adequately address the alleged post-termination due process violation, McGreal cannot proceed with his procedural due process claims related to the arbitration hearing.[6]But McGreal's pre-termination claim that he

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[5] McGreal may not be able to challenge the arbitral award, as the Illinois Supreme Court has held that "individual employees represented by a union should only be allowed to seek judicial review of an arbitration award if they can show that their union breached its duty of fair representation." *Stahulak v. City of Chicago*, 703 N.E. 2d 44, 48, 184 Ill. 2d 176, (1998).

[6] Because the court has concluded that McGreal does not have a claim for procedural due process violations related to his arbitration hearing, the court need not address defendants' argument that

was terminated prior to the arbitration hearing and was thus denied the right to respond to charges against him is not foreclosed by the existence of a state law remedy. McGreal has the right to a pre-termination hearing, although it need not be a full-blown hearing where adequate post-termination proceedings exist. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985); *Chaney v. Suburban Bus Div. of Reg'l Transp. Auth.*, 52 F.3d 623, 628 (7th Cir.1995) ("[A]n adequate post-deprivation remedy does not necessarily preclude the requirement of a predeprivation hearing where such a hearing was feasible and practical."). Here, the CBA provides that discharge "may be imposed upon a post-probationary employee only for just cause," and that a pre-disciplinary meeting is required prior to the imposition or recommendation of discharge. Ex. A to First Am. Compl. §§ 19. 2–19.3. The pre-disciplinary meeting must provide the employee and union representative with "the opportunity to informally discuss, rebut or clarify the reasons for contemplated disciplinary action." *Id* . § 19.3. The complaint's allegations suggest that no such pre-disciplinary meeting or other opportunity to respond to the charges occurred.

Although "the added benefits in this case of pre-termination notice and an opportunity to be heard are not huge" because an extensive post-termination hearing took place, "they are in no way insignificant." *Chaney*, 52 F.3d at 629; *Moore v. Shaw*, No. 07–1253, 2008 WL 2692123, at *5 (C.D.Ill. July 1, 2008) ("[E]ven

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the intracorporate conspiracy doctrine bars McGreal's § 1983 conspiracy claim. That claim relates only to the conduct of the arbitration hearing and is thus also dismissed

if the post-deprivation grievance procedures are adequate, they do not retroactively cure insufficient pre-deprivation process."). *But see Michalowicz v. Vill. of Bedford Park*, 528 F.3d 530, 537 (7th Cir. 2008) (where post-termination hearing was available, alleged pre-termination hearing deficiencies were not valid grounds for due process claim). Because due process is a "flexible concept" and the "requirements applicable to a particular situation are highly fact-specific," *Fenje v. Feld*, 301 F.Supp. 2d 781, 799 (N.D.Ill. 2003), at this stage, McGreal's claims alleging pre-termination violations of his due process rights will not be dismissed. *See Chaney*, 52 F.3d at 630; *Stimeling v. Bd. of Educ.*, No. 07–13302008 WL 2876528, at *7 (C.D.Ill. July 24, 2008).

V. *Monell* Claim

The Village may be held liable under § 1983 when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978). Liability may be based on (1) an express policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; or (3) a constitutional injury caused by a person with final policymaking authority. *Baxter v. Vigo Cnty. Sch. Corp.*, 26 F.3d 728, 734–35 (7th Cir.1994) (citing *Monell*, 436 U.S. at 690–91).

McGreal alleges that the Village has a long-standing practice of failing to adequately train, supervise, and discipline its employees. He also alleges that McCarthy

has final policymaking authority and that he deprived McGreal of his right to a fair and impartial hearing related to his termination. In his response, he claims he has alleged an express policy that an officer's termination is imposed once arbitration is requested, but no such allegation can be found in the first amended complaint.

The Village argues that McGreal's *Monell* claim must be dismissed because he has failed to adequately support his allegations of a practice or policy. McGreal, however, is not held to a heightened standard in pleading a *Monell* claim, even after *Twombly* and *Iqbal*. *See McCormick v. City of Chicago*, 230 F.3d 319, 323 (7th Cir. 2000) (citing *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed. 2d 517 (1993)); *Riley v. Cnty. of Cook*, 682 F.Supp. 2d 856, 861 (N.D.Ill. 2010). "[A]n official capacity claim can survive even with conclusory allegations that a policy or practice existed, so long as facts are pled that put the defendants on proper notice of the alleged wrongdoing." *Riley*, 682 F.Supp. 2d at 861 (citing *McCormick*, 230 F.3d at 325).

McGreal has at this stage sufficiently alleged at least one basis for *Monell* liability: that McCarthy is a final policymaker who caused the constitutional deprivations complained of. *See McGreal v. Ostrov*, 368 F.3d 657, 685–86 (7th Cir. 2004) (defendant police chief's initiation of termination proceedings against plaintiff actionable under *Monell* where municipality had conceded that police chief was municipal policymaker with respect to termination proceedings). Although McGreal will have to establish, by reference to applicable state or local law, that McGreal indeed was the final policymaker

with respect to the Police Department's employment decisions, *see Argyropoulos v. City of Alton*, 539 F.3d 724, 740 (7th Cir. 2008), his allegations are sufficient at this stage.

VI. Tortious Interference with Advantageous Business Relations[7]

To state a claim for tortious interference with advantageous business relations, McGreal must allege "(1) a reasonable expectation of entering into a valid business relationship, (2) the defendant's knowledge of the expectation, (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship, and (4) damage to the plaintiff resulting from the defendant's interference." *Atanus v. Am. Airlines, Inc.*, 932 N.E. 2d 1044, 1048, 403 Ill.App.3d 549 (2010). Defendants argue that McGreal's tortious interference claim should be dismissed because he had no reasonable expectancy of entering into a valid business relationship nor, by extension, can he establish that defendants purposefully interfered with that expectancy.

McGreal alleges that he had an expectation of being hired by several police departments he applied to after being terminated by the Village. But it is well established that "[t]he hope of receiving a job offer is not a sufficient expectancy" to allege a claim for tortious interference with a prospective employment relationship. *Anderson v. Vanden Dorpel*, 667 N.E. 2d 1296, 1299, 172 Ill. 2d 399 (1996); *see also Myers v. Phillips Chevrolet, Inc.*, No. 04 C 0763, 2004 WL 2403126, at *3 (N.D.Ill. Oct. 26, 2004) ("Federal courts applying Illinois

[7] This tort claim is also commonly referred to as tortious interference with prospective economic advantage.

law have repeatedly applied *Anderson* to reject claims for intentional interference with prospective business advantage where the plaintiff does not have an actual job offer but instead has merely the hope of receiving a job offer.") (collecting cases). In *Anderson*, the plaintiff alleged that she was the "leading candidate" for a position, that she had been sought out for the position by the employer, and that she had been told her interviews had gone well and she would be recommended for hire. *Anderson*, 667 N.E. 2d at 1299–1300. But the court stated that "favorable comments of the type allegedly made [in *Anderson*] should not be regarded as giving rise to a legally protectible expectancy." *Id.* at 1300. In concluding that the allegations were not sufficient, the court did note that it was not determining that "in all cases a job applicant must have had a firm offer in hand to state a cause of action for intentional interference with prospective economic advantage." *Id.* at 1299.

Anderson, decided under Illinois's fact pleading rules, does not compel dismissal here. McGreal has alleged that he was ranked first on the Village of Mokena's eligibility list for police officers at a time when there was an opening and that he was not hired because of defendants' actions.[8] First Am. Compl. ¶ 111. This is not just McGreal's subjective belief that he was the "leading candidate" for the position; he alleges that he was in fact the first in line to be hired for the open position. Under the federal notice pleading standards, this is sufficient at this stage to demonstrate that he had a

[8] In his response, McGreal claims he applied to nine police departments and had reached the final step with two departments. His first amended complaint only alleges applications to three police departments and that he reached a final stage with one.

reasonable expectancy of employment with the Village of Mokena. *See James v. Intercontinental Hotels Grp. Res., Inc.*, No. 09–cv–781, 2010 WL 529444, at *4–5 (N.D.Ill. Feb.10, 2010) (allegations sufficient to state reasonable expectancy in continued employment where plaintiff alleged she had an exemplary work record, consistently received positive performance evaluations, and had been promoted to an executive level position, distinguishing cases decided under Illinois's fact pleading rules).

McGreal has also at this stage sufficiently alleged the third element of a tortious interference claim, that defendants purposefully interfered to prevent his hiring. McGreal has alleged that he "was denied the opportunity to be employed as a police officer due to the actions of representatives of the Village of Orland Park." First Am. Compl. ¶ 110. Read in the light most favorable to McGreal, this is sufficient to allege purposeful interference. McGreal will have to establish through discovery the actions defendants took to interfere with his expectancy of employment with the Village of Mokena.

VII. Preemption of Breach of Contract Claim

Defendants further argue that McGreal's breach of contract claim for alleged CBA violations is preempted by the Illinois Public Labor Relations Act ("IPLRA"), 5 Ill. Comp. Stat. 315/1 *et seq.* McGreal argues that because federal labor law preempts inconsistent state labor law, the IPLRA does not restrict the forum in which he can maintain his claim. But the federal Labor Management Relations Act expressly does not apply to public employers such as the Village. *See* 29 U.S.C. § 152(2). Instead, "[t]he National Labor Relations Act

leaves States free to regulate their labor relationships with their public employees." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 181, 127 S.Ct. 2372, 168 L.Ed. 2d 71 (2007). Because McGreal's employer was the Village, "any claim involving the interpretation of [his] collective bargaining agreements arises under Illinois law, not federal law." *Marconi v. City of Joliet*, 989 N.E. 2d 722, 728, 2013 IL App (3d) 110865 (2013). Therefore, the IPLRA governs whether McGreal's breach of contract claim may be maintained in this court.

The IPLRA's stated purpose is "to regulate labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements." 5 Ill. Comp. Stat. 315/2. The IPLRA has been interpreted to confer exclusive jurisdiction on the Illinois Labor Relations Board over matters involving collective bargaining agreements between public employers and employees, including breach of contract claims. *See Proctor v. Bd. of Educ., Sch. Dist. 65, Evanston, Ill.*, 392 F.Supp. 2d 1026, 1031 (N.D.Ill. 2005); *Utomi v. Cook County*, No. 98 C 3722, 1999 WL 787480, at *5 (N.D.Ill. Sept. 24, 1999); *Cessna v. City of Danville*, 296 Ill.App.3d 156, 162–68, 693 N.E. 2d 1264 (1998). McGreal's breach of contract claim is founded on defendants' alleged failure to comply with the CBA. *See* First Am. Compl. ¶ 155. Allowing this claim to go forward here "would undermine the [IPLRA's] stated purpose and frustrate the legislature's intent to provide a uniform body of law in the field of labor-management relations to be administered by those who have the required expertise in this area."

