IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GREG LaFOND,

Plaintiff,

v.

LARRY STURZ, DAVID ELVIG, TOM STEUDING and CITY OF ALTOONA,

Defendants.

OPINION AND ORDER

03-C-435-C

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This is a civil action for monetary relief. Plaintiff Greg LaFond contends that defendants Larry Sturz, David Elvig, Tom Steuding and the City of Altoona, Wisconsin (1) violated his rights under the First Amendment by exercising a not-for-cause buy-out provision in his employment contract in retaliation for his protected speech; (2) subjected him to a hostile work environment; (3) breached his employment contract; (4) defamed him; and (5) wrongfully terminated his employment in violation of state public policy. Now before the court is defendants' motion for summary judgment on all five counts. Jurisdiction is present with respect to plaintiff's First Amendment claim. 28 U.S.C. § 1331. To the extent supplemental jurisdiction may exist over the remaining state law claims, 28 U.S.C.

§ 1367, it will be relinquished for the reasons stated below.

Defendants' motion will be granted with respect to plaintiff's First Amendment retaliation claim. Much of plaintiff's claim is premised on speech that is not protected under the First Amendment because it relates to matters of personal rather than public concern. Although some of his speech may be protected, plaintiff has failed to cite evidence that would support an inference that it was a motivating factor in defendants' decision to exercise the buy–out provision of his contract. Because defendants are entitled to judgment on plaintiff's sole federal law claim, the remainder of his state law claims will be dismissed without prejudice. Absent exceptional circumstances, federal district courts relinquish jurisdiction over state law claims when all federal claims are dismissed before trial.

At the outset, I note that in proposing findings of fact, the parties have provided very little foundation information. For example, much of this case revolves around defendants' attempt to add an "electioneering policy" to plaintiff's job description and plaintiff's objection to the amendment, yet none of the parties proposed even one finding of fact regarding the *content* of the policy. See Procedure to Be Followed on Motions for Summary Judgment, I.B.3, attached to Preliminary Pretrial Conference Order, dkt. #9 ("The statement of proposed findings of fact shall include ALL factual propositions the moving party considers necessary for judgment in the party's favor. For example, the proposed findings shall include factual statements relating to . . . the context of the dispute."). In many

instances, the proposed findings of fact that are directed to background information propose only that plaintiff had made a certain claim. For example, the combined proposals indicate that plaintiff has *claimed* that his attorney made a demand for a public apology rather than the fact that plaintiff's attorney *actually made* such a demand. See Plt.'s Resp. to DPFOF, dkt. #33, at ¶ 8-9. "Claims" are matters of law, not fact. Where it appears clear from the proposals or the briefs that the content of the claims is truly undisputed, I have treated it as such.

Further frustrating the process of determining what facts are truly undisputed, many of the proposed findings simply indicate what evidence there is on a particular point. Rather than proposing something to be true, many of the proposed findings assert that someone has testified that it is true. The fact of evidence is not relevant, only the reasonable inferences that can be drawn from it are. I have treated similar proposals as if they asserted the content of the testimony rather than the existence of the testimony where it is clear that the opposing side has done so in responding. Nonetheless, the product of the combined proposals is a choppy sequence of events rather than a coherent narrative.

From the parties' proposed findings of fact and the evidence cited therein, I find the following to be material and undisputed for the purpose of deciding this motion.

UNDISPUTED FACTS

Plaintiff Greg LaFond was the administrator and city clerk for defendant City of Altoona, Wisconsin, a fourth class municipality organized under the laws of the state of Wisconsin. Defendant Larry Sturz has been the mayor of Altoona since April 2002. At all relevant times, defendants David Elvig and Tom Steuding were members of the city's common council.

A. Ely Complaint

In March 2002, defendant Steuding ran against Ralph Ely for a position on the city common council. At some point that month, Ely contacted plaintiff regarding a campaign truck that Ely believed to be inappropriate. In response, plaintiff took photographs of the truck, observed its temporary license plate and election waiver form and contacted the city police. He provided Ely with the information he had gathered and a copy of the police report; the only conclusion plaintiff reached was that the truck was owned by Hillcrest Truck & Auto. Plaintiff did not discuss the police investigation with either defendant Sturz or defendant Steuding during this month and took no further action until Ely filed a written complaint regarding the truck later that July.

(In his complaint, plaintiff alleges that Ely complained of the improper use of a campaign truck *by* defendants Sturz and Steuding, Plt.'s Cpt., dkt.# 2, at ¶ 78. Although defendant's proposed fact regarding Ely's complaint is vague on this point, Dfts.' PFOF, dkt.

