IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BLAINE R. KVAPIL,

Plaintiff,

v.

CHIPPEWA COUNTY, WISCOSIN, JAMES L. KOWALCYZK, WILLIAM REYNOLDS, BRUCE G. STELZNER, and DOUGLAS CLARY,

Defendants.

OPINION AND ORDER

11-cv-402-wmc

For eight years, plaintiff Blaine Kvapil carried on a dispute with the defendant Chippewa County over unlicensed and inoperable vehicles on his property, which included his making physical threats against the county zoning administrator. The dispute reached its climax in the summer of 2008, when Kvapil filed a series of grievances against county officials and threatened two county officials. In response, the county suspended and later terminated Kvapil from seasonal employment and the county sheriff sent a memorandum to the heads of each department about Kvapil's threatening behavior.

Kvapil brought the parties' dispute to federal court pursuant to 18 U.S.C. § 1983, alleging that (1) defendants violated his Fourteenth Amendment due process rights by causing him to be suspended and terminated without notice or hearing; (2) defendants Chippewa County, William Reynolds, Bruce Stelzner and Douglas Clary violated his First Amendment rights by causing him to be suspended and terminated in retaliation for

exercising his right to freedom of speech and to petition the government; (3) defendants Chippewa County and Sheriff James Kowalczyk violated his First Amendment rights by distributing the memorandum in retaliation for his speech and petitions; and (4) Chippewa County and Kowalczyk violated his Fourteenth Amendment due process rights by depriving him of his liberty interest in his reputation without notice or hearing.

Before the court is defendants' motion for summary judgment (dkt. #25), which the court will grant in full. First, Kvapil's due process claim based on his suspension and termination fails, because he has no property interest in seasonal employment. Second, no reasonable juror could find on the undisputed facts of record that Kvapil's protected speech or petitions were the "but-for" cause of his suspension or termination. Third, Kvapil withdrew his First Amendment retaliation claim against Kowalczyk (Plt.'s Br. in Resp (dkt. #48) 54.). Fourth, Kvapil's due process claim based on the memorandum fails, because he cannot show that Kowalczyk memorandum was publicly disseminated or contained false statements.

STATEMENT OF FACTS[1]

A. The Parties

Plaintiff Blaine Kvapil was employed as a seasonal employee in the Chippewa County Highway Department from June 5, 2006, until June 27, 2008. Defendant County of Chippewa is a municipal corporation, which was organized and exists under Wisconsin law. Defendant James Kowalczyk is the elected sheriff of Chippewa County.

[1] The following facts are undisputed or reasonably inferred in plaintiff's favor as the non-moving party.

Defendant William Reynolds was the Chippewa County Administrator at the time of Kvapil's firing in 2008. Defendant Douglas Clary has been the Chippewa County Planning and Zoning Administrator since 2000. Defendant Bruce Stelzner has been the Chippewa County Highway Commissioner since 1990.

B. Kvapil's Employment with Chippewa County Highway Department

Soon after being hired by the Chippewa County Highway Department in the spring of 2006, Kvapil participated in an orientation at which he was provided with various rules and documents that were read and discussed in detail. Kvapil completed a form titled "Chippewa County New Employee Orientation for Limited Term Employees," which advised him of the work rules, harassment policy, violence policy and employee handbook.

Kvapil acknowledged receiving the employee handbook by signing a "receipt" that stated:

> This employee handbook has been prepared for information purposes only. None of the statements, policies, procedures, rules or regulations contained in this handbook constitutes a guarantee of employment, a guarantee of any other rights or benefits, or a contract of employment, express or implied.
>
> Unless noted in the collective bargaining agreements or working agreement, all county employees are employees at will, and employment is not for any definite period. Termination of employment may occur at any time at the option of Chippewa County.

(Doyle Aff., Ex. 64 (dkt. #40-8).)

The handbook itself included a provision for "At Will Employment," which stated:

> All employees of the County are "at will" employees. Based upon this, employment can be terminated by either the County or the employee, at will, with or without cause, and with or without notice, at any time.

(Stelzner Aff., Ex. 2 that 1 (dkt. #37-10) 4.) In addition, the handbook contained the following provision about violence and threats of violence:

> Chippewa County is committed to providing a work environment that is free from violence. Any acts or threatened acts of violence will not be tolerated. Anyone engaging in violent behavior will be subject to discipline, up to and including termination; and may be personally subject to other civil or criminal prosecution.
>
> Chippewa County's prohibition against threats and acts of violence applies to all Chippewa County personnel, including contract and limited term employees (and any other person on Chippewa County property).

(*Id.* at 2.)

As a seasonal employee, Kvapil had no rights under the County's contract with AFSCME—Local 736, with the exception of hours and rate of pay. For example, he did not have the posting, seniority or grievance rights enjoyed by full-time, union employees. Furthermore, Kvapil had no guarantee that he would be called back the following year.

Each spring, the County would evaluate the need for seasonal employees and determine which, if any, prior seasonal employees would be called back to work. When a seasonal employee was asked to return for employment, the employee would again be required to attend an orientation in which work rules, county policies and handbook were provided and discussed. Kvapil was rehired in the spring of 2007 and 2008.

C. History of the Zoning Dispute and Threats

From 2000 until the present, Kvapil and the Chippewa County Planning and Zoning Department have been engaged in a war of wills over Kvapil's alleged violation of zoning laws for his property in Wheaton, Wisconsin. As a municipality under the jurisdiction of Chippewa County, the County is responsible for ensuring the residents of Wheaton comply with county zoning ordinances. The zoning department accused Kvapil of violating these ordinances by maintaining unlicensed and inoperable vehicles on his property. Kvapil denied that this use of his property violated the ordinances and refused to allow the department access to his property to determine whether he was in compliance.

Defendant Douglas Clary was appointed administrator of the Chippewa County Planning and Zoning Department in 2000. In June 2000, Clary sent Mr. and Mrs. Kvapil a letter stating that the department had information that vehicles had been moved onto the property despite it being zoned agricultural, making any type of business dealing with vehicles prohibited. Two days later, Kvapil called Clary at his home about the letter. Kvapil was upset that the County was telling him what he could do with his property. When Clary told him that all the vehicles had to be licensed or removed, Kvapil stated that was not going to happen and that the County did not want to mess with him. Kvapil also refused to allow county officials on his property and told Clary that he would be placing booby traps all over the property.

Between 2000 and 2004, the Planning and Zoning Department sent Kvapil numerous letters stating that his property was not in compliance with zoning ordinances.

The first letters warned Kvapil that he had 30 days to correct the violations, but later letters suggested that Kvapil apply for a conditional use permit or that Kvapil meet informally with the department to resolve the dispute. Kvapil claimed frequently that he was in compliance, but continued to refuse access to the property to verify this claim.

In January 2004, Clary wrote a memorandum to the County Board Chair about his contacts with Kapvil, his difficulty dealing with him and his verbally abusive behavior. Clary also initiated a complaint with Kvapil's seasonal employer, the County Department of Transportation. Kvapil's property was the subject of several meetings of the Chippewa County Planning and Zoning Committee in 2004. In a letter dated May 21, 2005, Bob Sworski, Chair of the Wheaton Town Board, formally requested that the County enforce its zoning ordinances with respect to Kvapil's property.

In January 2006, Kvapil's property was discussed at another zoning committee meeting and the Zoning department sent Kvapil another letter about complaints made regarding the property. In the letter, Clary explained that since Kvapil had been given an additional 18 months to come into compliance, he would be issued citations for each day he remained in violation if he did not remove the vehicles or demonstrate they were licensed and operable in 30 days. Clary updated the committee in June 2006, but it appears no official actions were taken at the time.