Cessna, 693 N.E. 2d at 168. Since McGreal's breach of contract claim cannot be addressed without interpreting the CBA, this claim belongs before the Illinois Labor Relations Board and will be dismissed.[9]

VIII. Colorado River Abstention

Next, defendants urge the court to abstain from exercising jurisdiction over McGreal's declaratory judgment request pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed. 2d 483 (1976). McGreal seeks a declaration that the Village and McCarthy could not terminate McGreal's employment without a finding of just cause by an authorized trier of fact, that the arbitrator appointed pursuant to the CBA must meet the qualifications set forth in Section 5.3(a) of the CBA, and that by not meeting those requirements Stoia never had subject matter jurisdiction to conduct the arbitration hearing. Defendants argue that McGreal is seeking adjudication of the same issues in two state law forums—the Illinois Labor Relations Board and the Cook County Chancery Court—and that the court should avoid duplicative and piecemeal litigation by staying consideration of McGreal's declaratory judgment request.

The court need not reach the question of whether *Colorado River* abstention applies, however, for McGreal's declaratory judgment claim mirrors his breach of contract claim. The court has already deter-

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[9] To pursue his breach of contract claim, McGreal would also have to claim that the union breached its duty of fair representation. *Utomi*, 1999 WL 787480, at *5 ("[U]nion members lack standing to sue for breach of a collective bargaining agreement unless they also claim that the union breached its duty of fair representation.").

mined that McGreal's breach of contract claim is within the exclusive jurisdiction of the Illinois Labor Relations Board. The same analysis applies to McGreal's declaratory judgment claim, which would involve determining the meaning of the CBA. Because the Illinois Labor Relations Board has exclusive jurisdiction over the matters raised in McGreal's declaratory judgment claim, that claim will be dismissed.

IX. Official Capacity Suits against Individual Defendants

Finally, the individual defendants argue that McGreal's claims against them in their official capacities as Village employees should be dismissed as redundant. A suit against a public official in his "official capacity" is a suit against the entity of which that official is an agent. *Richman v. Sheahan*, 270 F.3d 430, 439 (7th Cir. 2001). Because McGreal has named the Village as a defendant for his § 1983 claims, naming the individual defendants in their official capacities is superfluous. *See Jungels v. Pierce*, 825 F. 2d 1127, 1129 (7th Cir.1987) (where plaintiff sued the city, "nothing was added by suing the mayor in his official capacity"). Therefore, the official capacity claims against the individual defendants will be dismissed. *See Kiser v. Naperville Cmty. Unit*, 227 F.Supp. 2d 954, 960–61 (N.D.Ill. 2002) (dismissing claims against individuals sued in their official capacities because they served "no legitimate purpose").

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss [# 59] is granted in part and denied in part. All claims against the individual defendants in their official capacities are dismissed with prejudice. McGreal's § 1983 claims (counts I–III and V) are limited to alleged

violations occurring on or after June 28, 2010. McGreal's procedural due process claim (count I) is dismissed with respect to allegations related to the arbitration hearing. McGreal's declaratory judgment claim (count IV) and breach of contract claim (count VII) are dismissed without prejudice to refiling before the Illinois Labor Relations Board. The individual defendants have absolute immunity for their testimony under oath during the arbitration hearing.

Defendants are given until August 23, 2013 to answer the first amended complaint. This case will be called for a status hearing and scheduling conference on September 26, 2013 at 8:30 a.m.

Date: August 2, 2013

/s/ Joan H. Lefkow
U.S. District Judge

APPENDIX C

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

No. 12-cv-5135
Joseph S. McGreal,

Plaintiff,

v.

Village of Orland Park, et al.,

Defendants.

OPINION AND ORDER

In his second amended complaint,[1] Joseph McGreal alleges under 42 U.S.C. § 1983 that the Village of Orland Park (the Village) and three members of its Police Department (OPPD), Timothy McCarthy, Patrick

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[1] On August 2, 2013, this court granted in part and denied in part defendants' motion to dismiss McGreal's first amended complaint. In that ruling, the court limited McGreal's § 1983 claims (his Fourteenth Amendment, First Amendment, and *Monell* claims) to alleged violations occurring on or after June 28, 2010, further limited his Fourteenth Amendment claim by excluding allegations relating to an arbitration hearing conducted pursuant to a collective bargaining agreement, and dismissed his declaratory judgment and breach of contract claims without prejudice to refiling in the proper forum. (Dkt. 77.) On September 23, 2013, McGreal filed his second amended complaint against the Village and seven members of its police department (Dkt. 89) but later dismissed four of them, leaving McCarthy, Duggan, and Bianchi as the only individual defendants (Dkt. 178). This court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 1367.

Dugan, and James Bianchi, terminated his employment without a proper pre–termination hearing, in violation of his Fourteenth Amendment due process right (count I) and in retaliation for his union activities in violation of his First Amendment rights to freedom of association (count II) and speech (count III). (Dkt. 89.) He also alleges a *Monell* policy claim based on Chief McCarthy's longstanding practice of failing to adequately train, supervise, and discipline its employees (count IV),[2] as well as state law tort claims of interference with advantageous business relationship (count V), and intentional infliction of emotional distress (count VIII). (*Id.*) McGreal alleges that the Village is vicariously liable for the state law claims against its employees (count VI) and required under Illinois law to indemnify them for any judgment entered against them (count VII).[3](*Id.*) The defendants' motion for summary judgment on all counts is now before the court. (Dkt. 202.) For the reasons stated below, defendants' motion (Dkt. 202) is granted.

LEGAL STANDARD

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[2] While McGreal's complaint makes allegations relating to a failure to train theory, his submission fails to address this claim in any meaningful way, such as with evidence suggesting a policy or practice of failing to train officers in a manner resulting in deprivation of constitutional rights. As such, this claim is considered abandoned.

[3] The Local Governmental and Governmental Employees Tort Immunity Act (Illinois Tort Immunity Act), 745 Ill. Comp. Stat 10/9–102, directs local public entities to pay tort damages incurred by employees acting with the scope of their employment. The statute applies to federal as well as state law judgments.

Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). To determine whether a genuine fact issue exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. Fed. R. Civ. P. 56(c). In doing so, the court must view the facts in the light most favorable to the non–moving party and draw all reasonable inferences in that party's favor. *Scott* v. *Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). The court may not weigh conflicting evidence or make credibility determinations. *Omnicare*, 629 F.3d at 704.

The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In response, the non–moving party cannot rest on bare pleadings alone but must designate specific material facts showing that there is a genuine issue for trial. *Id.* at 324; *Insolia* v. *Philip Morris Inc.*, 216 F.3d 596, 598 (7th Cir. 2000). If a claim or defense is factually unsupported, it should be disposed of on summary judgment. *Celotex*, 477 U.S. at 323– 24.

LOCAL RULE 56.1

Unless otherwise noted, the facts set out below are taken from the parties' Local Rule 56.1 statements and are construed in the light most favorable to plaintiff. The court will address many but not all of the facts in-

cluded in the parties' submissions, as the court is "not bound to discuss in detail every single factual allegation put forth at the summary judgment stage." *Omnicare, Inc.* v. *UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011) (citation omitted). In accordance with regular practice, it has considered the parties' objections to the statements of fact and includes in this background only those portions of the statements and responses that are appropriately supported and relevant to the resolution of this motion. Any facts that are not controverted as required by Local Rule 56.1 are deemed admitted.

Preparation of this opinion has been made particularly difficult by plaintiff's counsel's failure to comply with Local Rule 56.1 in preparing and responding to statements of material facts. This court's standing order directs counsel to read *Malec* v. *Sanford*, 191 F.R.D. 581 (N.D. Ill. 2000), before submitting summary judgment filings. Although counsel are not new to federal court litigation, they have apparently not recently reviewed *Malec*, since their submissions are largely inconsistent with the helpful guidance in the case: (1) a response to a movant's statement of facts is neither the place for argument nor additional facts that do not actually dispute the factual statement; (2) "supporting documents submitted with a motion that are not referred to in the statement of facts will be ignored"; (3) the paragraphs in a statement of facts should be short and not argumentative or conclusory; (4) paragraphs also must contain specific references that support the factual allegation and the specific references provided should not be so voluminous that they send the court on a wild goose chase; and (5) the memorandum of law should cite back to the statement of facts as opposed to record citations. *See id.* at 583–86. Frankly, the motion could have been granted by simply rejecting plaintiff's Local Rule 56.1 submissions. The court has done its best, however, to

winnow the facts to those supported by the record in order that the case can be resolved on the merits.

BACKGROUND

Joseph McGreal was a full–time officer with OPPD from January 10, 2005 until June 28, 2010, when his employment was terminated. (Dkt. 215–1 (Defendants' Corrected Local Rule 56.1 Statement of Material Facts (Defs.' LR 56.1)) ¶ 1.) The events that form the basis for the issues before the court run from August 2009 through McGreal's termination approximately nine months later. During that period, Timothy McCarthy was OPPD's Chief of Police; Thomas Kenealy was Patrol Division Commander; Patrick Duggan and James Bianchi were lieutenants; Paul Grimes was Village Manager.

During 2008, McGreal was elected secretary of the Metropolitan Alliance of Police Local #159, the union representing the Village's police officers. (*See* Dkt. 220–2, McGreal's Local Rule 56.1 Statement of Additional Facts (McGreal's LR 56.1) ¶ 1; *see also* Defs.' LR 56.1, Ex. G1 (Dkt. 215–28) (McGreal to Kenealy, Step 1 Grievance #2010–06) at 1.) As a Local #159 member and leader, McGreal claims to have engaged in representation of several officers in grievance matters and in advocacy for the collective bargaining rights of union members. (McGreal to Kenealy, Step 1 Grievance #2010–06 at 1.)