#24, ¶ 69 ("In March 2002, Ely contacted LaFond about a campaign truck that Ely did not believe was appropriate"), for the purpose of deciding this motion, I will assume that the truck was used by defendants Sturz and Steuding. The deposition testimony defendants cite in support of their proposed fact indicates that the truck was used in the election campaigns of defendants Sturz and Steuding. Lafond Dep., dkt. #21, at 207-08 (truck had disclaimer on it stating "authorized and paid for by Larry Sturz and Tom Steuding").)

In July 2002, Ely filed a written complaint regarding the campaign truck. In response, plaintiff asked the city police to question Robert Brown, the owner of Hillcrest Truck & Auto. After being questioned by the police, Brown complained to defendant Sturz that plaintiff was harassing him. In addition, plaintiff asked defendant Sturz to answer a few questions regarding the truck. Defendant Sturz told plaintiff to submit his questions in writing. After plaintiff did so, defendant Sturz refused to answer and instead instructed plaintiff to assure Ely that the truck was legal. On August 8, 2002, after obtaining approval from the city's attorney, William Thiel, plaintiff sent Ely a report summarizing the investigation of the campaign truck. Plaintiff provided defendants Sturz and Steuding with copies of the report.

Not satisfied with the responses he had received to his complaints earlier in the year, Ely contacted the Eau Claire County district attorney regarding his concerns about the campaign truck on October 21, 2002. The district attorney explained that because the value

of the two-week use of the truck was less than $100, there was no election law violation. Ely told plaintiff about the district attorney's response. Because plaintiff was convinced that the value of using the truck for two weeks far exceeded the $100 contribution cap, he met with George Dunst, legal counsel for the Wisconsin state board of elections, on December 18, 2002.

On January 22, 2003, plaintiff, in his official capacity, forwarded Ely's complaint to the Eau Claire County district attorney and attached his office's most recent memorandum analyzing Ely's complaint. Pursuant to his official obligation, plaintiff placed a copy of the complaint in the business mailboxes of defendants Sturz and Steuding. Eight days later, an investigator from the Wisconsin Department of Transportation visited Hillcrest Truck & Auto to interview Brown. The investigator concluded that the campaign truck had been illegal, a conclusion later confirmed by the state elections board. Both defendants Steuding and Sturz heard about the investigation.

B. Gesche Complaint

On May 21, 2002, Lynn Gesche, an employee of the city park and recreation department, filed a harassment complaint against plaintiff. At some point before Gesche filed the complaint, defendant Sturz spoke with Gesche about the matter. The day after the complaint was filed, defendant Sturz directed the deputy city administrator, Cindy Bauer,

to issue a notice for a closed session meeting to be held on May 31, 2002, for the purpose of discussing Gesche's grievance. In addition, defendant Sturz sent a letter with a copy of the grievance to each council member and plaintiff, indicating that testimony from both plaintiff and Gesche would be heard at the closed session. Plaintiff objected to the closing of the meeting on the ground that it violated his employment agreement and the city's personnel manual. On May 27, 2002, plaintiff sent a letter to Bauer, questioning the scheduling of the meeting and the issuance of a notice with respect to it. At the conclusion of all other business at the May 31, 2002 meeting, defendant Sturz cancelled the closed session portion. A "letter of reprimand" was placed in plaintiff's file regarding Gesche's complaint.

C. Electioneering Policy

Shortly after he was elected mayor, defendant Sturz directed the city's deputy clerk, Cindy Bauer, to provide him a copy of plaintiff's employment agreement. At a personnel committee meeting on April 30, 2002, defendant Sturz recommended updating the position description for the city administrator. Pursuant to his job duties, plaintiff provided information and advice to assist in this process. Although plaintiff prepared drafts of the position description, he repeatedly stated his understanding that the revised description would not apply to him because he had a pre-existing employment agreement. Defendant

Elvig and another member of the personnel committee revised plaintiff's drafts and in so doing, added an "electioneering policy."

(Neither party has explained the content of the "electioneering policy," although plaintiff alleged in his complaint that it would have precluded him from participating in municipal elections. Plt.'s Cpt., dkt. #2, at ¶ 87. Both parties appear to assume that the "ICMA code of ethics" is synonymous. According to the website of the International City/County Management Association, the code of ethics provides in relevant part that its members are to "refrain from all political activities which undermine public confidence in professional administrators [and] participation in the election of the members of the employing legislative body." ICMA Code of Ethics, available at http://www2.icma.org. Accordingly, I will assume for the purpose of deciding this motion that the "electioneering policy" would have banned the city administrator from participating in municipal elections.)

On September 17, 2002, Thiel wrote to defendant Elvig, stating that the electioneering policy revision might not be enforceable. The letter contained draft language to be included in the position description. At a council meeting held that evening, plaintiff stated that a similar electioneering provision had not been included in any other city job description. He told the council that he believed that the provision violated his First Amendment right to free speech. Additionally, plaintiff noted that all employees of the city were already subject to its code of ethics. Nonetheless, defendant Elvig encouraged the

personnel committee to adopt the new job description and the committee voted in favor of the amendment.