During their ongoing disputes, Kvapil often complained that the County was not investigating other property owners for similar junk vehicle violations. The zoning department evaluated the properties that Kvapil identified with some specificity, determined that (1) some of them were in other municipalities outside the County's

zoning jurisdiction; and (2) others were not violating zoning codes because they had different zoning classifications than Kvapil's property.

On multiple occasions during their ongoing zoning dispute, Kvapil threatened Clary. Some but not all of these threats were documented in a file that Clary kept about Kvapil. The following threats occurred between 2000 and 2004:

- On June 7, 2000, Kvapil stated he would be setting up bear and booby traps all over his property. Kvapil also said that if he caught Clary on his property he would be in big trouble and that Clary did not want to mess with him.

- On November 7, 2001, Kvapil told Clary not to tell him what he could or could not do with his property and that if he found Clary on his property, he would break his legs.

- During a recorded phone conversation with Clary, Kvapil stated that he (1) would come over to Clary's house and sleep with his wife, (2) would see Clary's name in the obituaries and (3) "likes to go home at night" (apparently with implication that Clary may not being going home at night).

- On May 2, 2003, Kvapil came into the Planning and Zoning Department office. After being told Clary was not there, he raised his voice and stated "What, do I have to go to his fucking house?" Kvapil continued swearing and then left the office.

- On January 28, 2004, Kvapil called asking for "Asshole," referring to Clary. Kvapil demanded that Clary stop harassing him and stated that he was harassing the wrong person.

- On January 29, 2004, Kvapil contacted Clary and stated that, since he was being harassed, Kvapil was going to watch and harass Clary.

- On May 14, 2004, Kvapil called Clary indicating that (1) the trucks were his personal vehicles, (2) Clary should just send the "fucking citation" and (3) he wanted a jury trial.

Throughout their dispute, the zoning department never treated Kvapil any differently from other property owners who were allegedly violating zoning ordinances.

They tried to work with Kvapil to avoid resorting to the courts: each time Kvapil stated that he would clean up his property, the zoning department gave him additional time to do so; similarly, when Kvapil expressed interest in rezoning his property or bringing matters before the Chippewa County Zoning Board, the department gave him additional time to accomplish rezoning or obtain permits.

D. The 2008 Inspection of Kvapil's Property

1. The warrant and inspection

On May 7, 2008, almost two years after its last attempt to enforce the ordinance, the zoning department sent another letter to Kvapil. In the letter, Clary stated that he viewed the property from the road on April 9, 2008, observing (1) approximately 17 unlicensed or inoperable vehicles, (2) scrap metal dumpsters being used for a non-permitted salvage yard and (3) the property was being used as a base for a snowplowing and landscaping business that was not approved in an agricultural district. Clary further stated that Kvapil had been given sufficient time to bring the property into compliance and that the letter was a notice that the property was in violation of the Chippewa County Zoning Ordinances. Finally, Clary stated that Mr. and Mrs. Kvapil had 30 days to either bring the property into compliance or obtain a conditional use permit.

On May 15, 2008, Clary returned a message he had received from Kvapil. Clary tried to explain the problems with Kvapil's property. Clary told Kvapil that if Kvapil had let Clary on the property earlier in this process and not threatened to break his legs -- among other threats -- they probably would not be in this situation right now. Kvapil responded that "it was a promise." When Clary asked him what he meant, Kvapil said to

stay off his property. After the conversation, Clary began preparing a "Special Inspection Warrant" and an affidavit in support of the warrant.

2. Kvapil calls Chippewa County's Counsel, James Sherman

That same day, Kvapil called James Sherman, the Chippewa County Corporation Counsel. Kvapil wanted to explain that he was not violating the zoning codes and to complain that Clary was harassing him, refusing to work with him through the town board and failing to apply the ordinances even-handedly against other properties. Sherman responded by threatening Kvapil's employment with the County, stating that if Kvapil wanted to remain a county employee, then he had better cooperate and let Clary onto his property.[2]

3. Kvapil's requests for records filed June 10, 2008

On June 10, 2008, Kvapil visited the zoning department office and filled out five forms titled "Requests for a Public Record." On the requests, he asked for

1. A "[c]opy of all people who voted on the ordinance change for farmers Junk in 2006 and Doug Clary's involvement in this ordinance."
2. "[R]ecords of all lawsuits filed against Chippewa County Zoning office and Doug Clary from present to last 5 years."
3. "Doug Clary's time line for bringing all people into compliance in town of Wheaton and the rest of Chippewa County on Junk cars scrap."
4. A "[c]opy of records of Doug Clary and Dave Staber of cars junk yard when working on ordinance for Junk cars."
5. A "copy of records concerning handicap couple on Long Lake that replaced their Decks that county zoning is suing [for a] county variance."

[2] Sherman denies threatening Kvapil's employment, but admits asking why, if Kvapil had nothing to hide, he would not work with the zoning office. (Sherman Aff. (dkt. #66) ¶ 2.)

(Clary Aff., Exs. 23-26 (dkts. ##38-3-8).)

Kvapil wanted to use his requests to complain to the Wheaton Town Board about Clary and to persuade it to discontinue using Chippewa County zoning enforcement for Wheaton. Kvapil had already raised this matter with the town board and its members several times in the past. Kvapil had also filed various requests for public records in the past, but had not used these forms to file general complaints unless he believed the County was withholding additional records. However, county employees told him that he could use these forms to file general complaints, as well as records requests.[3]

Kvapil received responses to each of his requests on June 17, 2008. To his first request, the County responded that partial records existed and gave him copies of relevant zoning committee and county board minutes, as well as signed resolutions from various towns, including Wheaton, adopting the Comprehensive Rewrite of the Zoning Ordinance. To the second, third and fourth requests, the County responded that it did not keep that information. In response to the fifth request, the Zoning department stated that it was unsure what records Kvapil was requesting, but that he could come in to review the file and request specific copies of information within specific files. Each response also informed Kvapil that he should contact the office if he had questions. Kvapil did not follow up with regard to any of these responses.

4. Inspection of Kvapil's Property

On June 13, 2008, Judge Cameron signed a warrant for Kvapil's property to "determine if said premises comply with sections 70-71(b)(1)—conditional use permit

[3] The County denies this.

required to operate a junk or salvage yard—and 70-128—unlicensed, junked or inoperable motor vehicles or equipment—of the Chippewa County Code of Ordinances." The inspection occurred later that day. Clary asked for and was assigned a Sheriff's deputy to accompany him during the inspection. Clary told County Sheriff Kowalczyk that (1) he had had issues with Kvapil over the past several years and (2) Kvapil had refused to allow Clary to enter the property, as well as made numerous threats against Clary and his family.

As a result of the inspection, Kvapil was issued a citation on June 18, 2008, for violating Chippewa County Ordinance 70-128 by having custody of inoperative motor vehicles, including 18 vehicles, eight snowmobiles and three to four lawn tractors. Kvapil was issued a second citation two weeks later for violating the same ordinance, along with an accompanying letter stating that (1) further inspections would occur until the property was brought into compliance and (2) further citations with increasing monetary penalties could be issued. Kvapil was later found guilty of both violations.