Although McGreal had in all previous performance evaluations been favorably rated, at some point during 2009 conflict arose, leading to an "Interrogation" of McGreal on January 21, 2010, regarding certain in-

stances of conduct on the job.[4] The first incident of consequence to this litigation occurred on August 20, 2009, and related to McGreal's conduct regarding whether he should represent another OPPD officer when that officer was lodging a complaint about a fellow officer. (*See* McGreal to Kenealy, Step 1 Grievance #2010–06 at 10; *see also* McGreal's LR 56.1, Ex. 253 (Dkt. 220–20) at 25.) The parties have not pointed the court to evidence that any disciplinary investigation of the incident was initiated at that time. The next incident was an October 27, 2009 traffic stop of Charles Robson, which OPPD questioned as to whether the stop and follow–up paperwork were done properly. OPPD undertook an investigation of this incident on November 23, 2009. (*See* Defs.' LR 56.1 ¶ 32; *see also id.* Ex. C–57 (Dkt. 215–13) at 18:22–19:16; McGreal to Kenealy, Step 1 Grievance #2010–06 at 7; McGreal's LR 56.1, Ex. 253 (Dkt. 220–20) at 6; *id.* ¶ 16.)

Around the same time as the Robson stop, the Village made it publicly known that it was having financial difficulties (McGreal's LR 56.1 ¶ 7) and on November 2, 2009, it held a board meeting to discuss those difficulties

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[4] Defendants' deny that McGreal's past work record was favorable, but McGreal's statement is accepted as true for the purpose of the motion. Defendants also contend, and McGreal contests, that this and other examinations were formal interrogations as defined by the Uniform Peace Officers Disciplinary Act. (*See, e.g.*, Dkt. 220–3) (McGreal's Response to Defendant's Corrected Local Rule 56.1 Statement of Material Facts (McGreal's Resp. LR 56.1) ¶ 7.) While the court will continue to use the word "interrogation" to refer to these questioning sessions, it takes no position on whether the sessions themselves were formal interrogations as defined by that act.

(*id.* ¶ 9).[5] McGreal attended that meeting on behalf of Local #159 and presented written recommendations to eliminate certain newly–created, non–essential positions, eliminate the take–home squad car program for everyone but the Chief, Deputy Chief, and Investigations Lieutenant, and offer a new longevity benefit to police officers.[6] (*Id.* ¶ 11; *see also id.*, Ex. 74 (Dkt. 220–16).) All of the individual defendants (McCarthy, Bianchi and Duggan) deny knowing that McGreal made this presentation, and McGreal does not dispute their denial. (Defs.' LR 56.1 ¶ 23; McGreal's Resp. LR 56.1 ¶ 23.)

In the days that followed the board meeting, three more incidents occurred. On November 5, 2009, McGreal was believed to have improperly run the license plate on Commander Kenealy's personal vehicle. (*See* McGreal's LR 56.1, Ex. 253 at 31–33; McGreal to Kenealy, Step 1 Grievance #2010–06 at 12–13.) On November 7, 2009, McGreal took part in a high–speed pursuit that his superiors considered unauthorized and reckless. (*See* Defs.' LR 56.1 ¶¶ 100–01.) McGreal participated in another pursuit on November 9, 2009, that was similarly characterized by OPPD as unauthorized.

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[5] The previous day, McGreal received a midyear evaluation that directed McGreal to "continue to maintain [his] current level of activity during the rest of the rating period." (McGreal's LR 56.1 ¶ 10.)

[6] Defendants dispute that McGreal attended the board meeting. (Dkt. 231) (Defendants' Response to McGreal's LR 56.1 Statement of Additional Material Facts (Defs.' Resp. LR 56.1) ¶ 11.) Their citations, however, only dispute whether the individual defendants (as well as the Village Manager) knew that McGreal attended and presented at the meeting. (*See id.*)

(Defs.' Resp. LR 56.1 ¶ 20.) McGreal contends that his conduct was not improper in either incident. (*See* McGreal's LR 56.1 ¶¶ 17, 20.)

At an unspecified time, these incidents became part of an OPPD investigation of McGreal's conduct which entailed an interrogation of McGreal on January 21, 2010. (*See* Defs.' LR 56.1, Ex. C–57 (Dkt 215–13).) (There were other incidents subject to the investigation but these are identified because they are most relevant as they are closest in time to McGreal's presentation to the Village Board.[7])

On January 21and March 24, 2010, McGreal was questioned regarding "each and every incident that ul-

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[7] The incidents are not fully set forth in the parties' statements of facts, but those that were being considered prior to McGreal's termination are included in OPPD's June 2, 2010 statement of cause for termination. (*See* McGreal's LR 56.1, Ex. 253 (Dkt. 220–20).) In total, the allegations consisted of (1) an improper traffic stop of Charles Robson on October 27, 2009, (2) an insufficient case report relating to that same event, (3) an unauthorized and reckless pursuit (the Alsip Pursuit), (4) an unauthorized and reckless pursuit (the Forest Preserve Pursuit), (5) ostracizing an employee on the OPPD's November 24, 2009 Awards Night, (6) ostracizing that same employee at that night's roll call, (7) improperly calling in sick, (8) improperly conducting himself during the representation of another officer (the Zorbas complaint), (9) making a false report of a superior, (10) leaving his beat and being idle while on duty, (11) failing to report for a court appearance, (12) running the license plate on Commander Kenealy's personal vehicle, (13) reporting late for duty, (14) lying at the January 21, 2010 interrogation, (15) interfering with the investigation of his conduct, and (16) failing to produce phone records as requested. McGreal disputed then and disputes in his additional statement of material facts whether these incidents were properly handled. (*See, e.g.*, McGreal's LR 56.1 ¶¶ 14–21, 25–27.) As explained below, whether OPPD handled them correctly is not before this court.

timately led to his termination." (*Id.* ¶¶ 7, 9.) Prior to each of these interrogations, the Village provided McGreal with a written notice that identified the incidents that would be discussed.[8] (*Id.* ¶ 8,[9] Ex. C–57 at Ex. 1 (Dkt. 215–16–17); *Id.*, Ex. C–66 at Ex. 1 (Dkt. 215–22).) These interrogations resulted in 195 pages of sworn testimony from McGreal, in which he explained his version of the incidents. (*Id.* ¶ 9.) While the transcripts of the interrogations indicate that McGreal was represented by counsel, McGreal was not questioned by his attorney. (*See id.*, Ex. C–57 (Dkt. 215–13), Ex. C–66 (Dkt. 215–22).)

On April 21, 2010, Chief McCarthy provided McGreal with written notice of a pre–disciplinary meeting that identified sixteen incidents about which the OPPD was considering taking disciplinary action and the specific department policy violated. (*Id.* ¶ 10; *id.*, Ex. D. (Dkt. 215–24).) The meeting occurred a week later, on April 28, 2010, and prompted McGreal to file a grievance that the meeting was an insufficient pre–disciplinary meeting because he had not been given an opportunity to review all of the evidence that the OPPD had to support its charges. (*Id.* ¶¶ 12–13.)

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[8] McGreal disputes this paragraph of defendants' statement of facts, but his response is limited to stating additional information that does not actually rebut defendants' statement. (See McGreal's Resp. LR 56.1 ¶ 8.)

[9] Before the second of these sessions, on March 5, 2010, McGreal was placed on administrative leave. (Defs.' LR. 56.1 ¶ 57.) McGreal in this law suit challenges his termination, not being placed on administrative leave.

In response to McGreal's grievance, on June 2, 2010, McGreal, Chief McCarthy, and Commander Kenealy met to discuss the grievance. (*Id.*¶ 14.)[10] During that meeting, the three discussed the charges and the general nature of the OPPD's evidence. (*Id.* ¶¶ 14–15.)[11] That same day, Chief McCarthy filed a statement of charges before the Board of Fire and Police Commissioners, seeking McGreal's termination. (McGreal's LR 56.1 ¶ 39.) After being charged, McGreal filed a grievance with OPPD in which he referenced his November 2, 2009 presentation, set forth his version of the sixteen incidents at issue, alleged violations by the OPPD of the collective bargaining agreement, and requested that all

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[10] McGreal correctly points out that this meeting was not *per se* another pre–disciplinary meeting but was rather step 2 in McGreal's grievance relating to the April 28, 2010 pre– disciplinary meeting. (*See* McGreal's Resp. LR 56.1 ¶ 14.) That said, this court is less concerned with the formal title of the meeting and more concerned with its substance and documentation.

[11] McGreal improperly disputes defendants' summary of the meeting. (*See* McGreal's Resp. LR. 56.1 ¶ 14–15.) In his responses to these paragraphs of defendants' statement of facts, McGreal cites to a letter from his lawyer that preceded the meeting and additionally cites back to Chief McCarthy's summary of the meeting and states that parts of it are inaccurate. (*Id.*) He does not, however, provide any citations to the record in support of his assertion that the summary is inaccurate. (*Id.*) McGreal, likewise, raises no objections regarding the document's admissibility. (*See id.*). Further, even if McGreal had properly supported his dispute of these paragraphs, he still would have to address the fact that this summary, which is an internal memorandum from Chief McCarthy to McGreal, appears to have been received by McGreal on June 9, 2010. (*See* Defs.' LR 56.1 ¶ 14, Ex. F.) Therefore, even if the types of evidence were not discussed at the meeting, the memorandum itself identified the types of evidence that OPPD intended to rely on and would be admissible to show McGreal's knowledge. (*See id.*)

charges against him be dropped. (McGreal to Kenealy, Step 1 Grievance #2010–06.) Kenealy responded in writing, denying McGreal's grievance. (Defs.' LR 56.1, Ex. G–1 (Dkt. 215–29).)

McGreal then advanced his grievance to step 2, and Chief McCarthy and Commander Kenealy met again with McGreal. (*Id.* ¶¶ 20–21.) Chief McCarthy again denied the grievance. (*Id.*, Ex. G1 (Dkt. 215–30), McCarthy to McGreal, Step 2 Grievance #2010–06.) Meanwhile, McGreal elected to submit the charges against him to arbitration instead of proceeding with a hearing before the Board of Fire and Police Commissioners. (McGreal's LR 56.1 ¶ 40.) On June 28, 2010, McGreal was terminated, following the approvals of Chief McCarthy and Village Manager Grimes.[12] (*Id.*)

Thereafter, McGreal sought other work, and OPPD provided information to prospective employers authorized by releases given by McGreal to the OPPD. (Defs.' LR 56.1 ¶ 109.) McGreal knows of no information provided to these prospective employers other than as authorized in his releases. (*Id.* ¶ 111.)