On September 26, 2002, the city's common council held an open meeting at which the council discussed the personnel committee's proposed revision to the city administrator job description. When defendant Elvig asked plaintiff whether he believed that the revision applied to him, plaintiff responded that the matter should be taken up with his attorney.

D. October 10, 2002 Meeting

The city published a notice that a closed common council meeting would be held on October 10, 2002. The notice of this closed meeting was contained in the notice of the regular council meeting scheduled for that evening. On October 9, 2002, the Eau Claire Leader-Telegram published an article entitled "LaFond Comes Under Scrutiny," indicating that the agenda for the meeting listed LaFond's job performance as a topic of discussion. In addition, the article stated that the agenda referred to a portion of state law implicating the possible disciplinary action.

The purpose of the closed portion of the meeting was to discuss plaintiff's conduct at the September 26 city council meeting. Some council members were concerned that plaintiff's relationship with the council had deteriorated to the point where they could not have a discussion with him without involving lawyers. Plaintiff demanded that the meeting

be open to the public pursuant to state law and offered to provide members of the common council copies of the verbatim transcript of the September 26 meeting, but defendant Sturz refused both. At the outset of the meeting, defendant Sturz commented on the long hours plaintiff spent at work.

At the meeting, plaintiff denied that there was anything inappropriate about his conduct at the September 26 meeting. In response, defendant Elvig said to plaintiff: "This is another example of negative behavior. This is what I mean by no cooperation. Are you going to change your ways?" Plaintiff indicated that he had no intention of changing his behavior because he did not believe it had been negative. When plaintiff asked whether the meeting was disciplinary, Thiel responded that "It [was] getting close." Defendant Sturz then adjourned the meeting. No disciplinary action was taken against plaintiff at the meeting.

E. October 21, 2002 Meeting

On October 21, 2002, the common council held a closed meeting at which a "test vote" was taken regarding the award of a lucrative engineering contract to SEH, a company owned in part by Tim Marko, who was a former member of the common council and a personal friend of defendant Elvig. Shortly thereafter, plaintiff expressed his concerns about the legality of this meeting to Thiel and defendant Sturz. In response, defendant Sturz

indicated that he did not think that it was his responsibility to determine whether the meeting was illegal; Thiel then stated that he was responsible for the legality of the meeting. The November 15, 2002 edition of the Eau Claire Leader-Telegram contained an article suggesting that the October 21 closed session violated state open meetings laws.

F. Open Records Requests

On September 26, 2002, Julian Emerson, acting on behalf of the Eau Claire Leader-Telegram, made a request pursuant to open records laws for a copy of plaintiff's employment contract and copies of all legal bills from the city attorney's law firm from the year 2002. As city clerk, it was plaintiff's responsibility to respond to open records requests. Pursuant to his normal practice, plaintiff provided Emerson with the documents as soon as he received the request.

On October 14, 2002, Emerson made another open records request for any and all records relating to the possibility that the city might buy out plaintiff's employment contract under its not-for-cause termination provision. Because of the subject matter of this request, plaintiff referred it to Thiel. On October 18, 2002, plaintiff notified Emerson that his second request was denied on the advice of the city's attorney. Eleven days later, Emerson made a third request, seeking documents related to any possible buy-out of plaintiff's employment contract, which plaintiff denied on Thiel's advice. On December 6, 2002,

Emerson made a fourth request, again asking for documents related to a possible buy-out, which plaintiff forwarded to Thiel.

On January 6, 2003, Emerson made a sixth request, asking for any buy-out related documents and for copies of all legal bills the city had incurred since September 26, 2002. Plaintiff informed both Thiel and defendant Sturz. On January 15, 2003, Thiel wrote Emerson a letter, indicating that the city would release the documents he had requested. Two days later, plaintiff wrote letters to Thiel, Emerson, defendant Sturz and the common council, indicating that he waived any objection to the release of any documents that pertained to him.

On January 21, 2003, Thiel released three documents to Emerson. Emerson responded ten days later, asking whether the three documents were the only records the city had relating to his request. On February 7, 2003, Thiel provided Emerson with a copy of a memorandum that he had sent defendant Sturz on November 26, 2002, supplementing the previous document production.

G. Public Apology

In October and December 2002, plaintiff's counsel demanded public apologies from defendant Sturz and the common council.

H. Termination

At a closed session meeting on November 23, 2002, the city council authorized defendant Sturz to negotiate a buy-out of plaintiff's contract. These negotiations never took place. On December 3, 2002, plaintiff made a public statement indicating that he was not interested in a buy-out.

On February 4, 2003, plaintiff sent defendant Sturz and every common council member a memorandum, objecting to the inclusion of the electioneering policy in the city clerk position description and stating that he did not believe the provision would apply to him if adopted.