E. Events Surround Kvapil's Suspension

1. Kvapil's threatens Clary again on June 13

On the day of the inspection, Clary telephoned Kvapil while he was at work to tell him about the search warrant. After the inspection had been completed, although still in the afternoon of the same day, Kvapil visited the zoning department's office in the courthouse to demand "documents and information" setting forth the reasons for the warrant and the inspection, believing that Clary had used documents and information that were two years out of date. Kvapil began filling out a public records request, writing

on the form "information + beliefs that Clary used for," but he never completed or signed the request.

Clary approached Kvapil while he was filling out the request. Kvapil demanded to see "the information and beliefs" Clary used as the basis for the warrant. Clary gave Kvapil a copy of the signed warrant. (The parties dispute whether Kvapil was also given a copy of the affidavit, although defendants have submitted what appears to be a copy of the torn affidavit. (Dkt. #70-3.)) Clary tried to explain that the supporting affidavit provided the reasons for the warrant. Kvapil had a copy of the affidavit, but he believed Clary was withholding documents used to support the affidavit. An argument ensued. Kvapil again demanded to know when Clary would start enforcing the junk vehicle ordinances against other property owners and began listing owners he believed were in violation. Kvapil asserts (though defendants deny) that Clary threatened Kvapil, saying that when Clary was done with Kvapil, he would have nothing left.

Ultimately, Kvapil became hostile, tore up the warrant, threw it at Clary and said to him in a raised voice, "You're going down." As Kvapil began heading for the front door, Clary told another county employee that he was going upstairs to talk to Reynolds, the County Administrator. Kvapil heard Clary's statement and responded that they could not use Kvapil's job "against" him and "that he was going to see an attorney in Madison." Kvapil then left the office.

Clary immediately spoke with Reynolds about Kvapil's threat and his history of threatening and abusive behavior towards Clary and members of the zoning department.

That day, Clary wrote a memorandum describing his version of the events for Kvapil's file and reported his version of the event to Kowalczyk as the county sheriff.

2. Kvapil's June 16 public records request

On June 16, 2008 Kvapil filed a "public records request" with the zoning department, which demanded ". . . that Doug Clary bring all parcels of land in the town of Wheaton in to compliance – start with Paul Krumenaar – town board chairman within 10 days." (Clary Aff., Ex. 27 (dkt. #38-9).) That same day, Kvapil also submitted a "request for a public record" to the "administrator office" for the following:

> I Blaine Kvapil want Bill Reynolds to request Doug Clary do his job and bring all parcels of land in the town of Wheaton into compliance with all county Zoning codes in 10 days will need a written answer to this as soon as possible.

(Doyle Aff., Ex. 63 (dkt. #40-7).)

On June 17, 2008, the zoning department responded to Kvapil's request, stating that a public record for his request did not exist. On June 18, 2008, Reynolds wrote on Kvapil's request that "this was not a valid request for a record," signed it and returned the request to Kvapil. He took no further action on the request.

Sometime between June 16 and 18, 2008, before his suspension, Kvapil also visited County Administrator Reynolds personally at his office to repeat his request. Kvapil acted amicably during this interaction and did not threaten Reynolds. According to Kvapil, Reynolds said "in a demeaning and threatening manner, 'Boy, I served twenty (20) years in the Marine Corps.'"[4] Reynolds also did not act on Kvapil's request.

[4] Defendant Reynolds denies making this statement, but acknowledges telling Kvapil that he would not tolerate his threats.

3. Decision to discipline Kvapil

On June 16 and 17, 2008, Reynolds, Stelzner and Malayna Halverson-Maes (the human services director for Chippewa County) exchanged a series of emails about what course of action, if any, should be taken in response to Kvapil's June 13 threat. (Supp. Doyle. Aff. (dkt. #71-3) 2-3.) As Commissioner of the Highway Department, Stelzner was responsible for that department's employees and for determining appropriate discipline for work infractions.

Reynolds' initiated this exchange with an email to Stelzner and Halverson-Maes on June 16, 2009. He informed them that "Kvapil made what I consider to be the latest in a long line of threats to Doug Clary" and that the county "has a zero tolerance policy towards any violence or threat of violence." Accordingly, Reynolds directed Stelzner to "[p]lease inform [Kvapil] that his services with the county are no longer necessary."

After Stelzner and Halvorson expressed their concern that Kvapil may need union representation, Reynolds softened his position in a later email, suggesting instead that they should write a letter of reprimand. In this proposed letter, either Reynolds or Stelzner were to "outline the issues that Blaine has been causing—including the harassment 'requests' regarding Planning and Zoning operations, and his threats in the past and more recent." (*Id.* at 2.) The letter would "reacquaint him with the zero-tolerance policy regarding threats and inform him that unless his actions cease, he will be terminated."

In a subsequent email between the two, Stelzner told Reynolds that he was having trouble finding a disciplinary issue, because Kvapil made the threat while he was off of

work. In addition, Stelzner said, "from my perspective it appears that we are using a coercive measure of continued employment to resolve a zoning code violation." (*Id.* at 1.) Stelzner wanted to ensure that his evaluation focused solely on employment rules and not on the unrelated zoning issues. Reynolds responded that "[t]his has nothing to do with any underlying zoning issue." (*Id.*) Rather, it was about ensuring that Kvapil "will not be allowed to bully, threaten or intimidate county employees." (*Id.*)

Reynolds never required Stelzner to take any particular action with respect to Kvapil. Instead, after reading Reynolds' email response, as well as further evaluating the work rules and County Ordinances, Stelzner decided that a one-day suspension was appropriate. None of their prior emails mentioned a one-day suspension.

Before issuing the suspension letter, Stelzner was unaware of any of the details surrounding Kvapil's zoning history. He only knew that the threats Kvapil made against Clary arose out of some type of zoning issue. Stelzner was also unaware that Kvapil had made public records requests to the zoning department or the county administrator.

Clary was not a participant in the first several rounds of emails in the June 16 and 17 chain between Reynolds, Stelzner and Halverson-Maes. Reynolds first carbon-copied Clary on his email suggesting the reprimand letter. Clary was then included on the subsequent emails. Clary contributed only one email in the exchange: after Stelzner said he was having difficulty finding a violation of the personnel ordinances, Clary sent an email that stated in its entirety, "Why can we not use Ordinance 48.62(7) as a measure?" (Dkt. #63-10.) This rule makes violation of county ordinances or written departmental rules cause for discipline.

4. June 18 disciplinary letter and suspension

On June 18, 2008, Stelzner gave Kvapil a letter from the County Highway Department informing him that, as a result of his threat, he was receiving a one-day suspension without pay and a notice would be placed in his personnel file. In the suspension letter, Stelzner explained Kvapil's conduct on June 13, 2008, violated

> County Ordinance 48-8(d)(2) Harassment; degrading conduct directed against a protected class member that is sufficient to interfere with that person's work or create an offensive and/or hostile work environment. Additionally your behavior violated County Ordinance 48-62(7) noncompliance with county ordinances and 48-62(8) creating a disturbance on the work premises by.....conduct that adversely affects morale, production, or maintenance of proper discipline.
>
> As an employee of Chippewa County it is your responsibility to comply with County Ordinances. Your interaction of June 13, 2008 with the County Zoning Administrator violated the County 's zero-tolerance policy regarding threats and violence and County Ordinance 48-8(d)(2).

(Stelzner Aff. (dkt. #37-4)(ellipses in original).) The letter also notified Kvapil that further infractions could make him subject to more severe discipline, including discharge.

