IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

SCOTT DIX Plaintiff, vs. CITY OF CEDAR FALLS, JEFF OLSON, RON GAINES, SUSAN DEBUHR, FRANK DARRAH, MARK MILLER, DARREL KRUSE, and NICK TAIBER Defendants.	No. 22-cv-2028-MAR **ORDER**

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I. INTRODUCTION

Before me is a Motion for Partial Summary Judgment filed on May 22, 2023, by Defendants City of Cedar Falls, Ron Gaines, Susan DeBuhr, Frank Darrah, Mark Miller, Daryl Kruse, and Nick Taiber ("Defendants"). (Doc. 15.) On June 26, 2023, Plaintiff filed a timely Resistance to Defendants' Motion for Partial Summary Judgment.[1] (Doc.

[1] On June 2, 2023, Plaintiff timely sought and extension to file his resistance to Defendants' motion for partial summary judgment. (Doc. 18.) The Court granted the motion and extended Plaintiff's deadline to file his resistance to June 26, 2023. (Doc. 19.)

21.) Defendants filed a timely Reply to Plaintiff's Resistance to Motion for Partial Summary Judgment. (Docs. 24 and 26.)

Also before me is a Motion for Summary Judgment filed on October 13, 2023, by Defendants. (Doc. 30.) In this motion, Defendants seek summary judgment on grounds additional to those raised in their May 2023 Motion for Partial Summary Judgment. On November 3, 2023, Plaintiff filed a timely Resistance to Defendants' Motion for Summary Judgment. (Docs. 38-43.) Defendants filed a timely Reply to Plaintiff's Resistance to Motion for Summary Judgment. (Doc. 51.)

Additionally, before me is a Motion for Summary Judgment filed on October 16, 2023, by Plaintiff. (Doc. 34.) On November 6, 2023, Defendants filed a timely Resistance to Plaintiff's Motion for Summary Judgment (Doc. 45.) Plaintiff filed a timely Reply to Defendants' Resistance to Motion for Summary Judgment (Doc. 56.)

Pursuant to the Consent and Order of Reference to a Magistrate Judge (Doc. 11), the parties all consented to disposition by a United States Magistrate Judge, and the case was subsequently assigned to me. *See* 28 U.S.C. § 636(c)(3).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Federal Rule of Civil Procedure 56(a). "Summary judgment is proper 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show'" an absence of a genuine dispute as to a material fact. *Hilde v. City of Eveleth*, 777 F.3d 998, 1003 (8th Cir. 2015) (quoting *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc)). "A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party; a fact is material if its resolution affects the outcome of the case." *Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, 826 F.3d 1149, 1157 (8th Cir. 2016) (quoting *Gazal v. Boehringer Ingelheim*

Pharm., Inc., 647 F.3d 833, 837-38 (8th Cir. 2011)). "The movant 'bears the initial responsibility of informing the district court of the basis for its motion,' and must identify 'those portions of [the record] . . . which it believes demonstrate the absence of a genuine issue of material fact.'" *Torgerson*, 643 F.3d at 1042 (alterations in original) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the movant has done so, "the nonmovant must respond by submitting evidentiary materials that set out 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Celotex Corp.*, 477 U.S. at 324).

On a motion for summary judgment, the court must view the facts "in the light most favorable to the nonmoving party." *Id.* (quoting *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial," and summary judgment is appropriate. *Ricci*, 557 U.S. at 586 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "The nonmovant 'must do more than simply show that there is some metaphysical doubt as to the material facts. . . .'" *Torgerson*, 643 F.3d at 1042 (quoting *Matsushita*, 475 U.S. at 586). Instead, "[t]o survive a motion for summary judgment, the nonmoving party must substantiate [its] allegations with sufficient probative evidence [that] would permit a finding in [its] favor based on more than mere speculation, conjecture, or fantasy." *Williams v. Mannis*, 889 F.3d 926, 931 (8th Cir. 2018) (third alteration in original) (quoting *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 801 (8th Cir. 2011)). Mere "self-serving allegations and denials are insufficient to create a genuine issue of material fact." *Anuforo v. Comm'r of Internal Revenue*, 614 F.3d 799, 807 (8th Cir. 2010). "Evidence, not contentions, avoids summary judgment." *Reasonover v. St. Louis Cty.*, 447 F.3d 569, 578 (8th Cir. 2006) (quoting *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 809 (8th Cir. 2003)).