On February 7, 2003, Thiel gave defendant Sturz a draft notice of a closed session meeting of the common council to consider termination of plaintiff's contract pursuant to its not-for-cause buy-out provision. The provision required a two-thirds vote of the six member city council to buy out plaintiff's contract. Plaintiff, who was not aware that Thiel had sent this memorandum, fulfilled Emerson's fifth document request by providing him copies of 76 documents on February 10, 2003. Plaintiff did not consult with Thiel regarding which documents were appropriate for disclosure. One of these documents was the memorandum that Thiel had prepared for defendant Elvig, undercutting a number of the election law violation allegations that defendant Elvig had made against plaintiff in the March 2002 white binder.

About this time, defendants Sturz and Elvig contacted defendant Steuding, who was spending the winter in Florida, about his ability to return so that a common council meeting could be held to discuss buying out plaintiff's contract. Defendant Steuding returned to Altoona by February 13, 2003. Defendant Sturz directed the deputy city clerk to publish a formal notice of a closed session meeting of the common council to be held on February 15, 2003.

At the February 15 meeting, the common council voted four to one in favor of terminating plaintiff's employment contract pursuant to its not-for-cause provision. Defendants Steuding and Elvig both voted in favor of the buy-out. The single "no" vote came from common council member Jeff Manhardt. Defendant Sturz did not vote because he was not a member of the common council.

Two days later, plaintiff inventoried the contents of his personnel file and found that the "letter of reprimand" he had received as a result of Gesche's complaint was missing. Defendant Sturz had destroyed the letter after the council voted to terminate plaintiff's contract. At no point prior to plaintiff's termination was the electioneering policy enforced. There had been no occasion to do so.

OPINION

A. First Amendment Retaliation

"[P]ublic employees do not relinquish all rights to free speech under the First Amendment, even when that speech relates to their employment," Hulbert v. Wilhelm, 120 F.3d 648, 650 (7th Cir. 1997) (citing Connick v. Myers, 461 U.S. 138 (1983)), and public employers are prohibited from retaliating against their employees for protected speech. Abrams v. Walker, 307 F.3d 650, 654 (7th Cir. 2002). A retaliatory act is actionable under § 1983 even if it would have been proper had it been taken for other reasons. Howland v. Kilquist, 833 F.2d 639, 644 (7th Cir. 1987).

Plaintiff contends that defendants bought out his employment contract pursuant to its not-for-cause provision in retaliation for his having exercised his First Amendment right to free speech. In order to establish a prima facie case of First Amendment retaliation, plaintiff must demonstrate that (1) his speech was a matter of public concern; and (2) his conduct was a substantial or motivating factor in the defendants' actions. Gustafson v. Jones, 290 F.3d 895, 906 (7th Cir. 2002). If plaintiff makes this showing, the burden shifts to defendants to show that the government's interest, as an employer, in efficiently providing public services outweighs plaintiff's First Amendment interest or that defendants would have taken the alleged retaliatory act anyway. Id.; Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977).

1. Public Concern

The question whether speech is constitutionally protected is a question of law to be decided by the court. Taylor v. Carmouche, 214 F.3d 788, 792 (7th Cir. 2000); Kokkinis v. Ivkovich, 185 F.3d 840, 843 (7th Cir. 1999). In the employment context, the determination is governed by the analytical framework set out in Pickering v. Board of Education, 391 U.S. 563 (1968), and Connick, 461 U.S. 138, under which an employee must first show that he engaged in speech that is a matter of public concern. Williams v. Seniff, 342 F.3d 774, 782 (7th Cir. 2003); McGreal v. Ostrov, 368 F.3d 657, 672 (7th Cir. 2004).

Speech is deemed a matter of public concern if it relates to a "political, social, or other concern to the community, rather than merely a personal grievance of interest only to the employee." Gustafson, 290 F.3d at 907. A court must consider the content, form and context of the speech. Id. at 906-07. Content is the most important factor, Kuchenreuther v. City of Milwaukee, 221 F.3d 967, 974 (7th Cir. 2000), "though '[t]he speaker's motivation and choice of forum are [also] important because, absent those factors, every employment dispute involving a public agency could be considered a matter of public concern.'" Wright v. Illinois Dept. of Children and Family Services, 40 F.3d 1492, 1501 (7th Cir. 1994) (quoting Barkoo v. Melby, 901 F.2d 613, 618 (7th Cir. 1990)).