Stelzner delivered the suspension letter during a meeting with Kvapil and a union representative, James Gordon. At the meeting, Stelzner told Kvapil and Gordon that the disciplinary decision was "out of his hands," and when Kvapil asked if the decision had come from Reynolds, Stelzner answered, "Yes." (Kvapil Aff. (dkt. #54) ¶ 28; Gordon Decl. (dkt. #53) ¶ 3.)[5]

[5] Stelzner avers that he never made these statements. (Stelzner Aff. (dkt. #74) ¶ 4.)

A week later, Matthew Hartman, President of AFSCME-Local 736, called Reynolds to complain about Kvapil's suspension for off-duty conduct. Hartman argued that whatever Kvapil did on his own time should have no affect on his employment. Even so, Reynolds maintained that he had been within his rights to give Kvapil a "day off," that he had more "tools in his bag" to deal with Kvapil because he was a county employee and that maybe he should have fired Kvapil. (Hartman Decl. (dkt. #52) ¶ 4.) Reynolds did or said nothing to contradict Hartman's implication that Reynolds was the person who decided to discipline Kvapil.[6]

F. Events Surrounding Kvapil's Discharge

1. Kvapil's complaint with the sheriff's department

On June 25, 2008, Kvapil filed a written complaint with the Chippewa County Sheriff's Department complaining that Reynolds and Clary were violating the "state Mandamus laws." The statement prepared by Kvapil reads as follows:

> I Blaine Kvapil have requested Doug Clary to bring the town of Wheaton into compliance codes on Junk car & inoperable cars like he has done to me. Doug Clary told me he is only worried about me and nobody else. I feel that he is in violation of the state Mandamas law section 783.07. I also directed a written complaint to Bill Reynolds that I wanted him to make Doug Clary do his Job and bring all of Wheaton into compliance and Reynolds signed my complaint This is not a valid request for a record. I feel this is violating my rights under the state mandamus law. It seems that Doug Clary and Bill Reynolds are making their own laws as they go. They are discriminating against me by not holding a town meeting and enforcing these ordinances equally across the board for all residents of Wheaton township. Also every time

[6] Reynolds avers that he never said he ordered Kvapil's discipline. (Supp. Reynolds Aff. (dkt. #73) ¶ 5.)

I request a record from Doug Clary, they do not exist.

(Doyle Aff., Ex. 65 (dkt. #40-9).)

A sheriff's deputy accepted the complaint and interviewed Kvapil. The deputy informed Kvapil that the complaint would be sent up the chain of command, but he could not say whether the sheriff's department would be the one to investigate given the nature of the allegations. Kowalczyk learned that Kvapil also filed a complaint around this time, but did not learn about its content until years later. Kvapil's complaint was forwarded ultimately to the district attorney's office for review.

Also, on June 25, 2008, Kvapil visited the Chippewa County Human Resources Department and stated that "he was getting a lawyer and taking Reynolds down two notches."

2. The Driving Incident and Kvapil's Termination

Dave Lemanski, director of Chippewa Rivers Industries (CRI), sent an email to Stelzner on June 25, 2008. CRI was owned by Chippewa County, and the Chippewa County Highway Department would assign Highway Department drivers to conduct deliveries for CRI. Lemanski told Stelzner that he received a report that a CRI truck had run a private citizen off the road at approximately 1:45 p.m. on June 25, 2008, somewhere around Highways 12 and AA.

In a subsequent email, Lemanski stated that based on the records of drivers, time and location, he had determined that Kvapil was the driver.[7] Stelzner reviewed Kvapil's

[7] Plaintiff objects to this proposed finding of fact as hearsay. However, the Lemanski emails are not being considered for the truth of the matter asserted -- neither that the incident occurred nor that Kvapil was the driver. Rather, it is offered to establish

time card from June 25, 2008, to verify that he indeed drove a CRI truck on that date. Stelzner had no reason to doubt Lemanski's conclusion. After conducting this investigation into the matter, Stelzner decided to terminate Kvapil's employment.

As before, Stelzner still did not know about Kvapil's open records request, the nature of his zoning dispute or Kvapil's complaint with the sheriff's department. Nor did Stelzner consult with Clary, Reynolds or Kowalczyk before deciding to fire Kvapil for his alleged driving incident. Stelzner did, however, send Reynolds a copy of Kvapil's termination letter the morning before it was delivered, stating that this letter would be presented to Kvapil at the end of the day and, until then, it was to remain confidential.

On June 27, 2008, Stelzner issued Kvapil a letter notifying him of his termination as a result of the driving incident and violation of County personnel ordinances and Highway Department work rules. The letter cites Kvapil's June 18, 2008, suspension, as well as County Ordinances §§ 4.62(8), disrespect to clients or the public; 48.62(2), willful or negligent use of county equipment; and 48.62(13), repeated poor work performance. Stelzner gave the letter to Louis Revoir, the assistant highway commissioner, to deliver to Kvapil.[8]

On June 27, 2008, Kvapil filed a grievance under the AFSCME—Local 736 Union Contract, which was signed by Hartman, the AFSCME Union President. Hartman

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Stelzner's *belief* as to what happened. While Kvapil denies that the incident occurred, asserts that he was at the intersection at that time because he took a different route and asserts that there is not a lane-merge at this location, these issues are beside the point.

[8] At the time, Revoir told Kvapil that Reynolds made the decision to terminate Kvapil. However, Revoir's statement is inadmissible for lack of foundation, because it was based only on his speculative personal belief, and he had spoken with neither Reynolds nor Stelzner about the suspension or termination decisions.

discussed the grievance with Kvapil and informed him that he did not have rights under the union contract to file a grievance. Nevertheless, Hartman agreed to file the grievance to see what would happen. On July 25, 2008, Stelzner returned the grievance to Hartman, stating:

> The original Grievance Report is being returned directly to you because the current Labor Agreement between Chippewa County and AFSCME— Local 736 makes no provision for the filing of grievances by AFSCME— Local 736 on behalf of seasonal employees.

Neither Kvapil nor Hartman ever spoke to Stelzner about the return of the grievance form or appealed the decision to return the grievance form.

G. Events Surrounding Sheriff Kowalczyk's Memorandum About Kvapil

1. Kvapil's Meeting with Kowalcyzk

On July 10, 2008, Kvapil went to the County Department of Administration requesting to see his employee file. When an employee told Kvapil that the office did not keep that information and Reynolds was on vacation, Kvapil responded that Reynolds "will be on a permanent vacation pretty soon," adding that he used to work for the rendering plant and knew where barrels were buried containing harmful and dangerous acid.

Later in July of 2008, Kowalczyk was informed of Kvapil's latest threats against Reynolds. While the sheriff's department provides security for the county courthouse, the sheriff does not report to or supervise the county administrator. Given Kvapil's history of threats and the recent threat to Reynolds, Sheriff Kowalczyk nevertheless scheduled a meeting with Kvapil at the County building. The meeting occurred on July

17, 2008, but when Kvapil realized the sheriff was unwilling to discuss Kvapil's "writ of mandamus" complaint, he cut the meeting short. Before leaving, Kvapil suggested that Kowalczyk contact his attorney.[9]

2. Kvapil's Contact with County Board Member

On July 25, 2008, Kvapil visited the home of Evelyn Maloney, a member of the county zoning committee. When her husband informed Kvapil that she was not home, Kvapil said he would return the next day. The next day, Maloney attended a meeting of the county board and the department heads. Reynolds brought Maloney over to Kowalczyk to inform him about Kvapil's visit to her house. Kowalczyk told her about Kvapil's threats and advised her not to answer the door when he arrived, but to call the police and request an officer come to her house and ask Kvapil to leave. On July 27, 2008, when Kvapil visited Maloney's house again, she contacted the police, told them that she did not want to talk with Kvapil and that he should be told to leave. The police responded and Kvapil left without incident. Neither Reynolds, Clary, Stelzner nor Kowalczyk pressured Maloney to decline to speak with Kvapil.