III. RELEVANT BACKGROUND

The following facts are either uncontested or, if contested, viewed in the light most favorable to the nonmoving party. *See Munz v. Michael*, 28 F.3d 795, 796 (8th Cir. 1994).

Plaintiff Scott Dix is a resident of Janesville, Iowa, and was a firefighter for the City of Cedar Falls, Iowa, and the President of the International Association of Firefighters Local 1366. Defendant City of Cedar Falls, Iowa ("the City") is an Iowa municipal corporation organized under Iowa law and operates the Cedar Falls Public Safety Department.[2] Defendant Jeff Olson, at all times relevant to this matter, was employed by the City as the Director of the Public Safety Department. Defendant Ron Gaines is employed by the City as the City Administrator. Defendants Susan DeBuhr, Frank Darrah, Mark Miller, Darrel Kruse, and Nick Taiber were at all times relevant to this matter members of the Cedar Falls City Council. (Doc. 1 at 2-3; Doc. 4 at 2-5; Doc. 21-2 at 1-2.)

Starting in 2005, the City began implementing public safety supplemental staffing, with various personnel having been cross-trained in both police and fire duties. (Doc. 21-2 at 2.) In 2015, the City created a new Public Safety Officer job classification, which required licensing and certification in both police and fire services. (*Id.*) Beginning in 2016, new hires in the Public Safety Department were required to be cross-trained public safety officers. (*Id.*)

On February 17, 2020, the City Council held a work session focused on the Public Safety Officer Program. (*Id.*) Defendant Olson presented information regarding the benefits of the program. (*Id.* at 2-3.) On February 20, 2020, the City Council held a

[2] The Cedar Falls Public Safety Department consists of a Fire Division and a Police Division. The Fire Division provides medical and fire suppression services for the City and the Police Division provides law enforcement and investigation services for the City.

special meeting. At the meeting, the City Council considered two proposed resolutions: (1) a resolution approving continued implementation of the Public Safety Program; or (2) a resolution approving immediate implementation of the Public Safety Program, including reorganization of the Public Safety Department. (*Id.* at 3.) The City Council voted and passed Resolution No. 21,893, approving the immediate implementation of the Public Safety Program and reorganization of the Public Safety Department.[3] (*Id.*) In a separate vote, the City Council approved the creation of a task force to address issues associated with the implementation of the Public Safety Program and reorganization of the Public Safety Department. (*Id.*) On February 21, 2020, the City's Mayor, Robert Green, vetoed Resolution No. 21,893. (*Id.*) On March 2, 2020, the City Council held a meeting, where, among other agenda items, Council Members DeBuhr, Darrah, Miller, Kruse, and Taiber voted to override Mayor Green's veto of Resolution No. 21,893. (*Id.* at 4.)

On March 16, 2020, the City Council, by a 6-1 vote, with Council Members DeBuhr, Darrah, Miller, Kruse, and Taiber voting in favor, adopted the proposed "Transition Plan for Reorganization of the Public Safety Program." (*Id.*; Doc. 30-1 at 9.) The plan included a "Firefighter Transition Task Force," which was charged with "determining and recommending a plan of equitable outcomes for former firefighters displaced as a result of the elimination of the Firefighter job classification[.]"[4] (*Id.*; Doc. 15-5 at 237.) Under the Transition Plan, City employees, in this case firefighters, including Plaintiff, affected by the immediate implementation of the Public Safety Officer Program were placed on paid administrative leave, effective March 3, 2020, and ending on June 22, 2020. (Doc. 15-2 at 4.)

[3] Defendants DeBuhr, Darrah, Miller, Kruse, and Taiber all voted in favor of Resolution No. 21,893.