Plaintiff's claim is based on six speech acts: (1) investigating Ely's complaints; (2) objecting to violations of Wisconsin's open meeting laws; (3) providing Emerson with

documents in compliance with open records laws; (4) demanding a public apology; (5) objecting to notice of a closed session meeting; and (6) objecting to the electioneering policy. Defendants concede that an investigation of a citizen complaint, alleged violation of open meetings law and compliance with open records laws are matters of public concern but contend that the remaining three acts involve matters of a personal concern. Dfts.' Br., dkt. #35, at 7. (Although there may be some question whether plaintiff's investigation of a citizen complaint and his compliance with open records law constitute "speech" under the First Amendment, Spiegla v. Hull, No. 03-2480, 2004 WL 1301857, *6 (7th Cir. June 14, 2004) ("There must be a communicative element to speech that puts the listener on alert that a matter of public concern is being raised."); see also Tharling v. City of Port Lavaca, 329 F.3d 422, 428 (5th Cir. 2003) (plaintiff's role in executing investigation not speech), the parties have not developed it in the briefs. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) ("a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact.") (internal quotation marks omitted).)

a. Public apology

It is not necessary to linger on plaintiff's contention that a demand for a public apology from the city addresses a matter of public concern. It is well settled that "a personal grievance of interest only to the employee does not qualify as a matter of public concern." Sullivan v. Ramirez, 360 F.3d 692, 699 (7th Cir. 2004). Plaintiff asserts that it is a matter of public concern whether public officials operate government in an ethical manner. However, plaintiff does not explain how a failure to issue a public apology is "unethical"; at most, it may suggest a lack of politeness. An implied suggestion that defendants may have been impolite to plaintiff is far from a matter of public concern. Plaintiff has not even identified why he thinks he was owed an apology. As the Court of Appeals for the Seventh Circuit has warned, "if every facet of internal operations within a government agency were of public concern . . . no escape from judicial oversight of every governmental activity down to the smallest minutia would be possible." Kuchenreuther, 221 F.3d at 974-75.

b. Objection to closed session meeting of October 10, 2003

Plaintiff fares no better with his assertion that his objection to a closed session meeting scheduled for October 10, 2003, addresses a matter of public concern. Plaintiff alleges (but has not proposed as fact) that the notice of this meeting contained a reference to Wis. Stat. § 19.85(1)(f), which he contends "create[s] the inference that [plaintiff] was the subject of a disciplinary proceeding for some (unspecified) misconduct, and set the stage

for him to be tried and convicted in the 'court of public opinion.'" Plt.'s Br., dkt. #32, at 9. It is not clear why plaintiff believes that his reputation is a "matter of political, social or other concern to the community." Connick, 461 U.S. at 146. Preserving one's reputation may be of great personal importance but it is of little or no concern to the public. "'[W]here considerations of motive and context indicate that an employee's speech raised a topic of general societal interest merely for personal reasons rather than a desire to air the merits of the issue, or for the sole purpose of bolstering his own position in a private personnel dispute with his superiors, these factors militate against the conclusion that the employee's speech is entitled to First Amendment protection.'" Metzger v. DaRosa, 367 F.3d 699, 702 (7th Cir. 2004) (quoting Campbell v. Towse, 99 F.3d 820, 827 (7th Cir. 1996)). Although speech is not unprotected simply because the employees has a stake in the matter, Cliff v. Board of School Commissioners, 42 F.3d 403, 410 (7th Cir. 1994), "[it] will not be protected if the expression addresses only the personal effect upon the employee." Gustafson, 290 F.3d at 908.

Plaintiff's argument might carry more weight if his characterization of Wis. Stats. § 19.85(1)(f) were correct. Plaintiff asserts that "Wis. Stat. § 19.85 (1)(f) is the *only* statute that specifically authorizes a 'close session' meeting for disciplinary action." Id. at 10 (emphasis in original). By its terms, § (1)(f) provides that a governmental entity may hold a closed session meeting for "[c]onsidering financial, medical, social or personal histories or

disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons . . . which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations." This section permits a closed session for considering a person's disciplinary history, but not for taking disciplinary action. Instead, subsection (1)(b) authorizes a closed session for "[c]onsidering dismissal, demotion, licensing or discipline . . . and the taking of formal action on any such matter."

An employee who is the subject of the closed session under Wis. Stat. § 19.85(1)(f) has a right to demand that the meeting be open to the public. Wis. Stat. § 19.85 (1)(b). Plaintiff argues that it is a matter of concern to the public that defendant Sturz rejected his demand that the meeting be held in public. However, there is no indication that plaintiff spoke out against the denial.