3. Kowalczyk's Memorandum to Department Heads

Given this history of threats, and the fact that Kvapil was upset with losing his job, the Sheriff was concerned for the safety and welfare of county staff. On or about July 30, 2008, he prepared a memorandum regarding Kvapil intended for some 29 county department heads. The memo included Kvapil's name, birth date and a

[9] Kowalczyk avers that he invited Kvapil to discuss the threats. At the meeting, he told Kvapil that this type of conduct would not be tolerated, but Kvapil tried to redirect the focus toward other matters, including the zoning dispute. (Kowalczyk Aff. (dkt. #28) ¶6.)

photograph of his face; it reported in general terms that Kvapil was under investigation for violation of county ordinances; it advised that for Kvapil, the dispute had become personal; and it stated that Kvapil "apparently has a personal vendetta against members of the courthouse organization," reporting that he had made threats to physically harm a department head and his wife and County Administrator Reynolds. The memorandum instructed employees to contact the sheriff's department if they saw Kvapil "in/around the courthouse" and to let them know if Kvapil had a scheduled appointment so that a deputy could be present "to help insure that the meeting goes off without any trouble." It also reminded staff that while they should not provide services any differently to Kvapil than to others, he "is not allowed to do his business in a disruptive, threatening or otherwise disorderly manner."

Kowalczyk emailed this memorandum to county department heads, asking them to "please share this information with your employees." He did not direct them to post the memorandum in public areas. In the past, the sheriff's department has sent similar memorandums to the county departments when an individual had "issues" with either an employee or circuit court judge. Such memorandums were intended only to make county employees aware of potential issues and ensure the safety of county personnel. Stelzner, Reynolds or Clary did not post the memorandum in a public area and never saw the memorandum posted in a public area.

While Kvapil offers no admissible evidence that the memorandum was ever posted at least three friends gave him copies after its release. Kvapil had to explain the memorandum to friends, business clients and acquaintances, which he found

embarrassing and humiliating. Since the memorandum, Kvapil has had one appointment scheduled in the courthouse offices at which deputy sheriffs' were present.[10] During Kvapil's trial on the zoning citations, deputies were also present in the back of the courtroom on two occassions. After receiving notification of the hearing from Clary, Kowalczyk arranged for deputies to be present. (Kowalczyk Dep. (dkt. #58) 95:22-96:19.)[11]

H. Similarly-Situated Employees

Other county highway department employees have damaged public and private property and caused personal injury to members of the public while operating county vehicles, but Stelzner did not fire or initiate discipline against them. Through an affidavit by Hartman, plaintiff introduces various, allegedly similarly-situated individuals:

- Stelzner did not discipline a Highway Department employee who hit and injured a pedestrian while operating a County snow plow. The employee was a union employee. The pedestrian was cited under Wis. Stat. 346.28(1) for not traveling on the correct side of the highway or moving out of the way vehicles, if practicable, so Stelzner determined that there was no reason for disciplinary action.

- The seasonal Highway Department employee who took over for Kvapil was not disciplined when he struck and damaged a vehicle belonging to a private citizen. Stelzner has reviewed the WCCA reports for both employees who drove for CRI after Kvapil and did not see any damage citations or any other information which would indicate that either

[10] Kvapil offers no evidence that the deputies were present because of the memo, but this would seem a reasonable inference.

[11] Between 2008 to 2009, Kvapil also avers that he lost six clients and $71,000 of income from his lawn mowing, snow-plowing and real estate cleanout businesses. Other than his conclusory assertions, however, he has no evidence that the memo caused these injuries. In addition, Kvapil asserts that, on one occasion, he went to clean out an investment property for a real estate client and the occupants refused to let him into the building. Again, however, plaintiff presents only inadmissible hearsay evidence that the memorandum was the cause of the occupant's refusal to let him into the building.

employee was involved in an incident or should have been disciplined for some incident. (Supp. Stelzner Affd. ¶ 11).

- While operating a dump truck with the bed up, a county employee brought down a power line. The construction foreman issued the employee a letter of reprimand, stating that "further infractions will be subject to a more severe Degree of discipline, up to and including discharge."

- Stelzner did not initiate discipline when the "hot mix foreman" for the Highway Department backed into and damaged a citizen's vehicle. The foreman was not a seasonal employee.

- Stelzner did not initiate discipline against a county employee who, around the time when Kvapil was terminated, damaged the side of a shop building while operating county machinery. This employee was a union employee and was issued a warning, which was placed in his personnel file, stating "further infractions will be subject to a more severe degree of discipline, up to and including discharge."[12]

OPINION

Kvapil alleges that defendants Chippewa County, William Reynolds, Bruce Stelzner and Douglas Clary violated (1) his First Amendment rights (as incorporated in the Fourteenth Amendment) by causing him to be suspended and then terminated for exercising his right to freedom of speech and to petition the government and (2) his right to due process under the Fourteenth Amendment by suspending and terminating him without due process of law. In addition, Kvapil alleges that defendant Kowalczyk violated his right to due process under the Fourteenth Amendment by depriving him of his reputation without due process of law.

[12] Kvapil introduces these incidents with other employees through an affidavit by Hartman, the union president. While it is not clear from the affidavit that Hartman has personal knowledge of all of these facts, the court will assume for purposes of summary judgment that Hartman's testimony about the above employee incidents would be admissible.

I. First Amendment Retaliation

Specifically, Kvapil argues that he was suspended in retaliation for his June 10 petitions and terminated in retaliation for his June 10 and 16 petitions, his complaint with the sheriff's department and his legal threat to take Reynolds "down a notch or two." To sustain a claim for First Amendment retaliation, Kvapil must demonstrate that (1) his speech was on a matter of public concern and (2) his speech played at least a substantial part in his employer's decision to take an adverse employment action against him. *Greene v. Doruff*, 660 F.3d 975, 979 (7th Cir. 2011) (holding burden shifting approach of *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977) still applies to First Amendment retaliation claims on summary judgment). If Kvapil satisfies the first two elements, defendants may still prevail by proving that they would have disciplined Kvapil even in the absence of his speech. *Gustafson v. Jones*, 290 F.3d 895, 906 (7th Cir. 2002).

As the Seventh Circuit recently explained, Kvapil has the burden to prove that the petitions were the "but-for" cause of his termination, while

> at summary judgment, the burden of proof is split between the parties. Initially, to establish a prima facie case of retaliation, 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. Then, the burden shifts to the employer to rebut the causal inference raised by the plaintiff's evidence. If the employer fails to counter the plaintiff's evidence, then the employer's retaliatory actions are considered a "necessary condition" of the plaintiff's harm, and the plaintiff has established the but-for causation needed to succeed on his claim.

Kidwell v. Eisenhauer, 679 F.3d 957, 965 (7th Cir. 2012) (citing *Greene*, 660 F.3d at 979).