[4] Plaintiff argues that the Firefighter position was not immediately eliminated and remained "on the books" for nearly one year after passage of Resolution No. 21,893. (Doc. 21-2 at 5.)

As part of the Transition Plan, the affected firefighters were provided three options for moving forward: (1) cross-train for a Public Safety Officer position; (2) apply for another position with the City; or (3) receive severance. (Doc. 30-1 at 9.) The Transition Plan further provided that if none of the three options were selected by June 22, 2020, the employee would be laid off. (*Id.*) On March 23, 2022, Plaintiff was given formal notice of the Transition Plan, including the three options or layoff. (*Id.* at 10.) Plaintiff acknowledged receipt of the notice by signature. (*Id.*; Doc. 30-2 at 295-96.) Specifically, the notice stated:

> As of today, March 23, 2020, you are hereby provided notice that you will be put on layoff status as of June 22nd per article 6C.1 of the collective bargaining agreement. Between the date of this notice and the effective date of the layoff, unless circumstances change, you will be on paid administrative leave. During this time, you will need to be considering the options that have been laid out for you by the Firefighter Transition Task Force and approved by City Council on March 16, 2020.

(Doc. 30-2 at 295.) Also, on March 23, 2020, City personnel informed Plaintiff of his options and advised him that if none of the three options were chosen, he would be laid off effective June 22, 2020. (Doc. 30-1 at 10.) Plaintiff did not select any of the three options and he was laid off on June 22, 2020. (*Id.* at 10-11.)

On June 21, 2022, Plaintiff filed the instant Complaint, alleging unlawful retaliation in violation of the First Amendment and Fourteenth Amendment right to freedom of speech under 42 U.S.C. Section 1983 (Count I); unlawful retaliation in violation of the First Amendment and Fourteenth Amendment right to freedom of association under 42 U.S.C. Section 1983 (Count II); unlawful retaliation in violation of the First Amendment and Fourteenth Amendment right to freedom to petition under 42 U.S.C. Section 1983 (Count III); and intentional infliction of emotional distress (Count IV). (Doc. 1.)

IV. ANALYSIS

A. Service on Defendant Jeff Olson

Plaintiff has never served the summons and Complaint on Defendant Olson and no attorney has filed an appearance on behalf of Olson. The attorney for all other Defendants, Andrew Tice, argues that Olson should be dismissed from this case because Plaintiff cannot demonstrate good cause or excusable neglect for failing to effectuate service on Olson. (Doc. 15-3 at 20.) Specifically, Mr. Tice argues that "the record does not reveal any facts which excuse Plaintiff's neglect in serving Olson or provide a reasonable basis for Plaintiff's inaction." (*Id.* at 22.) Further, Mr. Tice states that "[m]ore than nine months have passed since Plaintiff first filed the Complaint and service has still not been made." (*Id.* at 22-23.)

In response, Plaintiff "concedes that [he] did not directly serve [D]efendant Olson with the Complaint in this matter." (Doc. 21 at 21.) Plaintiff notes that his attorney sent Mr. Tice and another attorney at Mr. Tice's firm, Michael Galloway, a copy of the Complaint on July 20, 2022. (*Id.*; Doc. 21-3 at 19.) However, on July 20, 2022, Olson had not retained Mr. Tice and/or Mr. Galloway and Mr. Galloway informed Plaintiff that they could not accept service. (*Id.*; *Id.*) Plaintiff asserts that he "is without sufficient information as to whether [D]efendants' counsel was retained to represent [D]efendant Olson in this matter, or, if so, when they were so retained." (*Id.*; *Id.*) Plaintiff maintains that "[i]f [D]efendants' counsel were so retained, they did not contact [P]laintiff's counsel to confirm as much" and "[i]f they were not retained, it is not clear that their clients have standing to seek [D]efendant Olson's dismissal from this matter." (*Id.*; *Id.*)

Pursuant to Federal Rule of Civil Procedure 4(c)(1), "[t]he plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service." *Id.* Rule 4(m) provides that:

> If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m). Under Rule 4(m), "if the district court concludes there is good cause for plaintiff's failure to serve within [90] days, it *shall* extend the time for service. If plaintiff fails to show good cause, the court still *may* extend the time for service rather than dismiss the case without prejudice." *Kurka v. Iowa County, Iowa*, 628 F.3d 953, 957 (8th Cir. 2010) (emphasis in original) (quoting *Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 887 (8th Cir. 1996)). An extension of time for service is warranted if the plaintiff establishes excusable neglect. *Kurka*, 628 F.3d at 957.