ANALYSIS

I. Section 1983 Claims (Counts I–IV)

In order to prevail on a § 1983 claim, a plaintiff must establish that the defendant deprived him of a right secured by the Constitution or laws of the United States

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[12] There is some ambiguity in the testimony cited by the parties as to who made the final decision to terminate McGreal. In any event, defendants assert and McGreal does not dispute, that "the Village Manager is the final policy maker with respect to employment decisions." (Defs.' LR 56.1 ¶ 107; McGreal's Resp. LR 56.1 ¶ 107.)

and that the defendant acted under color of state law. *Brokaw* v. *Mercer Cty.*, 235 F.3d 1000, 1009 (7th Cir. 2000) (citations omitted). McGreal alleges that defendant state actors violated his Fourteenth Amendment right to procedural due process and his First Amendment rights to freedom of speech and association.

A. Fourteenth Amendment § 1983 Claims (Counts I, IV)

To establish a claim for violation of procedural due process under the Fourteenth Amendment, a plaintiff must prove "(1) deprivation of a protected interest, and (2) insufficient procedural protections surrounding that deprivation." *Michalowicz* v. *Vill. of Bedford Park*, 528 F.3d 530, 534 (7th Cir. 2008). Concerning (2), "[t]he fundamental requirement of due process is the opportunity to be heard –at a meaningful time and in a meaningful matter.' +" *Mathews* v. *Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965)). "[A] –procedure required by contract, statute, or regulation does not create a constitutionally protected right nor does violation of a contract, statute, or regulation, by itself, constitute a violation of due process.' +" *Harris* v. *City of Chicago*, 665 F. Supp. 2d 935, 951 (N.D. Ill. 2009) (quoting *Fenje* v. *Feld*, 301 F. Supp. 2d 781, 802 (N.D. Ill. 2003)). Rather, the right is "flexible, requiring different procedural protections depending upon the situation at hand." *Doyle* v. *Camelot Care Ctrs., Inc.*, 305 F.3d 603, 618 (7th Cir. 2002).

Defendants agree that McGreal had a "protected interest" in his employment with OPPD, but they contend that there is no genuine issue of material fact that McGreal received all the pre–termination process that

was due, and more.[13] In response (*see* Dkt. 220–1 at 19–25), McGreal does not clearly articulate a theory but it seems to be that Chief McCarthy imposed discipline (in this case termination) once McGreal asked for arbitration and before a "fair hearing" occurred,[14] arguing that this practice is contrary to the collective bargaining agreement and the Orland Park Municipal Code. In due process terms, he seems to be asserting that McCarthy as a final policy maker denied him due process on the basis that he terminated McGreal's employment before the arbitrator decided his case.[15] Under this theory, a full–blown arbitration hearing (or police board hearing) was necessary in order to comport with due process. This reflects a fundamental misunderstanding of the due process clause. As indicated above, whether a state or local code or a collective bargaining agreement was violated is immaterial to one's claimed denial of a pre–termination hearing consistent with due process, so the

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[13] This court previously dismissed McGreal's procedural due process claim to the extent that it was based on the post–deprivation procedures. (Dkt. 77 at 13–16.)

[14] McGreal relies on provisions of the Village's Municipal Code and the collective bargaining agreement to define his due process rights. The referenced ordinance allows a Chief of Police to suspend an officer up to thirty days without pay. The collective bargaining agreement permits discipline, including discharge, to be imposed only for just cause and requires that, before a decision to impose or recommend discipline, including discharge, the Chief of Police is to notify the union and meet with the employee involved (and a representative if requested), inform the employee of the reasons for the contemplated action, and give the employee the opportunity to informally discuss, rebut or clarify the reasons for the action. (*See* Dkt. 220–1 at 21.)

[15] Although cast as a *Monell* claim, there is no evidence of policy and practice other than McGreal's *ipse dixit*.

court will address the issue of whether McGreal received the pre–termination process that was due.

A pre–deprivation hearing need not be a full–blown hearing where adequate post–termination proceedings exist. *See Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); *Chaney* v. *Suburban Bus Div. of Reg'l Transp. Auth.*, 52 F.3d 623, 628 (7th Cir. 1995). The case law refers to such a hearing as "truncated," and even the word hearing is perhaps a misnomer, since the notice and opportunity to be heard may be oral or written. *See Hudson* v. *City of Chicago*, 374 F.3d 554, 563 (7th Cir. 2004) (noting that the plaintiff's opportunity to respond conformed with due process when he was given the chance to submit a memorandum to contest the charges against him). "In its truncated form, –pretermination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story.' +" *Michalowicz*, 528 F.3d at 537 (quoting *Gilbert* v. *Homar*, 520 U.S. 924, 929, 117 S. Ct. 1801, 138 L. Ed. 2d 120 (1997)). If McGreal has been afforded each of these three steps, then he has received all of the process due.

The doctrine makes it clear that, whatever the more comprehensive hearing rights McGreal may have had under the collective bargaining agreement or the Village Code, all that was constitutionally required was provided to McGreal. As far as the court can discern, on April 21, 2010, he was notified of the contemplated termination, the reasons for it, and that he was to appear for a hearing on April 28, 2010, to discuss the specific bases OPPD relied on for its planned action. McGreal attended the meeting and, dissatisfied, asked for more documentation. Chief McCarthy arranged another meeting on June 2, at which time at least some of the

evidence on which OPPD intended to rely at an anticipated hearing before the Board of Police and Fire Commissioners was shown to him and discussed.[16] On June 10, McGreal filed a grievance in which he contested each and every one of the charges and asked for the charges to be dismissed against him. Commander Kenealy considered this request and rejected it. McGreal appealed that decision to Chief McCarthy, who again rejected the request. In sum, McGreal was provided with notice of the reasons for his termination, an explanation of the evidence supporting it, and an opportunity to tell his side, all before he claims to have been terminated on June 21, 2010. This is undoubtedly consistent with the requirements of pre–deprivation procedural due process.

Accordingly, defendants are granted summary judgment on counts I and IV.

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[16] The procedure in place for termination of Orland Park police officers is not clear from the parties' submissions. Presumably, they are explicit within the collective bargaining agreement and Illinois municipal law and rules of the Board of Police and Fire Commissioners. The court infers from the record that the Board had the final authority to terminate McGreal, subject to administrative review. Alternatively, however, the collective bargaining agreement must have permitted an officer to submit the proposed termination to arbitration, as that is what McGreal did. It is implied that the termination occurred (presumably once McGreal was no longer on the payroll) by the end of June, possibly once he elected arbitration, such that the arbitration was within the realm of "post–termination procedure" for purposes of the due process clause. There is no basis in the due process clause for the argument that OPPD had to keep him employed pending a final determination

B. First Amendment § 1983 Claims (Counts II, III)

McGreal asserts that defendants violated his constitutional rights by punishing him for exercising his First Amendment rights when he presented written suggestions to the Village Board on November 2, 2009. (Dkt. 220–1 at 8.) To survive summary judgment on a First Amendment punishment claim, a plaintiff must demonstrate that "(1) his speech was constitutionally protected; (2) he has suffered a deprivation likely to deter free speech; and (3) his speech was at least a motivating factor in the employer's actions." *Kidwell* v. *Eisenhauer*, 679 F.3d 957, 964 (7th Cir. 2012) (citing *Massey* v. *Johnson*, 457 F.3d 711, 716 (7th Cir. 2006)); *see also Hawkins* v. *Mitchell*, 756 F.3d 983, 996 (7th Cir. 2014); *Peele* v. *Burch*, 722 F.3d 956, 959 (7th Cir. 2013). Only the third element is at issue, as defendants concede that McGreal engaged in protected speech and that discharge from employment is likely to deter free speech.

In *Greene* v. *Doruff*, the Seventh Circuit set forth the standard for analyzing causation:

> [A] plaintiff need only show that a violation of his First Amendment rights was a "motivating factor" of the harm he's complaining of, and that if he shows this the burden shifts to the defendant to show that the harm would have occurred anyway— that is, even if there hadn't been a violation of the First Amendment—and thus that the violation had not been a "but for" cause of the harm for which he is seeking redress.

660 F.3d 975, 977 (7th Cir. 2011); *see also Kidwell*, 679 F.3d at 964–65; *Hawkins*, 756 F.3d at 996 n.10;

Peele, 722 F.3d at 960.[17] McGreal may establish causation through either direct or circumstantial evidence. "Importantly, regardless of which type of evidence is offered, [t]o demonstrate the requisite causal connection in a retaliation claim, [a] plaintiff[ ] must show that the protected activity and the adverse action are not wholly unrelated." *Kidwell*, 679 F.3d at 965 (alterations in original) (internal quotation marks and citations omitted).

The individual defendants all deny knowing of McGreal's protected speech. McGreal does not dispute this denial. "[T]o establish that a defendant retaliated against a plaintiff because of a protected constitutional right, a plaintiff must demonstrate that the defendant knew of the retaliation and knew of the plaintiff's constitutional activities." *Stagman* v. *Ryan*, 176 F.3d 986, 999 (7th Cir. 1999); *see also O'Connor* v. *Chicago Transit Auth.*, 985 F.2d 1362, 1370 (7th Cir. 1993) ("Allegedly protected speech cannot be proven to motivate retaliation, if there is no evidence that the defendants knew of the protected speech."); *Malec*, 191 F.R.D. at 589 ("Because [the plaintiff] has produced no evidence that these defendants knew about his allegedly protected activities, he cannot, as a matter of law, establish a triable issue of a First Amendment violation …").

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[17] In certain formulations, the Seventh Circuit has also noted that if the defendant shows that the harm would have occurred anyhow, the burden shifts back to the plaintiff to show that the proffered reason was pretextual. *See Thayer* v. *Chiczewski*, 705 F.3d 237, 251–52 (7th Cir. 2012); *see also Hawkins*, 756 F.3d at 996 n.10. Similarly, the Seventh Circuit has also articulated the causation factor as requiring a plaintiff to show that "her protected speech was a but–for cause of the employer's action." *Diadenko* v. *Folino*, 741 F.3d 751, 755 (7th Cir. 2013).

McGreal relies on circumstantial evidence of suspicious timing to rebut the defendants' showing. In that context, the Seventh Circuit has explained that "[c]ircumstantial evidence may include suspicious timing, ambiguous oral or written statements, or behavior towards or comments directed at other employees in the protected group....[S]uspicious timing will rarely be sufficient in and of itself to create a triable issue" because "the timing may be just that—suspicious—and a suspicion is not enough to get past a motion for summary judgment." *Kidwell*, 679 F.3d at 966 (citations and internal quotation marks omitted). At a minimum, for suspicious timing to support an inference of causation, the adverse employment action must follow "close on the heels of protected expression, and the plaintiff [must] show that the person who decided to impose the adverse action knew of the protected conduct." *Id.* (quoting *Lalvani* v. *Cook Cty.*, 269 F.3d 785, 790 (7th Cir. 2001)) (alteration in original).