A. Speech on Matter of Public Concern

An employee's speech or petition is protected only if it relates to a matter of "public concern" rather than a "matter of only personal interest," which the court must determine by analyzing the "the content, form, and context of [the speech] as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). The content of the speech or petition is the most important factor. *Gustafson*, 290 F.3d at 906-07. When analyzing the context, courts look at whether the point of the speech was to "bring to light actual or potential wrongdoing or breach of public trust," *Connick*, 461 U.S. at 148, or "a subject of general interest and of value and concern to the public." *City of San Diego v. Roe*, 543 U.S. 77 (2004). A plaintiff's motive is a relevant feature of the context, but speech that is otherwise of public interest loses its protection only if it "addresses only the personal effect upon the employee, or if the only point of the speech was to further some purely private interest." *Gustafson*, 290 F.3d at 908 (internal quotation omitted).

Defendants argue that Kvapil has not identified any protected speech, because his "public records requests" were trivial, filed incorrectly and concerned matters only of personal interest. However, several of his public records requests were genuine attempts to obtain documents about public affairs. Even if his other "public records requests" and his "mandamus" complaint were filed incorrectly, they were genuine attempts to file grievances with public officials who had the power to correct Kvapil's perceived problems.

Moreover, the content of Kvapil's grievances was unrelated to his employment. Kvapil was exercising his right as a citizen to petition the government. Although the "requests" arose from his private dispute about zoning enforcement, several of the

complaints asserted that the zoning administrator and county administrator were not enforcing the ordinances uniformly. Selective enforcement of zoning ordinances would arguably constitute a breach of the public trust and a matter of general public interest. Accordingly, the court concludes that Kvapil's requests were protected petitions on matters of public concern.

B. Kvapil's Petitions May Have Been a Motivation in His Suspension But Not His Termination

Kvapil argues that *Reynolds* decided to suspend and terminate Kvapil for filing his public records requests, while defendants contend that *Stelzner* decided to suspend and terminate Kvapil, and that Stelzner was not even aware of Kvapil's protected petitions. Resolving all disputed facts and reasonable inferences in Kavpil's favor for purposes of summary judgment, he is partially correct.

1. Defendant Stelzner

No reasonable jury could conclude that Stelzner was motivated by Kvapil's petitions, because Kvapil has offered no evidence that Stelzner was even aware of his public records requests or complaint to the Sheriff's department. Stelzner knew only that Kvapil was engaged in a personal zoning dispute, and even that he knew about only in general terms. Kvapil argues a trier of fact could infer that Stelzner knew about his requests because Reynolds mentioned them in the June email chain, but Reynolds only mentioned Kvapil's "harassment 'requests'" without further elaboration or discussion.

Kvapil's more general assumption is that Stelzner caved into pressure from Reynolds, and Reynolds was motivated by Kvapil's petitions. There is, however, no evidence that Reynolds or Clary played any role in the decision to terminate Kvapil,

much less controlled Stelzner's decision. Indeed, there is no evidence that Stelzner communicated in any way with Reynolds or Clary before he decided to fire Kvapil.

The only evidence Kvapil offers that the termination was retaliatory is (1) it exceeded the recommended punishments under Chippewa County Ordinance § 48-63; and (2) it exceeded the discipline Stelzner gave to other employees with similar infractions. However, while an employers' "systematic abandonment of its hiring policies is circumstantial evidence" of a retaliatory motive, courts do not require employers to adhere rigidly to their voluntary procedures and, where an "employees' performance was seriously deficient and worthy of disciplinary action, a procedural abnormality will not suffice to establish a retaliatory motive." *Kidwell*, 679 F.3d at 969 (quotations and citations omitted).

Ordinance § 48-63 states that a disciplinary progression is recommended and provides expressly that "the above-recommended sequence of discipline may be altered depending on the severity of the infraction." Driving in a deliberately reckless fashion and forcing another driver off the road is a serious offense. Moreover, Kvapil has not shown that the employees he identified were similarly situated. None of them even allegedly engaged in similar deliberate and reckless conduct and many were in fact disciplined. Because Kvapil has neither established a genuine dispute about whether retaliation was a motive for Stelzner's decision to terminate him, nor that Reynolds controlled Stelzner's decision, summary judgment is appropriate as to Kvapil's claim that he was terminated in retaliation for his protected First Amendment activities.

2. Defendants Reynolds and Clary

Kvapil's claim that his suspension was retaliatory requires a more extensive discussion. Contrary to defendants' contention, there is sufficient evidence for a jury to infer that Reynolds controlled the decision to suspend Kvapil. Reynolds initially instructed Stelzner to terminate Kvapil; later, he suggested a letter of reprimand. Even more telling, when Stelzner delivered the suspension letter, he said the decision was "out of his hands" and admitted that Reynolds made the decision. A week after the suspension, Reynolds also made several statements in his discussion with the union president that suggested he made the decision.

In addition, Kvapil's evidence is sufficient -- by the barest of margins -- to infer that Kvapil's petitions were a motivating factor in Reynolds' decision to suspend Kvapil. Kvapil identifies two pieces of evidence to support a reasonable inference that Reynolds' decision to discipline him was motivated in part by the petitions: (1) Kvapil was suspended just seven days after he filed five petitions with the zoning department and one day after he filed a petition directly with Reynolds; and (2) Reynolds wanted to include Kvapil's "harassment 'requests'" in the letter of reprimand.[13]

Kvapil relies primarily on the temporal proximity between his petitions and suspension. Under Seventh Circuit precedent, "suspicious timing will rarely be sufficient in and of itself to create a triable issue," but it can be circumstantial evidence of

[13] Kvapil also points to Sherman's threat on May 15, 2008, that Kvapil must let Clary inspect his property or lose his job. However, that conversation occurred a month before Kvapil filed his petitions; the alleged threat was directly related to the zoning dispute and unrelated to any protected activities; and Kvapil has no evidence that Sherman played any role in the decisions to suspend or terminate Kvapil.

causation if the plaintiff proves that "the person who decided to impose the adverse action knew of the protected conduct" and the adverse action occurs within "a few days" of the protected speech. *Kidwell*, 679 F.3d at 966-67 (quotations omitted). However, when "a 'significant intervening event separate[s] an employee's protected activity from the adverse employment action he receives, a suspicious-timing argument will not prevail" even if the two events occur within a few days. *Id.* at 967 (quotation omitted). For example, in *Davis v. Time Warner Cable of Se. Wis., L.P.*, the court held that a plaintiff failed to establish a prima facie case, despite a three day separation between his discrimination complaint and termination, because the plaintiff entered a questionable transaction in between to gain a commission in violation of employment guidelines and a supervisor's instructions. 651 F.3d 664, 675 (7th Cir. 2011).

Here, Kvapil was suspended seven days after his June 10 petitions and one day after his request to Reynolds directly, but this timing alone is not suspicious given Kvapel made a public threat on June 13, in between his petitions and the suspension. Clary reported this incident to Reynolds on Friday afternoon and on the next work day, June 16, Reynolds directed Stelzner to fire Kvapil. Moreover, Reynolds and Clary could have reasonably interpreted Kvapil's statement that "you're going down" as a continuation of his past physical threats. Kvapil has no evidence to suggest that their concern was pretextual. His argument that they *should have* interpreted the statement as a threat of legal action -- alongside his statement moments later about going to see an attorney -- is beside the point in light of his earlier, disturbing comments.