"A showing of good cause requires at least 'excusable neglect'—good faith and some reasonable basis for noncompliance with the rules." *Id.* (quoting *Adams*, 74 F.3d at 887). Generally, a finding of good cause is likely when " [1] the plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server, [2] the defendant has evaded service of the process or engaged in misleading conduct, [3] the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances, or [4] the plaintiff is proceeding pro se or in forma pauperis." *Id.* (alterations in original) (quoting 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1137 (3d ed.2002)). Whether good cause has been satisfied is "largely dependent upon the facts of each individual case" and "[i]t is for this very reason that such a determination is entrusted to the sound and considerable discretion of the district court in the first instance." *Id.* (quoting *Colasante v. Wells Fargo Corp.*, 81 Fed. App'x 611, 613 (8th Cir. 2003)).

Excusable neglect has been described as "'an "elastic concept" that empowers courts to' provide relief where a party's failure to meet a deadline is 'caused by

inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.'" *Id*. at 959 (quoting *Chorosevic v. MetLife Choices*, 600 F.3d 934, 946 (8th Cir. 2010)). In determining whether neglect is excusable, all relevant circumstances surrounding the plaintiff's omission must be taken into account. *Id*. The following factors are important for making such a determination: "(1) the possibility of prejudice to the defendant, (2) the length of the delay and the potential impact on judicial proceedings, (3) the reason for the delay, including whether the delay was within the party's reasonable control, and (4) whether the party acted in good faith." *Id*. (citing *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 866 (8th Cir. 2007)). The reason for the delay is generally the key factor in the analysis. *Id*.

I find that Plaintiff has failed to establish either good cause or excusable neglect for his failure to serve Mr. Olson. Plaintiff's failure to complete timely service is not the result of the conduct of a third person. Defendant Olson has not evaded service of process or engaged in misleading conduct. Plaintiff has not acted diligently in trying to effect service, there are no mitigating circumstances in this case, and Plaintiff is not proceeding pro se or in forma pauperis. Further, there is no evidence that the failure to timely serve Olson was caused by inadvertence, mistake, carelessness, or intervening circumstances beyond Plaintiff's control. Indeed, the record demonstrates that on July 20, 2022, Plaintiff attempted to serve Mr. Olson by providing Mr. Tice and Mr. Galloway a copy of the Complaint. However, at that time, Mr. Olson had not retained Mr. Tice and/or Mr. Galloway and Mr. Galloway informed Plaintiff that he and Mr. Tice could not accept service for Olson. Plaintiff made no further attempt to serve Mr. Olson. Plaintiff was made aware that he had failed to serve Mr. Olson on May 22, 2023, seven months beyond the time required for service under Rule 4(m). Upon learning that Mr. Olson had not been served, Plaintiff made no attempt to serve him late or seek an

extension of time to serve him. On October 13, 2023, nearly five months after learning that Mr. Olson had not been served, and almost one year beyond the time for timely service pursuant to Rule 4(m), Plaintiff moved for summary judgment against Mr. Olson without ever making an attempt to serve him. Accordingly, Plaintiff has failed to show good cause or excusable neglect for failing to serve Mr. Olson in accordance with Rule 4(m) and the Court is not required to extend the deadline for service. The Court also declines to exercise its discretion to extend the deadline for Plaintiff to serve Mr. Olson. Thus, Defendant Jeff Olson is dismissed without prejudice from this case.[5]

B. Statute of Limitations

1. Parties' Arguments

Defendants argue that Plaintiff's Section 1983 claims are barred by the applicable statute of limitations, as Plaintiff's claims accrued more than two years prior to the commencement of the instant lawsuit. (Doc. 33 at 10.) Specifically, Defendants argue that Plaintiff's claims began to accrue "when Plaintiff was provided notice of the City Council's resolution setting forth Plaintiff's approved options including lay-off." (*Id.*) Defendants assert that "Plaintiff's Section 1983 claims are premised upon his lay-off from the City's employment" and the "action leading to that lay-off occurred when the City Council, through Resolution 21,918, approved and adopted the Transition Plan for Reorganization of the Public Safety Program proposed by the Transition Task Force, which provided the firefighters with four (4) options including lay-off." (*Id.* at 14.)