Finally, plaintiff argues that the newspaper coverage of the meeting shows that his speech related to a matter of public concern. The Court of Appeals for the Seventh Circuit has recognized that media coverage is an indicium of public concern. Gustafson, 290 F.3d at 907; Zorzi v. County of Putnam, 30 F.3d 885, 896-97 n.11 (7th Cir. 1994). However, the article in the Eau Claire Leader-Telegram dealt with the subject matter of the meeting and not the procedures of its institution; plaintiff does not suggest that the article even

mentioned defendant Sturz's denial of plaintiff's demand that session be open to the public. In any event, media coverage is merely indicative rather than conclusive evidence of public concern. Id.

c. Electioneering policy

Finally, the parties debate whether plaintiff addressed a matter of public concern when he objected to the addition of an electioneering provision to the city clerk job description. Making this determination is complicated by the parties' failure to propose facts regarding the content or effect of this amendment. As stated above, I assume that the electioneering provision would bar plaintiff from engaging in campaigning activities for a particular candidate. The only objection plaintiff appears to have made was to the potential effect the policy would have on him if it was adopted. See Michael v. St . Joseph County, 259 F.3d 842, 846 (7th Cir. 2001) (rejecting retaliation claim for lack of evidence definitively establishing what plaintiff said).

"If the speech concerns a subject of public interest but the expression addresses only the personal effect upon the employee, then as a matter of law the speech is not of public concern." Marshall v. Porter County Plan Commission, 32 F.3d 1215, 1219 (7th Cir. 1994). For example, in Smith v. Fruin, 28 F.3d 646, 651 (7th Cir. 1994), a former government employee brought a retaliation claim based on his speech regarding second hand

smoke in the workplace. The court agreed with the holding of the lower court that the issue of second hand smoke was generally one of public concern. However, it reasoned that "the fact that an employee speaks up on a topic that may be deemed one of public import does not automatically render his remarks on that subject protected." Id. at 651. The court found the employee's remarks to be personal because they related only to how the second hand smoke affected him. Id.

Similarly, in Gray v. Lacke, 885 F.2d 399 (7th Cir. 1989), the court found an employee's complaints regarding sexual harassment to be of personal rather than public concern, reasoning

> Although sexual harassment may inherently be a matter of public concern, our court has repeatedly held that we must look to the point of the speech to see if the plaintiff addressed a matter of public or private concern. In this regard, Gray complained to her supervisors in order to have the sexual harassment stopped. Her communication related solely to the resolution of a personal problem.

Id. at 411 (internal citations omitted).

Plaintiff's objections to the electioneering policy are analogous to the speech in both Smith and Gray. In some instances, the propriety of restricting government employee's ability to engage in campaigning activities might be a matter of public concern. However, plaintiff's comments relate to how the amendment would affect him or whether it would even apply to him. Plt.'s Br., dkt. #32, at 7. Because plaintiff has not identified any

objection that he raised other than to the provision's effect on him, his remarks must be characterized as a matter of personal rather than private concern.

2. Substantial or motivating factor

The second element of a prima facie case of First Amendment retaliation requires plaintiff to show that his protected speech was a substantial or motivating factor in defendants' decision to take an adverse action against him, in this case, to buy out his contract. Mt. Healthy, 429 U.S. at 287; Vukadinovich v. Board of School Trustees of North Newton School Corp., 278 F.3d 693, 699 (7th Cir. 2002). To survive a motion for summary judgment, plaintiff must adduce evidence from which a fact finder could infer reasonably that his protected conduct was a motivating factor in defendants' decision to terminate his contract. However, he need not go so far as to prove that but for his speech, defendants would not have voted in favor of the buy-out. Spiegla, 2004 WL 1301857, at *10.

Although it may be highly probative that the allegedly retaliatory act follows closely on the heels of the protected speech, particularly where this fact is combined with others, Lalvani v. Cook County, 269 F.3d 785, 790 (7th Cir. 2001), a "mere temporal proximity between the filing of the charge of discrimination and the action alleged to have been taken in retaliation for that filing will rarely be sufficient in and of itself to create a triable issue."

Stone v. City of Indianapolis Public Utilities Division, 281 F.3d 640, 644 (7th Cir. 2002); see also Smith v. Dunn, 368 F.3d 705, 708 (7th Cir. 2004); Walker v. Board of Regents of University of Wisconsin System, 300 F. Supp. 2d 836, 862 (W.D. Wis. 2004) (temporal proximity may be more or less probative depending on facts of particular case). However, "there [] can be no causal link between the protected activity and an adverse employment action if the employer remained unaware of the protected activity." Morfin v. City of East Chicago, 349 F.3d 989, 1005 (7th Cir. 2003); see also Dey v. Colt Const. & Development Co., 28 F.3d 1446, 1458 (7th Cir. 1994).

Plaintiff's sole argument with respect to the substantial or motivating factor prong is as follows:

> Defendants assert that [plaintiff] cannot establish that any speaking out on his part was a motivating factor in the decision to terminate his employment agreement. However, the admissible evidence of record, including reasonable inferences viewed in the light most favorable to LaFond, supports a finding that LaFond's exercise of his First Amendment right to free speech was a motivating factor.