Applied to McGreal's First Amendment claim these principles demonstrate that, because McGreal cannot show that the defendants knew of the protected speech until *after* McCarthy initiated disciplinary investigations that led to the discharge,[18] he cannot survive summary judgment based on suspicious timing. To the extent McGreal contends that circumstantial evidence can also be found in evidence that the OPPD disciplined him more severely than others who committed the same

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[18] At some point McCarthy must have become aware that McGreal engaged in protected speech, since McGreal included it within his grievances. There is no evidence, however, that McCarthy had any indication of McGreal's speech until McGreal himself brought it to his attention as a reason for why McGreal believed he was *already* being unfairly treated.

transgressions, he fails to support his assertions with the record,[19] and his legal authority supports general propositions of law without an analysis of the facts of this case. *See Malec*, 191 F.R.D. at 586 ("A legal standard, even if correct, is useless to us unless applied to the facts of the case, particularly if it is a broad legal standard....").[20] McGreal cites law arising in the context of retaliation under Title VII, but even there he has proffered no evidence of ambiguous oral or written statements or comments directed at him or other employees that would suggest that hostility to his union activities was a motivating factor. *See Harden v. Marion Cty. Sheriff's Dept.*, 799 F.3d 857, 862–63 (7th Cir. 2015) (concerning retaliation under Title VII).

To find in his favor, a jury would have to infer that McGreal, who had represented union members in grievance matters for a significant period in the past without

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[19] McGreal's unsigned affidavit provides only minimal foundation for a spreadsheet on which he relies for this argument. The spreadsheet, however, even if received in evidence, does not identify a similarly situated officer or show unequal treatment for equal transgressions. *Cf. Harris* v. *City of Chicago*, 665 F. Supp. 2d 935, 956 (N.D. Ill. 2009) ("Statistical evidence is only helpful when the plaintiff faithfully compares one apple to another.").

[20] McGreal also makes two other generalized arguments, which can be swiftly dispatched. First, he argues that the outcome of the investigation was predetermined. His proffered support for this argument, however, is that the investigation of his hostile work environment grievance was predetermined, not the OPPD's investigation of his conduct as a police officer. Second, McGreal argues that the investigation was ludicrous and discusses the Charles Robson traffic stop; however, his argument is not adequately supported by his citations and merely shows that he disagrees with OPPD.

consequence from OPPD and who had attended Village meetings in the past on behalf of the union without consequence, nevertheless faced retaliation after he appeared at the November 2009 meeting with a proposal that seems to have been at least largely, if not entirely, rejected by the Village Board, setting into motion the subterfuge of an elaborate, lengthy investigation of his on–the–job conduct, culminating months later in a notice of contemplated termination. On these facts a reasonable jury could not find that McGreal's protected speech was a but–for reason for his termination.

While McGreal disputes that he was properly disciplined or that he committed some of the alleged conduct, he does not present evidence other than his own opinion that suggests that defendants did not believe the reasons they gave for McGreal's termination. It is not this court's job "to second–guess the employer's decision" but rather to determine whether defendants terminated McGreal because of his protected speech. *Stagman*, 176 F.3d at 1002; *see also Kidwell*, 679 F.3d at 969 ("[W]e look for pretext in the form of a dishonest explanation, a lie rather than an oddity or an error." (internal quotation marks and citations omitted)). On the record before the court, McGreal's assertions that defendants terminated McGreal because of his protected speech are purely speculative. Speculation is not sufficient to survive summary judgment.

Accordingly, defendants are granted summary judgment on counts II and III.

II. Tortious Interference with Advantageous Business Relations (Count V)

To state a claim for tortious interference with advantageous business relations, McGreal must allege "(1) a reasonable expectation of entering into a valid business relationship, (2) the defendant's knowledge of the ex-

pectation, (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship, and (4) damage to the plaintiff resulting from the defendant's interference." *Atanus* v. *Am. Airlines, Inc.*, 932 N.E. 2d 1044, 1048, 403 Ill. App. 3d 549, 342 Ill. Dec. 583 (1st Dist. 2010).

Defendants have offered evidence that the only documents that they provided to potential employers were those that were provided pursuant to a release of liability. McGreal does not contest this factual statement and completely abandons any discussion of this claim in his brief. Since McGreal has provided no evidence in support of his claim, this court is compelled to grant summary judgment to defendants.

Accordingly, defendants are granted summary judgment on count V.

III. Intentional Infliction of Emotional Distress (Counts VIII)

To establish an intentional infliction of emotional distress claim under Illinois law, McGreal must show that "(1) the defendants' conduct was extreme and outrageous; (2) the defendants knew that there was a high probability that their conduct would cause severe emotional distress; and (3) the conduct in fact caused severe emotional distress." *Swearnigen–El* v. *Cook Cty. Sheriff's Dep't*, 602 F.3d 852, 863–64 (7th Cir. 2010) (citing *Kolegas* v. *Heftel Broad. Corp.*, 607 N.E.2d 201, 211, 154 Ill. 2d 1, 180 Ill. Dec. 307 (1992)). "To meet the –extreme and outrageous' standard, the defendants' conduct – must be so extreme as to go beyond all possible bounds of decency, and to be regarded as intolerable in a civilized community.' +" *Id.* at 864 (quoting *Kolegas*, 607 N.E.2d at 211). While McGreal does address this claim in his brief, he does not do much more than state that he

"has ample evidence to establish his" claim. (Dkt. 220–1 at 25.) Nowhere in McGreal's statement of facts does he support the elements of this claim, including providing any factual support for his assertion of severe emotional distress.

Accordingly, defendants are granted summary judgment on count VIII.

IV. Respondeat Superior And Indemnification Under Illinois Law (Counts VI, VII)

Neither McGreal's *respondeat superior* nor indemnification counts provide an independent basis for liability. Since this court has granted summary judgment to defendants on all of McGreal's other counts, summary judgment is proper for these counts as well.

Accordingly, defendants are granted summary judgment on counts VI and VII.

CONCLUSION AND ORDER

For the foregoing reasons, defendants' motion for summary judgment (Dkt. 202) is granted, and the case is dismissed in its entirety.

Date: April 15, 2016

/s/ Joan H. Lefkow
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-2365

Joseph S. McGreal,

Plaintiff,

v.

Village of Orland Park, et al.,

Defendants-Appellees.

Filed: March 6, 2017

Before MANNION, KANNE, and HAMILTON, Circuit Judges.

Kanne, Circuit Judge. On June 28, 2010, Joseph McGreal was fired from his position as a police officer with the Orland Park Police Department. Thereafter, he sued the Village of Orland Park and three members of the police department—Chief of Police Timothy McCarthy, Lieutenant Patrick Duggan, and Lieutenant James Bianchi—claiming that the defendants violated his First Amendment rights by firing him in retaliation for his exercise of protected speech at a community board meeting. He also brought a state-law intentional-infliction-of-emotional-distress claim. The defendants filed a motion for summary judgment, which the district court granted.

This appeal ultimately comes down to evidence, or perhaps more appropriately, a lack of it. Because McGreal has offered no admissible evidence showing that he is entitled to relief, the district court properly dismissed his claims.

I. BACKGROUND

McGreal began working as a police officer in the Village of Orland Park on January 10, 2005. Early in his career, McGreal performed competently: he received positive reviews on his performance evaluations and was nominated for various commendations and other honors. But conflict between McGreal and the police department arose in 2009, which culminated in McGreal's firing on June 28, 2010.

McGreal alleges that he was fired because of his exercise of protected speech at a village board meeting held on November 2, 2009. The village had called that meeting to discuss options to address an anticipated budgetary shortfall. One of the cost-saving options that the village proposed involved laying off as many as seven full-time police officers. McGreal, who had been elected secretary of the local police union in 2008, contends that he attended the meeting on behalf of the union. There, he allegedly presented three alternative solutions, none of which required the laying off of any full-time officers: (1) eliminating certain newly-created, non-essential positions; (2) eliminating the take-home squad-car program for certain lieutenant positions; and (3) creating a new longevity-benefit program that would allow eligible officers to take early retirement. McGreal contends that those solutions, which protected lower-level police officers at the expense of their superiors, drew the ire of the defendants. According to McGreal, the defendants then retaliated against him because of his speech by accusing, interrogating, and ultimately firing him under the pretext of unsubstantiated violations of department policy.

The defendants, on the other hand, deny knowing that McGreal engaged in any protected speech or even attended the November 2 board meeting. Instead, they

argue that McGreal was legitimately fired because of a series of incidents that occurred in late 2009 and early 2010, none of which involved any protected speech.

The first incident occurred on October 27, 2009. That evening, McGreal conducted a traffic stop of a man named Charles Robson, which McGreal's in-squad video camera recorded. Because McGreal turned his microphone off shortly after placing Robson in handcuffs, the police department questioned whether the stop had been performed properly. The defendants also allege that McGreal initially refused to write a report for the stop and even lied under oath about what occurred during the stop. The department conducted an investigation of the stop and its aftermath on November 23, 2009.

The defendants next contend that McGreal committed several acts of misconduct shortly after the November 2 board meeting. These included two unauthorized, unnecessary, and dangerous high-speed chases. The defendants also point to McGreal's behavior at an awards banquet on November 24, 2009, during which McGreal allegedly ostracized a fellow officer who had been honored as the Officer of the Year. The defendants further allege that McGreal continued this inappropriate behavior during his shift that same evening after the banquet.

Because of these and other incidents, the department interrogated McGreal on January 21, 2010. Specifically, they questioned McGreal under oath about his actions during the Robson traffic stop, the awards ceremony, and his shift immediately following the awards ceremony. The defendants allege that McGreal lied during the interrogation about each of those incidents. Afterward, the defendants contend that McGreal committed several additional acts of misconduct, including one instance of reckless driving while off duty.

On March 5, 2010, the department placed McGreal on paid administrative leave. McGreal's misconduct continued after this date. The written order placing McGreal on leave included a no-contact clause, which ordered McGreal "to have no contact or discussion of any kind with any member of this department, citizen or complainant regarding these investigations." (R. 215-23 at 1.) According to the defendants, McGreal violated the no-contact clause on at least two occasions. The department interrogated McGreal again on March 24, 2010. There, the defendants allege that McGreal again lied under oath, claiming that he never contacted anyone in the department about his case. The department ordered him to provide his phone records to verify his testimony, but McGreal refused, claiming that he was not an authorized user on his telephone account and could not obtain the records. The department then obtained the records by subpoena, which revealed that McGreal had in fact contacted at least two officers. The records also showed that, on the same day the department had asked him to provide his phone records, McGreal had removed his name as an authorized user on the account in an apparent effort to obstruct the department's investigation.