[5] In his brief, Plaintiff asserts that, if Mr. Tice and Mr. Galloway were not retained by Mr. Olson to represent him in this matter, "it is not clear that their clients have standing to seek [D]efendant Olson's dismissal from this matter." Plaintiff cites no authority in support of this claim. (Doc. 21 at 21.) Moreover, Plaintiff knew as early as July 20, 2022 that Mr. Olson had not been served. Plaintiff was made aware on May 22, 2023 that Mr. Olson had still not been served. Thus, whether by the summary judgment motion filed by the other Defendants or on the Court's own motion, Plaintiff's failure to attempt to serve Mr. Olson for over one year without good cause or excusable neglect results in Defendant Jeff Olson's dismissal from this action without prejudice.

Defendants maintain that Plaintiff's "Section 1983 claims are time barred and must be dismissed." (*Id.* at 10.)

In response, Plaintiff argues that his Section 1983 claims are "not barred by the statute of limitations." (Doc. 43 at 23.) Specifically, Plaintiff argues that "the statute [of limitations] begins to run from the date of his actual layoff (June 22, 2020), not the date of the alleged 'notice' of four options given to the firefighters and members represented by IAFF Local 1366." (*Id.*) Plaintiff maintains that "there was no cause of action, or ability to obtain relief, until [he] exercised his choice and his layoff was effective, which occurred on June 22, 2020." (*Id.* at 32.)

2. Applicable Law

"The governing statute of limitations for § 1983 claims is the personal-injury tort statute of the State in which a cause of action arose." *Martin v. Julian*, 18 F.4th 580, 583 (8th Cir. 2021) (citation omitted). In Iowa, the statute of limitations period for personal injury actions is two years; and, therefore, Plaintiff's Section 1983 claims have a two-year statute of limitations. Iowa Code § 614.1(2); *see also Wycoff v. Menke*, 773 F.2d 983, 984 (8th Cir. 1985) (applying Iowa's two-year statute of limitations to Section 1983 claim). The parties agree that the applicable statute of limitations for Plaintiff's Section 1983 claims is two years. (Doc. 33 at 10; Doc. 43 at 23.)

"While state law determines the applicable statute of limitations for a § 1983 claim, federal law controls when a § 1983 claim accrues." *Public Water Supply District No. 1 of Greene County v. City of Springfield, Missouri*, 52 F.4th 372, 375 (8th Cir. 2022) (citing *Rassier v. Sanner*, 996 F.3d 832, 836 (8th Cir. 2021)). "[I]t is 'the standard rule that [accrual occurs] when the plaintiff has "a complete and present cause of action,"' . . . that is, when 'the plaintiff can file suit and obtain relief.'" *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (alteration in original) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997), in turn quoting,

Rawlings v. Ray, 312 U.S. 96, 98 (1941)). In a retaliation claim, "the cause of action accrue[s] when the retaliatory action occur[s]." *Rassier*, 996 F.3d at 836 (citing *Graham Cty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 419 (2005)); *see also Gekas v. Vasiliades*, 814 F.3d 890, 894 (7th Cir. 2016) ("Generally, the statute of limitations clock begins to run on First Amendment retaliation claims immediately after the retaliatory act occurred.").

3. Application

At issue here is whether Plaintiff's Section 1983 claims began to accrue at the time he was notified of the Transition Plan options, including layoff (March 23, 2020), or, whether his Section 1983 claims began to accrue at the time he was actually laid off (June 22, 2020).