Plt.'s Br., dkt. #32, at 15. Although this court generally views undeveloped arguments as waived, Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999), for the sake of deciding this issue on the merits, I will address those arguments that defendants assume plaintiff to be making and those that seem obvious from the facts. As a general matter, defendants assume that

plaintiff's causation argument rests primarily on the timing between his protected conduct and the decision to buy out his contract. Dfts.' Br., dkt. #35, at 12 ("[Plaintiff's] primary argument that the [d]efendants' decision to terminate his employment contract was motivated by protected conduct is his contention that the decision occurred shortly after some alleged protected conduct and therefore, must be causally related.").

Of plaintiff's six alleged protected speech acts, three remain: (1) his investigation of the use of the campaign truck as a violation of election laws; (2) his objection to certain open meeting law violations; and (3) his providing Emerson with certain documents pursuant to open records laws.

a. Campaign truck investigation

The evidence reveals a relatively short span of time between plaintiff's actions and the buy-out; plaintiff forwarded his office's review of Ely's complaint regarding the use of the truck to the Eau Claire district attorney on January 22, 2003, and placed copies of this letter in the business mailboxes of defendants Sturz and Steuding just 17 days before Thiel gave defendant Sturz a notice for the closed session meeting and less than a month before the vote was taken. Cf. Dey, 28 F.3d at 1462 (characterizing termination decision made approximately four weeks after employee complained characterized as following closely on the heels of protected activity). (There is no evidence that defendant Elvig knew that

plaintiff had submitted information regarding the campaign truck to the local district attorney.)

However, the only other evidence that plaintiff points to that might support an inference of causation is inadmissible as hearsay. Plaintiff has proposed as fact that defendant Sturz had told Manhardt that his reason for calling the February 15 closed meeting was "because [plaintiff] was harassing Bob Brown." Plt.'s Resp. to DPFOF, dkt. #33, at 25 and 27, ¶¶ 81H and 87B. In support of his proposed finding, plaintiff cites a portion of his deposition testimony in which he stated that he was told by council member Jeff Manhardt that defendant Sturz had tried to persuade him to vote in favor of the buy-out because of plaintiff's investigation regarding the campaign truck. Plt.'s Resp. to DPFOF, dkt. #25, ¶ 81H; see also LaFond Dep., dkt #21, at 233-34. This testimony is hearsay and may not be used to dispute defendants' proposed finding of fact. See Procedure to Be Followed on Motions for Summary Judgment, I.C.1, attached to Preliminary Pretrial Conference Order, dkt. #9 ("each proposed finding must be supported by *admissible* evidence") (emphasis added). (In addition, plaintiff cites evidence that does not support his factual proposition. In the portion of defendant Sturz's deposition testimony to which plaintiff refers, defendant Sturz acknowledged that he had discussed plaintiff's investigation of Brown with Manhardt but stated that he did not recall having told Manhardt that the investigation was the reason for the February 15 meeting. Sturz Dep., dkt. #20, at 40-43.) This leaves

plaintiff with nothing more than a close temporal sequence to support his contention that his protected speech was a motivation for the buy-out.

b. Objection to open meeting law violations

With respect to plaintiff's objections to alleged violations of open meetings laws, plaintiff has identified three objections. Plaintiff's first objection was to a closed session meeting to discuss Gesche's complaint that was scheduled for the conclusion of the council's open meeting of May 31, 2002. Plaintiff has adduced no evidence that any defendant criticized plaintiff for this objection. In fact, defendant Sturz canceled the session when plaintiff objected to it. In addition, there is no evidence that any defendant mentioned this objection at any point after May 2002. Finally, the eight-month time gap between plaintiff's objection and the buy-out significantly undercuts any inference of causation. Cf. Filipovic v. K & R Express Systems, Inc., 176 F.3d 390, 399 (7th Cir. 1999) (four months is counter-evidence of causal inference); Davidson v. Midelfort Clinic, 133 F.3d 499 (7th Cir.1998) (no causal inference warranted on five-month gap).

Plaintiff's second objection regarding closed meetings involved the October 10, 2002 meeting at which the council discussed plaintiff's behavior at the September 26, 2002 meeting. I have already concluded that this objection was not protected. Therefore, I need not determine whether the evidence supports an inference that these comments were a

substantial or motivating factor in the buy-out decision.

Plaintiff's third objection was to the closed meeting held on October 21, 2002, at which the council took a test vote regarding the award of a lucrative engineering contract. Plaintiff expressed his concerns regarding state open meeting law violations to Thiel and defendant Sturz at some point after the meeting was held and on November 15, 2002, the Eau Claire Leader-Telegram ran a story suggesting that the council had violated state open meetings laws by holding the contracting vote at a private session. Although there is some probative value to the fact that the council authorized defendant Sturz to attempt to negotiate a buy-out arrangement with plaintiff eight days after the story was published, none of the evidence supports an inference that defendants Steuding or Elvig knew that plaintiff had questioned the closing of the October 21 meeting. (I note that the November 15 newspaper article does not indicate that plaintiff objected to or questioned the closing of the meeting.)