As previously discussed, however, Kvapil need not rely on circumstantial evidence alone in light of Reynold's email of June 17th, which listed Kvapil's "harassment 'requests' regarding Planning and Zoning Operations" among the "issues that Blaine has been causing" that justified a letter of reprimand. While it is not clear what Reynolds was referring to because of Kvapil's long history of demands with the zoning department, many of which were trivial or harassing, Kvapil had filed a "public records request" on June 16, demanding that Reynolds make Clary enforce the county zoning ordinances uniformly. Moreover, the June 10 complaints were filed on public request forms. Considering all of this evidence, a reasonable jury *might* infer that Reynolds was referring to his public record requests. Although the email is a thin reed, it is sufficient for the trier of fact to infer that Reynolds knew about Kvapil's requests and to infer that they were *a motivation* for his decision to suspend Kvapil.

This is not to find that the petitions were "a sufficient condition" of the suspension decision, which is how Judge Posner interprets the "motivating factor" test from *Mt. Healthy v. Greene*, 660 F.3d at 978. "A sufficient condition is something that, if it is present, something else is bound to happen." *Id*. at 978. Here, there is no reason to think that Reynolds was bound to fire Kvapil because of his requests, especially since Reynolds pushed to discipline Kvapil following the threat, not following the initial petitions. This is one of those situations "in which the motivating factor is so weak that, while in the picture, it had no actual causal force; present or absent, the result would have been the same." *Id*. at 980. That does not, however, mean the petitions were not *a* motivating factor for purposes of a *prima facie* showing.

C. The *Mount Healthy* "But-For" Test

Even so, summary judgment is appropriate because defendants have met their burden of showing that Kvapil's petitions were not the "but-for" cause of his suspension. Specifically, defendants have offered overwhelming evidence that Reynolds would have disciplined Kvapil for his threatening behavior even if he had never filed any requests. *Mt. Healthy*, 429 U.S. at 287 (no First Amendment retaliation if the defendant shows "it would have reached the same decision . . . even in the absence of the protected conduct"). For three days after Kvapil filed his request, there was no mention of disciplining Kvapil. Reynolds only began pushing for Kvapil's termination the next workday after Kvapil visited the zoning department office, tore up the warrant and threatened Clary. Moreover, Reynolds' first email on June 16 mentioned *only* the threat. Although he made the isolated reference to Kvapil's "requests" in one email on the 17th, it was clear he did not consider them to be legitimate inquires of a public issue, but rather as intentional, additional "harassment." More importantly, the remainder of that email also focused only on Kvapil's threatening behavior, as did the remaining emails discussing Kvapil's discipline.

While Kvapil's June 13 threat was more ambiguous than his past threats, he had an extensive history of using physical threats and abusive language with Clary and the zoning department. Over the past eight years, Kvapil had threatened to booby-trap the disputed property, to break Clary's legs, to sleep with Clary's wife and to harass Clary generally. In addition, Kvapil stated at one point that he "likes to go home at night," while implying that Clary may not be going home *and* that Clary's name would likely be

in the obituaries. Under these circumstances, Clary and Reynolds reasonably interpreted Kvapil's June 13 threat as a continuation of his past threats.

Kvapil does not dispute that he used abusive language and threatened to harass and physically injure Clary. Instead, he argues that he threatened to injure Clary only if he entered Kvapil's land without a warrant. Otherwise, he argues, his threats were always about legal action. He further argues that his comment about sleeping with Clary's wife was facetious, made while he was telling Clary that if his "zoning enforcement efforts put me out of business I and my family would have to move in with Clary and sleep in the same bed with Clary and his wife." (Kvapil Aff. (dkt. #54) ¶ 50.) First, the undisputed record contradicts Kvapil's innocent characterization of his threats. Booby traps are not limited to trespassers. In a transcribed recording, Kvapil threatens Clary twice without any express or implied reference to legal action. (Kranz Aff. (dkt. #33-1) 7, 10). The statement about Clary's wife has none of his now asserted context:

> Now I'm gonna tell you what I'm gonna do, I'm gonna bring my family down to your house for supper, I'm gonna protest in front of your god damned house and if I get real bored maybe I'll even sleep with your wife if you're gonna keep harassing me.

(Kranz Aff. (dkt. #33) 5.)

Second, whatever Kvapil's actual intent, the question is whether his conduct was such that a reasonable juror would have to find it was the cause of his suspension, rather than his requests for records. In light of Kvapil's extensive history of threats and his most recent behavior towards a fellow county employee on county property, no employer would be required to continue employing Kvapil, much less suspend him for one day. *See*

Hall v. Bodine Elec. Co., 276 F.3d 345, 359 (7th Cir. 2002) ("[A]n employee's complaint of harassment does not immunize her from being subsequently disciplined or terminated for inappropriate workplace behavior.") Accordingly, the court concludes here that no reasonable jury could find that Kvapil's petitions were the "but-for" cause of his suspension. *Greene*, 660 F.3d at 979-80.

II. Fourteenth Amendment Procedural Due Process Claims

To establish his procedural due process claims, Kvapil must show that (1) he had a property interest, (2) defendants deprived him of that interest and (3) he was not given meaningful notice of the complaints against him or a fair hearing before the deprivation. *Dixon v. City of New Richmond*, 334 F.3d 691, 694 (7th Cir. 2003). The existence a property interest is a matter of state law. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

A. Suspension and Termination

Kvapil's first due process claim is that defendants Chippewa County, Reynolds, Clary and Stelzner violated his right to due process by failing to give notice or a hearing before suspending or terminating his employment. This claim fails because Kvapil had no property interest in his seasonal employment.[14]

An employee has "property interests" in the employment only if a contract, ordinance or statute contains "explicitly mandatory language" that restricts the

[14] In the complaint, Kvapil pleads that "defendants" (without qualification) terminated him without due process (Am. Cpt. (dkt. #18) ¶¶ 42-44) and maintains the same language in his reply brief. (Reply Br. (dkt. #48) 33-37.) However, plaintiff offers no evidence that Kowalcyzk was involved in either the decision to terminate or the decision to suspend Kvapil. Accordingly, this due process claim against defendant Kowalcyzk would be summarily dismissed even if Kvapil had a protected property interest in seasonal employment.

employer's discretion with "specified substantive predicates." *Fittshur v. Vill. of Monomonee Falls*, 31 F.3d 1401, 1406 (7th Cir. 1994) (quotation omitted) (language authorizing discharge when "necessary for good of the Village service" provided only nominal limitation that did not create property interest). The language must be clear, because the employee has no property right if the statutory or contractual language leaves him in the "grey area" between "at will" employment and employment that can be terminated only "for cause." *Cole v. Milwaukee Area Tech. Coll. Dist.*, 634 F.3d 901, 905 (7th Cir. 2011).

The relevant question under Wisconsin law then is whether the employment could be terminated at-will or *only* for cause. *Cole*, 634 F.3d at 904; *Listenbee v. Milwaukee*, 976 F.2d 348, 351 (7th Cir. 1992). "Under Wisconsin law, employment at will is the rule. Absent civil service regulations or laws, or a contract or collective bargaining agreement, a municipal employee is an employee at will and has no property interest in employment." *Vorwand v. Sch. Dist. of River Falls*, 167 Wis. 2d 529, 557, 482 N.W.2d 93 (1992).

Kvapil acknowledges that he had no *contractual* property right in his seasonal employment, because he was an employee without a right to recall or rights with respect to termination or the filing of grievances under the collective bargaining agreement. He also signed an acknowledgment that he received and read the employee handbook, which states: "Unless noted in the collective bargaining agreements or working agreement, all county employees are employed at will and employment is not for any definite period." The handbook further explains that "at will" employees "can be terminated by either the

County or the employee, at will, with or without cause, and with or without notice at any time." Kvapil received the handbook each season he was recalled.