On April 21, 2010, the department presented McGreal with a "summarized list of reasons for contemplated disciplinary action," which charged McGreal with a total of sixteen acts of misconduct. (R. 215-24 at 2.) After meeting with McGreal, Chief McCarthy filed a statement of charges with the Board of Fire and Police Commissioners. (R. 220-20.) McGreal was then fired on June 28, 2010.

McGreal contested his termination through arbitration. After meeting with the parties seventeen times over a fourteen-month period, the arbitrator sustained

McGreal's termination on November 14, 2012. McGreal unsuccessfully appealed the arbitrator's decision in the Appellate Court of Illinois. *McGreal v. Village of Orland Park*, No. 1-14-1412, 2015 WL 256529 (Ill. App. Ct. Jan. 20, 2015); *McGreal v. Ill. Labor Relations Bd. State Panel*, No. 1-13-3634, 2014 WL 7176785 (Ill. App. Ct. Dec. 16, 2014).

On June 27, 2012, McGreal filed this lawsuit under 42 U.S.C. § 1983 against the defendants in the Northern District of Illinois. In his complaint, McGreal alleged various constitutional and state-law claims surrounding his termination including: (1) a violation of due process under the Fourteenth Amendment, (2) retaliation in violation of the First Amendment, (3) a *Monell* claim against the Village of Orland Park and the police department, (4) tortious interference with advantageous business relations, and (5) intentional infliction of emotional distress. He further alleged that the village was liable under respondeat superior and indemnification theories.

The defendants filed a motion to dismiss, which the district court granted in part and denied in part on August 2, 2013. In particular, the district court dismissed all claims against the individual defendants in their official capacities, limited McGreal's § 1983 claims to alleged violations that occurred on or after June 28, 2010, and dismissed certain claims that were related to the arbitration hearing or that should have been filed with the Illinois Labor Relations Board. The defendants then filed a motion for summary judgment, which the district court granted in its entirety on April 15, 2016. The district court denied McGreal's motion for reconsideration on May 24, 2016. This appeal followed.

II. ANALYSIS

We review *de novo* a district court's grant of summary judgment, construing all facts and reasonable inferences in favor of the nonmoving party. *Tapley v. Chambers*, 840 F.3d 370, 376 (7th Cir. 2016). Summary judgment is proper when "the admissible evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting *Hanover Ins. Co. v. N. Bldg. Co.*, 751 F.3d 788, 791 (7th Cir. 2014)).

On appeal, McGreal contests only the district court's dismissal of his First Amendment and intentional-infliction-of-emotional-distress claims. Our review is thus limited to those claims. *See e.g., United States v. Beavers*, 756 F.3d 1044, 1059 (7th Cir. 2014) (treating as waived arguments that an appellant did not raise in his opening brief). We begin with his First Amendment claim and then turn to his intentional-infliction-of-emotional-distress claim.

A. First Amendment Retaliation

McGreal first argues that the defendants violated his First Amendment rights by firing him in retaliation for his speech at the November 2 board meeting. To prevail on this claim, McGreal must show that "(1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in the defendants' decision to take the retaliatory action." *Perez v. Fenoglio*, 792 F.3d 768, 783 (7th Cir. 2015) (quoting *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009)). The defendants dispute only the third element—in short, causation—arguing that McGreal's termination had nothing to do with his speech.

At summary judgment in First Amendment retaliation cases, the burden of proof for causation is divided and shifts between the parties. *Kidwell v. Eisenhauer*, 679 F.3d 957, 965 (7th Cir. 2012). First, the plaintiff must produce evidence that his speech was "at least a motivating factor—or, in philosophical terms, a 'sufficient condition'—of the employer's decision to take retaliatory action against him." *Id.* (quoting *Greene v. Doruff*, 660 F.3d 975, 979–80 (7th Cir. 2011)). If the plaintiff makes this initial showing, the burden then "shifts to the employer to rebut the causal inference." *Id.* The employer can meet its burden by offering an alternative explanation for the firing, showing that its decision to terminate the plaintiff "would have been made in the absence of the protected speech." *Thayer v. Chiczewski*, 705 F.3d 237, 252 (7th Cir. 2012). If the employer successfully rebuts the causal inference, the burden shifts back to the plaintiff to "demonstrate that the [employer's] proffered reason was pretextual and that the real reason was retaliatory animus." *Id.*

Here, McGreal fails at both steps one and three in this burden-shifting analysis. First, he has provided no admissible evidence that his speech was a motivating factor of the defendants' decision to fire him. Second, even if he had made that initial showing and shifted the burden back to the defendants, McGreal has provided no admissible evidence that the defendants' alternative explanations for his firing were pretextual. *See Swearnigen-El v. Cook Cnty. Sheriff's Dept.*, 602 F.3d 852, 861–63 (7th Cir. 2010) (analyzing both steps).

1. McGreal's Speech as a Motivating Factor

To show that his firing was motivated by his protected speech, McGreal must first demonstrate that the defendants knew of the protected speech. "Allegedly protected speech cannot be proven to motivate retaliation,

if there is no evidence that the defendants knew of the protected speech." *Stagman v. Ryan*, 176 F.3d 986, 999–1000 (7th Cir. 1999) (citation omitted). McGreal argues that the defendants retaliated against him because of his speech at the November 2 board meeting. To survive summary judgment, he thus has to provide admissible evidence that the defendants were aware of that speech before they initiated disciplinary proceedings.

McGreal has not met his burden: none of the "many documents" he references actually show that the defendants were aware of his speech. (Appellant's Br. at 29.) The first few documents McGreal cites—a memorandum written by the village manager to "All Village Employees" (R. 220-15 at 24) and an email from the union president to the union's members (R. 220-15 at 25)—were actually created weeks before the November 2 meeting and thus could not have provided the defendants with knowledge of who attended the meeting or what the meeting's attendees discussed. Other documents McGreal references—a letter from the village manager to the union president (R. 220-17 at 20) and an email from the union president to the village manager (R. 220-16 at 14)—do not address the November 2 meeting at all.

The deposition testimony that McGreal cites also doesn't show that the defendants knew of McGreal's speech. Although Chief McCarthy admitted during his deposition that he was aware that McGreal had met with the mayor and other board members on October 26, McCarthy did not testify that he knew McGreal attended or engaged in protected speech at the November 2 meeting. (R. 220-9 at 26.) Because McGreal has provided no evidence that the defendants knew of his speech, he has failed to show that his speech was a mo-

tivating factor of the defendants' decision to fire him. *Stagman*, 176 F.3d at 999–1000.

2. The Defendants' Alternative Explanations

Had McGreal made the initial showing that the defendants were aware of his protected speech and that his speech was a motivating factor in his firing, the burden would have shifted to the defendants to provide a legitimate and nonretaliatory explanation for the firing. But because the defendants provided several alternative explanations for McGreal's firing—that he (1) lied under oath during several formal interrogations, (2) committed numerous acts of insubordination, and (3) engaged in reckless conduct while on duty—the burden would have again shifted back to McGreal to show that these explanations were pretextual. *See Thayer*, 705 F.3d at 252. To show pretext and to survive summary judgment, McGreal must "produce evidence upon which a rational finder of fact could infer that the defendant[s'] proffered reason[s] [are] lie[s]." *Zellner v. Herrick*, 639 F.3d 371, 379 (7th Cir. 2011).

Again, McGreal has failed to meet his burden: he has offered no admissible evidence to show that the defendants' nonretaliatory explanations for his firing were anything but true. Although he does cite a few documents to bolster his pretext argument, none of these are sufficient to withstand summary judgment. For instance, he cites his own unsigned affidavit (R. 220-14), his Second Amended Complaint (R. 89 at ¶ 14), his statement of undisputed material facts (R. 220-2 at ¶¶ 39, 41), and a spreadsheet that he created based largely on his own experiences (R. 220-21 at 45–47). He also tries to bolster his argument with irrelevant citations to portions of the record that have nothing to do with his firing. In short, the documents he references are not admissible *evi-*

dence showing that the defendants' explanations are pretextual.

McGreal also largely relies on the suspicious timing of events to show pretext. But as we have repeatedly held, suspicious "timing alone does not create a genuine issue as to pretext if the plaintiff is unable to prove, through other circumstantial evidence, that he was terminated for a reason other than that proffered by the employer." *Pugh v. City Of Attica*, 259 F.3d 619, 629 (7th Cir. 2001). "The reason is obvious: '[s]uspicious timing may be just that—suspicious—and a suspicion is not enough to get past a motion for summary judgment.' " *Kidwell*, 679 F.3d at 966 (quoting *Loudermilk v. Best Pallet Co.*, 636 F.3d 312, 315 (7th Cir. 2011)). Because McGreal has cited no evidence apart from suspicious timing that the defendants' alternative explanations are untrue, he has failed to meet his burden. The district court thus did not err in granting the defendants' motion for summary judgment as to McGreal's First Amendment retaliation claim.

B. Intentional Infliction of Emotional Distress

McGreal next argues that the defendants' conduct amounted to an intentional infliction of emotional distress. To prevail on this claim under Illinois law, McGreal must show that (1) the defendants engaged in "extreme and outrageous" conduct; (2) the defendants "either intended that [their] conduct would inflict severe emotional distress, or knew there was a high probability that [their] conduct would cause severe emotional distress"; and (3) the defendants' "conduct in fact caused severe emotional distress." *Zoretic v. Darge*, 832 F.3d 639, 645 (7th Cir. 2016) (citing *Doe v. Calumet City*, 161 Ill.2d 374, 204 Ill.Dec. 274, 641 N.E.2d 498, 506 (1994)).

McGreal has offered absolutely no evidence that the defendants' conduct was extreme or outrageous or that their conduct caused him severe emotional distress. To the contrary, in his own brief, McGreal admits that the "severity" of his emotional distress was "probably of the garden variety." (Appellant's Br. at 53.) "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *McGrath v. Fahey*, 126 Ill.2d 78, 127 Ill.Dec. 724, 533 N.E.2d 806, 809 (1988) (quoting Restatement (Second) of Torts § 46, cmt. j (1965)). Garden-variety emotional distress is insufficient to meet that standard. The district court did not err in granting the defendants' motion for summary judgment as to McGreal's intentional-infliction-of-emotional-distress claim.