Although defendant Sturz was aware that plaintiff had raised concerns regarding the meeting, plaintiff has failed to cite any evidence showing that defendant Sturz played any part in the council's decision to authorize him to negotiate a buy-out. It is undisputed that defendant Sturz never invoked this authority. On the facts proposed, defendant Sturz's only apparent involvement in plaintiff's termination was setting up the February 15 meeting approximately four months after the October 21 meeting and three months after the

newspaper article was published. Standing alone, the timing falls significantly short of meeting plaintiff's burden to establish an implication of retaliatory motive.

c. Compliance with open records law

Finally, plaintiff points to his compliance with open records laws, specifically his document disclosure to Emerson, as the impetus for the buy-out. Plaintiff fulfilled Emerson's document request on February 10, 2003, just five days before the council vote. The record shows that plaintiff also provided Emerson with documents in response to his earlier request of September 26, 2002. Again, however, plaintiff has not pointed to any evidence from which it could be inferred that any council member had reason to know that plaintiff had provided any records, knew of the volume of documents produced or knew which specific documents he had disclosed. See Plt.'s Resp. to DPFOF, dkt. #33, ¶ 19K. Without such evidence, drawing an inference of retaliatory motive would be unreasonable.

B. State Law Claims

Plaintiff has failed to put into dispute the essential elements on which he has the burden of proof, thus entitling defendants to judgment as a matter of law on his First Amendment claim. Celotex, 477 U.S. at 322. In addition to his First Amendment claim, plaintiff has raised four state law claims (two breach of contract claims, one defamation

action and a common law claim of wrongful termination). (Although plaintiff's complaint indicates that his claim alleging hostile work environment is based in part on "applicable employment laws," Plt.'s Cpt., dkt. #2, ¶ 171, he asserts that he "does not base this claim on federal law" in opposing defendants' motion. Plt.'s Br., dkt. #32, at 21. Instead, plaintiff contends that the city breached its personnel manual, which he argues is adopted by reference in his employment contract, making this "hostile work environment" claim actually a breach of contract claim.) Although neither party addressed the issue, I must determine whether it would be appropriate for this court to exercise jurisdiction over plaintiff's remaining claims.

First, it is far from clear that this court would have supplemental jurisdiction to decide the merits of plaintiff's remaining state law claims. 28 U.S.C. § 1367 provides in relevant part:

> [I]n any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

The existence of supplemental jurisdiction is predicated on (1) the existence of a substantial federal claim and (2) a common nucleus of operative fact as to the state and federal claims such that the claims would ordinarily be tried in one proceeding. United Mine Workers v.

Gibbs, 383 U.S. 715 (1966). It does not appear that three of plaintiff's four state law claims would satisfy the common nucleus standard. Both breach of contract claims require interpretation of contract provisions not even remotely related to the First Amendment. Plaintiff's defamation claim is based on statements made by defendant Elvig that were not relevant to the retaliation claim. Although plaintiff's wrongful termination claim involves many of the same facts, it is largely undeveloped. See Plt.'s Br., dkt. #32, at 33 (arguing simply that admissible evidence and reasonable inference therefrom supports claim).

However, I need not determine definitively whether this court has supplemental jurisdiction over plaintiff's state law claims. Even if I were to conclude that there is jurisdiction, it would be inappropriate to exercise it. Khan v. State Oil Co., 93 F.3d 1358, 1366 (7th Cir. 1996) (if court dismisses federal claims before trial, normal course is to relinquish jurisdiction over supplemental law claims; practice is "based on legitimate and substantial concern with minimizing federal intrusion into areas of purely state law"), vacated on other grounds, 522 U.S. 3 (1997). See also Chicago v. International College of Surgeons, 522 U.S. 156, 173 (1997) ("pendent [now supplemental] jurisdiction is 'a doctrine of discretion, not of plaintiff's right'") (quoting Gibbs, 383 U.S. at 726). Although the presumption of relinquishment is rebuttable, Wright v. Associated Insurance Cos. Inc., 29 F.3d 1244, 1251 (7th Cir. 1994) (exception in unusual case where judicial economy, convenience, fairness and comity balance in favor of federal decision of state law issues),

neither party has suggested any reason why this case is an exception to the general rule. Accordingly, I will dismiss the state claims without prejudice, leaving plaintiff free to litigate them in state court.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Larry Sturz, David Elvig, Tom Steuding and City of Altoona is GRANTED with respect to plaintiff Greg LaFond's claim that defendants retaliated against him for exercising his First Amendment right to free speech by buying out his employment contract. I decline to exercise jurisdiction over plaintiff's four state law claims. Those claims are DISMISSED without prejudice to plaintiff's refiling them in state court. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 19th day of July, 2004.

BY THE COURT:
BARBARA B. CRABB
District Judge