Still, Kvapil argues that Chippewa County Ordinances § 48.62 gave him a property interest in his employment by requiring that county employees could be disciplined only for just cause. Section 48.62 provides, in relevant part, that:

> An employee may be disciplined for just cause including, but not limited to, the following infraction of work rules. The following list provides some examples. Individual departments may have additional written rules. Discipline for violations varies according to degree, but may include verbal warning, written reprimand, suspension without pay, or discharge. . . .
>
> * * *
>
> The above [list] does not constitute a complete list of the rules in which employees are expected to conform. Various employment jurisdictions have additional rules to the above list. (Sheriff's Department, Highway Department)

The section lists nineteen reasons, including "non-compliance with county ordinances or written departmental rules or procedures," § 48-62(7), and any "conduct which adversely affects morale, production or maintenance of proper discipline." § 48-62(8). The parties have identified no binding precedent in Wisconsin interpreting the phrase: "[a]n employee may be disciplined for just cause including, but not limited to, the following." Kvapil argues that the ordinance restricts defendants so that they may discipline him only for one of the listed reasons. According to his argument, § 48.62 extends for-cause employment to all of Chippewa County's employees -- contrary to the written agreement he enters into with the county each season when rehired as a seasonal employee. Kvapil cites several cases from the Wisconsin Court of Appeals that assume an arguably similar Dane County Ordinance creates a property right that normally entitles employees to

notice and a hearing. *Unertl v. Dane Co.*, 190 Wis. 2d 145, 154 (Wis. Ct. App. 1994) (discussing Dane County Ordinance § 18.13); *Dane Co. v. McCartney*, 166 Wis. 2d 956, 967-68 (Wis. Ct. App. 1992) (same).[15] However, these cases are unpersuasive, because neither offers any analysis of the ordinance and in neither case is the interpretation an essential part of the court's holding.

Moreover, Kvapil's conclusion is not the natural interpretation of the ordinance's language itself, nor is it supported when read in context of the statute as a whole. On its face, the ordinance is permissive, not mandatory. It identifies reasons that may justify discipline, rather than stating that employees shall be disciplined only for the listed reasons. Several of the listed reasons are so broad as to impose hardly any limit at all, in particular the provision that permits discipline for conduct that "adversely affects morale, production or maintenance of proper discipline." Even more to the point, the ordinance states explicitly -- *three times* -- that the list is not exhaustive.

Similarly, the surrounding ordinances suggests that the list in § 48-62 is offered only for guidance. Chippewa County Ordinance § 48-63 sets out recommended disciplinary sequences for the work rules listed in § 48-62. That ordinance begins with the statement that "for consistency in administering discipline county-wide, the following discipline is recommended for violation of the above rules." Together, §§ 48-62 and 48-63 adopt guidelines for supervisors to facilitate equal discipline, which is not enough to

[15] Dane County Ordinance § 18.13 provides:

> 18.13 SUSPENSION, MERIT STEP DENIALS, REDUCTIONS IN PAY, DEMOTIONS AND DISCHARGES. It is the intention of the county board of supervisors and the committee to secure a fair and effective means for discharging, suspending, denying merit steps, demoting or reducing the pay of employees for just cause.

mandate limits indicative of "for cause" employment. See *Flaningam v. Winnebago County*, 243 Fed. Appx 171, 174 (7th Cir. 2007) (applying Illinois law).

At bottom, Chippewa County Ordinance § 48.62 provides a non-exhaustive list of reasons for discipline to guide supervisors. It neither restricted the County's discretion, nor did it create for Kvapil any legitimate expectation of continued employment absent just cause. Therefore, the court concludes that Kvapil had no protected property interest in his employment for due process purposes.[16]

B. Sheriff Kowalcyzk's Memorandum

Kvapil's final claim is that Sheriff Kowalcyzk deprived him of a liberty interest in his reputation without due process when he circulated a memorandum regarding Kvapil's threats to county department heads. A plaintiff may prove a deprivation of a protected liberty interest by showing damage to his "good name, reputation, honor, or integrity," *Wis. v. Constantineau*, 400 U.S. 433, 437 (1971), but only if the defamation causes injuries that "take concrete forms and extend beyond mere reputational interests."

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[16] The Seventh Circuit reached a similar holding under Illinois law:

> "the fact that [the employer] decided to give specific warning that certain behaviors (i.e., abuse of sick leave, failure to return to work after physician release, non-compliance with secondary employment rules, and political misuse of an official position) will be punished, perhaps even result in termination, is no limitation on its power to punish for other reasons (or indeed to terminate for no reason at all, since the employment is at will)."

Border v. City of Crystal Lake, 75 F.3d 270 (7th Cir. 1996). See also *Lashbrook v. Oerkfitz*, 65 F.3d 1339, 1347 (7th Cir. 1995) (applying Illinois law) (provision in employee manual that "department head . . . may dismiss any employee for just cause" did not limit director's discharge only for just cause, because language was permissive *and* subordinate department heads could not dismiss the director).

Omoseghon v. Wells, 335 F.3d 668, 675 (7th Cir. 2003) (citing *Paul v. Davis*, 424 U.S. 693, 711-12 (1976)). Under this "stigma plus test," Kvapil must show that (1) defendant publicized "statements that would constitute defamatory statements if false," *Hannemann v. S. Door Co. Sch. Dist.*, 673 F.3d 746, 754 (7th Cir. 2012), and (2) the defamation caused an "alteration of legal status," such as altering or eliminating "a right or status previously recognized by state law." *Paul*, 424 U.S. at 708-09, 711.

Kvapil's claim fails the first prong, because he cannot show that the memorandum was published or the statements in it were false. The Seventh Circuit has explained that a named defendant must make the statements publicly, not simply internally:

> A plaintiff must demonstrate that a named defendant was the individual who made the disclosure; a '*res ipsa loquitur[-]like* approach, while perhaps sufficient to establish that someone . . . published the information, does not sufficiently establish that the someone was [a named Defendant].' *McMath v. City of Gary*, 976 F.2d 1026, 1031 (7th Cir. 1992) (emphasis in original). Further, the specific stigmatizing statements must be made public; statements made to employees within a department are not considered public dissemination. *Id.* at 1035-36.

Covell v. Menkis, 595 F.3d 673, 677-678 (7th Cir. 2010).

Here, Kowalcyzk sent the memorandum to the department heads and asked them to share the information with their employees. Kvapil has no evidence that any defendant disseminated the statements publicly. While Kvapil avers that he received the memorandum from at least three friends, he offered no affidavits describing who those friends were or how they obtained it. As *McMath* and *Covell* make clear, Kvapil cannot rely merely on the fact that the document leaked to meet the first prong.

Kvapil has also not shown that the statements in the memorandum were false. The memorandum accused Kvapil of making physical threats against a department head, his wife and County Administrator Reynolds. Kvapil argues that he never physically threatened Clary, his wife or Reynolds, but this argument is belied by the undisputed record already described above. Perhaps the memo could be said to exaggerate the severity of Kvapil's conduct in characterizing it as a "vendetta," but that does not show the statements attributed to him were defamatory.[17]

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Chippewa County, Wisconsin, James L. Kowalcyzk, William Reynolds, Bruce G. Stelzner and Douglas Clary is GRANTED. The Clerk of Court is ordered to enter judgment for defendants and close the case.

Entered this 26th day of June, 2013.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

[17] Because Kvapil has not established that the memorandum was defamatory, the court will not address the parties' additional arguments concerning whether Kvapil has established a sufficient "plus" element to show an alteration of his legal status.