III. CONCLUSION

For the foregoing reasons, the district court's grant of the defendants' motion for summary judgment is AFFIRMED.

APPENDIX E

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

No. 12-cv-5135
Joseph S. McGreal,

Plaintiff,

v.

Village of Orland Park, et al.,

Defendants.

OPINION AND ORDER

On April 15, 2016, the court entered summary judgment on all of Joseph S. McGreal's claims in favor of the Village of Orland Park, Illinois, and individual officials of the Village's police department. (Dkt. 239.) The judgment was affirmed on March 6, 2017 (Dkt. 275; see also *McGreal v. Village of Orland Park*, 850 F.3d 308 (7th Cir. 2017)) and rehearing was denied. Defendants seek an award of their attorneys' fees under the fee-shifting doctrines underlying 42 U.S.C. § 1988 on the basis that McGreal's claims were without foundation and his counsel had more than enough information to determine that before the lawsuit was filed. They also seek Rule 11 sanctions for McGreal's counsel's filing of a meritless opposition to their motion for summary judgment.

"[A] district court may award attorney's fees to a prevailing defendant [under § 1988] upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though the action was not brought in subjective bad faith." *Munson* v. *Friske*, 754

F.2d 683, 696 & n.9 (7th Cir. 1985) (citing *Christiansburg Garment Co.* v. *Equal Employment Opportunity*

Comm'n, 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)). The court must not award fees simply because the plaintiff lost, and it must consider the "course of litigation" in assessing the issue. *See Christiansburg Garment Co.*, 434 U.S. at 421–22.[1] "Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422.

Rule 11 imposes a duty on counsel and parties to make a reasonable inquiry, before filing a document, to ensure it is well grounded in fact and law. The principles underlying Rule 11 are thoroughly presented in *Mars Steel Corp.* v. *Cont'l Bank N.A.*, 880 F.2d 928, 931– 932 (7th Cir.1989):

> Rule 11 provides that a lawyer's or party's signature on any paper filed in district court
>
> > constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

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[1] [1] These cases dealt with fee shifting under Title VII, but neither party suggests that the principles are not the same for §1988.

> This has both a subjective and an objective component. A paper "interposed for any improper purpose" is sanctionable whether or not it is supported by the facts and the law, and no matter how careful the pre-filing investigation. The objective component is that a paper filed in the best of faith, by a lawyer convinced of the justice of his client's cause, is sanctionable if counsel neglected to make "reasonable inquiry" beforehand …"An empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating." [citation omitted]. Counsel may not drop papers into the hopper and insist that the court or opposing counsel undertake bothersome factual and legal investigation.
>
> Rule 11 is not a fee-shifting statute in the sense that the loser pays. It is a law imposing sanctions if counsel files with improper motives or inadequate investigation.

In order to give perspective on McGreal and his counsel's conduct and judgment, some background is necessary. After McGreal was fired from his job in June 2010, he exercised his right to have his termination reviewed by an arbitrator under a collective bargaining agreement between the Village and the Metropolitan Alliance of Police. The arbitration was conducted in accordance with the Illinois Uniform Arbitration Act, 710 Ill. Comp. Stat. §§ 5/1 *et seq*., which requires significant due process protections, including the employee's right "to be heard, to present evidence material to the controversy and to cross- examine witnesses appearing at the hearing," § 5/5, to be represented by an attorney, § 5/6, and to subpoena witnesses and documents, § 5/7,

and the right to appeal to the Circuit Court of Cook County, §§ 5/12, 5/16.

As reflected in the arbitrator's decision (Dkt. 248-1, Ex. 5), a hearing before the Federal Mediation and Conciliation Service occurred over seventeen days between January 26, 2011 and March 2, 2012. A voluminous record of documents and witness testimony was made. On November 14, 2012, about a month after John P. DeRose filed an appearance in this lawsuit on behalf of McGreal, the arbitrator rendered a 43-page single-spaced decision in which he summarized the evidence and, concerning each charge, the union's position, the employer's position, and his decision, stating reasons. All but one of the Village's nineteen charges were upheld. The arbitrator found by a preponderance of the evidence that there was just cause for the termination. He concluded that the employer had met the requirements for a pre-disciplinary hearing and that union animus was not the cause of McGreal's "problems." (*Id.* at 42.)

In December 2012, McGreal's counsel was given leave to file an amended complaint (Dkt. 44), mooting a motion to dismiss the original complaint. The first amended complaint named the Village and seven individual defendants and pleaded eight substantive claims. Under 42 U.S.C. § 1983, McGreal claimed that the police chief denied him due process by terminating him without cause and without a pre-termination hearing, and had retaliated against him in response to his union activities and a public statement he made at a Village Board meeting. He also asserted a *Monell* claim alleging that the Village failed to train and discipline officials to protect officers' constitutional rights. McGreal also sought a declaratory judgment that the arbitrator lacked subject matter jurisdiction, and he claimed dam-

ages for breach of the collective bargaining agreement, tortious interference with advantageous business relations, and intentional infliction of emotional distress.

On August 2, 2013, the complaint was dismissed in substantial part, leaving only claims of violation of procedural due process for failure to provide a pre-termination hearing, the First Amendment claims, and two of the state law claims. (*See* Dkt. 77.) Further, the court limited the claims to events that occurred after June 28, 2010. As ordered, McGreal filed a second amended complaint (Dkt. 89) narrowing his claims (although not the facts) to those surviving the motion to dismiss.

Discovery supervision was referred to a magistrate judge in February 2014. The magistrate judge entertained significant motion practice over the course of the ensuing year. McGreal does not dispute that he took twelve depositions and made 294 document requests and that the parties presented numerous motions to the magistrate judge. On March 24, 2015, all defendants moved for summary judgment.

Addressing that motion, McGreal's counsel's submission was non-compliant with the court's local rules, to the point that the court found the filings so wanting that "the motion could have been granted by simply rejecting McGreal's Local Rule 56.1 submissions." (Dkt. 239 at 4.) Nonetheless, skeptical that requiring a redo would improve the situation, the court undertook the extremely time-consuming task of "winnow[ing] the facts to those supported by the record in order that the case [could] be resolved on the merits." (*Id.*)[2]

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[2] In *Malec* v. *Sanford*, 191 F.R.D 581 (N.D. Ill. 2000), Judge Castillo of this court set out a detailed explanation of a proper response to a

(footnote continued)

The court ruled in favor of defendants on all claims because McGreal lacked evidence supporting one or more essential elements of each. The evidence demonstrated (1) that McGreal had a constitutionally-adequate pre-termination hearing because it was undisputed that he had been given notice of the reasons for his termination, an explanation of the reasons, and an opportunity to tell his side, all before he was terminated; (2) that he could not prove retaliation for speech or union activities because he had no evidence that his superiors were hostile to his union activity or that his speech at a Village Board meeting was even known to the deciding official before the deciding official initiated the termination process. Nor did he show that he was disciplined more harshly than other officers with similar conduct violations. Thus, he could not prove the causation element of his First Amendment claims, such that the court concluded that the claims were "purely speculative." (*Id.* at 16.) As to the state law claims, similarly, McGreal proffered no evidence.

Significantly, at several points, defense counsel endeavored to dissuade McGreal's counsel from proceeding further with the case. An email from a defense attorney to McGreal's counsel dated February 3, 2014, laid out in a respectful manner evidence that McGreal's continued litigation against the Village was "vindictive" and entirely unsupported against six of the individual

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(footnote continued from preceding page)

motion for summary judgment. Mr. DeRose was plaintiff's counsel in the case, thus was certainly aware of the obligations of Local Rule 56.1 fifteen years hence. He is, indeed, no stranger to this court, having appeared in 285 cases docketed on CM/ECF.

defendants (Dkt. 248-3, 3–4[3]), and sought their dismissal on pain of Rule 11 sanctions. Counsel rejected the demand the next day, and defense counsel reiterated the view that counsel was "refus[ing] to take a serious and considered view of the merits of [his] client's case," suggesting that a "sober review [of] the record, particularly the record of the arbitration proceedings" would persuade him that the case lacked merit. (*Id.* at 2.)

In July 2014, defense counsel tried again. In a formal letter to McGreal's counsel, defense counsel wrote that the case was baseless, giving notice that defendants would seek Rule 11 sanctions if McGreal continued to pursue the case. (*Id.* at 6–7.) In September, defense counsel for certain defendants beseeched McGreal to dismiss the case against them, again, stating, "It is now clear after the multitude of depositions that: a) your client's factual contentions do not have any admissible evidentiary support …"[4] (*Id.* at 15.) McGreal plowed ahead, making repetitive requests for documents that had already been produced, multiplying the litigation unnecessarily. (*See, e.g.*, *id.* at 17–19.)

McGreal, in response to the motion for attorneys' fees, relies on the truism that fee shifting in favor of defendants in a section 1983 case is the exception and should occur only where the case is frivolous. *See, e.g.*, *Johnson* v. *Daley*, 339 F.3d 582, 587 (7th Cir. 2003) (citing *Christiansburg Garment Co.* and stating,

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[3] Because the exhibits in this document are not separately paginated the page numbers referenced are those found in the CM/ECF headers

[4]. McGreal eventually voluntarily dismissed four of the individual defendants. (Dkts. 172, 178).

"[D]efendants recover legal expenses only if the suit is frivolous—in which event they would be entitled to recompense even without regard to a statute"[5]). Remarkably, McGreal suggests that his counsel's litigation over the years generates work for defense lawyers, who have commented that they would welcome more cases from his counsel. (Unfortunately, he does not acknowledge that, ultimately, the cost of unjustifiable litigation is borne by defendants.) And his counsel assures the court that neither he nor his client filed this case for any improper purpose but, rather, believed sincerely in the merit of McGreal's claims. Finally, McGreal drops in arguments that failed on the motion for summary judgment and on reconsideration that his First Amendment and intentional infliction of emotional distress claims were meritorious, despite the paucity of fact or law to support them.

Although it would not be unreasonable to conclude that the case was frivolous, unreasonable, or without foundation from the outset, the court is not fully persuaded that it was. Termination of employment is a traumatic event for anyone, and McGreal may have believed, for example, that his union activities were at the heart of his. Had his evidence of suspicious timing been bolstered by any other evidence of hostility to his union activities by the Village, perhaps he could have established at least one of his First Amendment claims. Furthermore, issues of motive and intent in a discharge situation are typically reserved for the finder of fact. Thus, the court does not rest on the fee-shifting principles underlying section 1988.

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[5] As quoted above, *Christianburg Garment* actually said "frivolous, unreasonable, or without foundation."

The court is persuaded, however, that under Rule 11, McGreal's counsel's summary judgment filings were not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Despite voluminous documentary discovery and more than a dozen depositions, counsel was unable to proffer evidence supporting all the elements of even one of his claims. Furthermore, his responses to the defendants' statements of material facts were laden with disingenuous and misleading statements.[6] Even if professions of subjective good faith

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[6] One of countless potential examples is McGreal's response to defendant's statement of fact no. 3: "By the conclusion of the arbitration hearing, the arbitrator had sustained seventy-five of the seventy- six charges of misconduct that had been filed against McGreal and sustained McGreal's termination from the OPPD." This statement called for a simple yes response, but McGreal disputed the documented fact, stating that the arbitrator had decided the case before the hearing and had told him that he "would never work in Orland Park again." (Dkt. 220-3.) Support for this statement was a letter from union counsel to McGreal in which counsel related, "As you know, Arbitrator Stoia requested to meet with the Village attorney and I privately before the hearing began. He told us that we should consider settlement and that there was 'no way' that you would be going back to work as a police officer in Orland Park." (Dkt. 220- 25 at 1.) He continued, "[The arbitrator] further indicated that he believes that you have lied on more than one occasion and he expressed concern that his decision would make it so that you may never be able to be employed as a police officer again." (*Id.*) Although the attorney did not approve of the arbitrator's approach and believed he had "made many decision early in this hearing," the attorney did advise McGreal to settle for $5,000 to $10,000 and a neutral reference and pointed out that "it is within the Union's discretion to withdraw this grievance." (*Id.*) McGreal saw this as the arbitrator's bias, although it was at least as likely the arbitrator's candid assessment. In either event, the response to the statement of material facts was improper.

by both McGreal and counsel are credited, the objective test is not overcome.

Sadly, McGreal's counsel has faced similar sanctions in other cases in this court, yet seems either unable or unwilling to incorporate into his method of practice the lessons that should have been learned. Counsel is in all respects known to the court as an honorable and kind individual who has endeavored for many years to vindicate the civil rights of his clients as a "private attorney general," and he has achieved favorable verdicts and settlements in some cases.[7] Nonetheless, it is unjust to excuse the imposition of significant unnecessary expense on opposing litigants as occurred in this unfortunate case.

Under Rule 11, "[a] sanction . . . must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include . . . , if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." For all of the reasons set out above, the court will allow a reasonable attorney's fee to defense counsel for their services in preparing the Rule 11 letter to McGreal's counsel, the reply to the motion for

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[7] Of the ten cases filed by Mr. DeRose from January 2005 through August of 2006, five were disposed of in the district court either by dismissal or summary judgment in favor of the defense (case nos. 05 C 336, 05 C 1421, 05 C 1577, 05 C 1888, 05 C 6338). Two appear to have been settled (nos. 05- 3108, 06-4345), one voluntarily dismissed (05 C 3400), and two tried to a jury, one resulting in a defense verdict (05 C 638) and the other a plaintiff's verdict, for which Mr. DeRose was awarded approximately $185,000 in fees (06 C 1462).

summary judgment and the motion for attorneys' fees,[8] as well as any other labor that resulted from the motion (other than the bill of costs). This is a small fraction of the fees billed to a small municipality in defense of a legitimate discharge of a police officer (*see* Dkt. 281-1) but, as stated in *Mars Steel*, Rule 11 is not a fee shifting device. Rather, the sanction is directed at McGreal's counsel to impress upon him that his conduct has consequences.

ORDER

All defendants' motion for attorneys' fees (248) is granted in part and denied in part. The court awards a reasonable attorney's fee to defendants' counsel for their services in preparing the Rule 11 letter to McGreal's counsel, the reply to the motion for summary judgment, and the motion for attorneys' fees, as well as any other labor that resulted from the motion (other than the bill of costs). The fees shall be paid by John D. DeRose. The parties shall proceed according to Local Rule 54.3(d)–(g). A motion for a specific award of fees shall be filed within 70 days of the entry of this order.

Date: September 27, 2017

/s/ Joan H. Lefkow
U.S. District Judge

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[8] See Rule 11(c)(2) ("If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees incurred for the motion."). Although defendants request $500,000 as reimbursement for fees billed to the case, the motion does not make clear whether defendants are seeking fees for the appeal or whether this court would have jurisdiction to award them as a consequence of the unwarranted response to the motion for summary judgment. As such, fees for the appeal are denied.

APPENDIX F

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

No. 12-cv-5135
Joseph S. McGreal,

Plaintiff,

v.

Village of Orland Park, et al.,

Defendants.

ORDER

Defendants' motion to set amount of attorneys' fees to be awarded (Dkt. 287) is granted. Defendants are awarded attorneys' fees in the amount of $66,191.75 against Attorney John P. DeRose. Plaintiff's "motion and statement" in response to LR 54.3(e) and (f) to vacate order assessing Rule 11 sanctions against Attorney DeRose (Dkt. 289) is denied.

STATEMENT

Plaintiff's objections to defendants' submission of their attorneys' hours as "unnecessary, redundant, and duplicative of each other's work" lacks reference to a particular instance of any of those characterizations. Therefore, these objections are deemed waived. The court has reviewed defendants' submission and sees no evidence of unnecessary time devoted to the tasks detailed in their time sheets. Plaintiff states that he spent 187 hours responding to the defendants' motion for summary judgment, suggesting that a reply memorandum should take less time than the approximate 275 hours defendants invested in the reply. This might be true in general, but here defendants' 53-page submission on summary judgment elicited a response of 90

pages (excluding exhibits), including a Local Rule 56.1 statement that this court has already described as non-compliant and "laden with disingenuous and misleading statements." (Dkt. 286 at 2, 8) Two inferences could be drawn from this: (1) that Mr. DeRose did not spend enough time and (2) that defendants' labor responding to the submission was more time-consuming as a result. The court finds the time spent by defendants reasonable, as were their hourly rates of $275 and less. Moreover, they have expressed willingness to forgo fees awarded for preparing the motion for fees and their response to the motion to reconsider the court's ruling, a total of nearly $28,000. In all, the defendants request for only the fees related to its reply memorandum is reasonable.

Plaintiff raises the point that defendants did not comply with Rule 11 by filing a separate motion from the motion for fees under § 1988 and by failing to give him a safe harbor warning after filing the motion, which would have given him an opportunity to withdraw the document. Plaintiff made no mention of either of these objections in response to the motion for fees (Dkt. 253), at a time when the court could have considered his position before ruling. The substance of the defendants' motion was that the entire case was unfounded in fact or law, an allegation that was borne out as far as this court and the court of appeals could discern. Defendant repeatedly made that point to Mr. DeRose to no avail. This procedural omission is not sufficient cause to upset the court's ruling.

Date: September 26, 2018

/s/ Joan H. Lefkow
U.S. District Judge

APPENDIX G

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

No. 12-cv-5135

Joseph S. McGreal,

Plaintiff,

v.

Village of Orland Park, et al.,

Defendants.

ORDER

The motion of Attorney John P. DeRose to reconsider order awarding attorney's fees against him (Dkt. 294) is denied.

STATEMENT

Mr. DeRose relies on *Northern Illinois Telecom, Inc.* v. *PNC Bank, NA*, 850 F.3d 880 (7th Cir. 2017), in support of his position that the court should not have excused the moving defendants' failure to follow the "safe harbor" procedure of Rule 11, Fed. R. Civ. P. Mr. DeRose states, without record citation, that he called the case to the court's attention nine months before the order imposing sanctions was entered. Whether or not that occurred, Mr. DeRose did not cite the case when the motion for sanctions was before this court, which was the appropriate time to bring it to the court's attention. Furthermore, *PNC Bank* did not overrule the Seventh Circuit's holding in *Nisenbaum* v. *Milwaukee Cty.*, 333 F.3d 804, 808 (7th Cir. 2003), that substantial compliance with the warning-shot requirement is sufficient for the court to rule on the merits of the motion.

"Substantial compliance requires the opportunity to withdraw or correct the challenged pleading within 21

days without imposition of sanctions." *PNC Bank*, 850 F.3d at 888. Here, defense counsel Michael J. Wall wrote a detailed letter to Mr. DeRose on July 16, 2014, in advance of the defendants' filing their motions for summary judgment, setting out the basis for his position that the entire case was unfounded in fact and law, demanding that he dismiss the case or "I shall proceed with the filing of the referenced motions [for summary judgment and for sanctions.]" (Dkt. 248-3.) Mr. Wall wrote a supplemental letter on September 30, 2014, further explaining his view that Mr. DeRose's conduct in discovery was harassing and only demonstrated the lack of substance to plaintiff's claims. (*Id.*) Mr. Wall again demanded that Mr. DeRose dismiss the case. Numerous other email exchanges made the same point and Mr. DeRose without fail declined to reconsider, forcing defendants to prepare the summary judgment motion and supporting materials. Judgment was entered on April 15, 2016 and plaintiff's motion for reconsideration was denied on May 24, 2016. Thirty days later, defendants filed their bill of costs and motion for attorney fees under 42 U.S.C. § 1988 and Rule 11. Mr. DeRose responded 28 days later. Rather than folding his tent even at that late date, Mr. DeRose proceeded with an unsuccessful appeal. There is little basis in this record for Mr. DeRose to have been "unclear as to both whether the opposing party is serious and when the 21-day safe-harbor clock starts to run." *PNC Bank*, 850 F.3d at 888.

Because the argument was not made in a timely manner and because the court finds substantial compliance with the safe harbor procedure, the court denies the motion.

Date: October 12, 2018

/s/ Joan H. Lefkow
U.S. District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-3342

Joseph S. McGreal, ,

Plaintiff,

v.

Village of Orland Park, et al.,

Defendants-Appellees.

Appeal of: John P. DeRose, Counsel for Plaintiff,

Appellant.

Filed: August 20, 2019

Before KANNE, SYKES, AND BRENNAN, Circuit Judges.

The Appellant filed a petition for rehearing and rehearing *en banc* on July 10, 2019, and on July 31, 2019, the Appellees filed an answer to the petition. No judge in active service has requested a vote on the petition for rehearing *en banc* and all members of the original panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are **DENIED**.

APPENDIX I

Federal Rules of Civil Procedure, Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) SIGNATURE. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) SANCTIONS.

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty in-

to court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) INAPPLICABILITY TO DISCOVERY. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.