In *Delaware State College v. Ricks*, in February 1973, the college's tenure committee recommended that Ricks, a college professor, be denied tenure. 449 U.S. 250, 252 (1980). However, the tenure committee agreed to reconsider its recommendation the following year. *Id.* In February 1974, the tenure committee again recommended that Ricks be denied tenure. *Id.* On March 13, 1974, the college's Board of Trustees voted to deny Ricks tenure. *Id.* Ricks filed a grievance, and a hearing was held in May 1974 by the college's grievance committee. *Id.* Shortly after the hearing the grievance committee recommended that Ricks's grievance be denied. *Id.* During the pendency of the grievance, the college offered Ricks a "terminal" contract to teach one additional year. *Id.* at 252-53. On September 4, 1974, Ricks signed the terminal contract which stated that the contract would expire on June 30, 1975. *Id.* at 253-54. On September 12, 1974, the Board of Trustees informed Ricks that his grievance was denied. *Id.* at 254. On April 4, 1975, Ricks attempted to file an employment discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"). *Id.* However, under Title VII, jurisdiction for Ricks's claim lied with a state fair employment

agency and the EEOC referred Ricks to the appropriate Delaware agency. *Id*. On April 28, 1975, the state agency waived jurisdiction and the EEOC accepted Ricks's complaint. *Id*. More than two years later, the EEOC issued Ricks a "right to sue" letter. *Id*. On September 9, 1977, Ricks filed a lawsuit in federal court alleging discrimination on the basis of his national origin in violation of Title VII and in violation of 42 U.S.C. Section 1981. *Id*.

The Supreme Court determined that the statute of limitations period commenced "when the tenure decision was made and Ricks was notified." *Id*. at 259. The Supreme Court explained that:

> the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure—the eventual loss of a teaching position—did not occur until later. The Court of Appeals for the Ninth Circuit correctly held, in a similar tenure case, that "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Abramson v. University of Hawaii*, 594 F.2d 202, 209 ([9th Cir.] 1979) (emphasis added); *see United Air Lines, Inc. v. Evans*, 431 U.S. [553,] 558, 97 S.Ct., [1885,] 1889 [(1977)]. It is simply insufficient for Ricks to allege that his termination "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id*. at 557, 97 S.Ct. at 1888. The emphasis is not upon the effects of earlier employment decisions; rather, it "is [upon] whether any present *violation* exists." *Id*. at 558, 97 S.Ct. at 1889 (emphasis in original).

Id. at 258 (first and fifth alteration in original). The Supreme Court concluded that:

> the limitations periods had commenced to run by June 26, 1974, when the President of the Board notified Ricks that he would be offered a "terminal" contract for the 1974–1975 school year. . . . By June 26, the tenure committee had twice recommended that Ricks not receive tenure; the Faculty Senate had voted to support the tenure committee's recommendation; and the Board of Trustees formally had voted to deny

> Ricks tenure. In light of this unbroken array of negative decisions, the District Court was justified in concluding that the College had established its official position—and made that position apparent to Ricks—no later than June 26, 1974.

Id. at 261-62.

In *Chardon v. Fernandez*, 454 U.S. 6 (1981) (per curiam), respondents were non-tenured administrators in the Puerto Rico Department of Education. *Id*. at 6-7. Prior to June 18, 1977, respondents were notified by letter that their appointments to the Puerto Rico Department of Education would terminate on specified dates between June 30 and August 8, 1977. *Id*. at 7. On June 19, 1978, respondents filed a complaint alleging that their terminations violated 42 U.S.C. Section 1983. *Id*. The district court dismissed respondents' lawsuit, finding that the action had accrued on the date respondents received their letters and their claims were barred by the applicable one-year statute of limitations. *Id*. The First Circuit Court of Appeals reversed the district court, finding that the limitations period did not begin to run until the respondents' appointments ended. *Id*. Relying on *Ricks*, the Supreme Court reversed the First Circuit, finding that the applicable statute of limitations began to run when respondents received their letters informing them that their appointments would terminate on specified dates between June 30 and August 8, 1977. *Id*. at 8. The Supreme Court explained that:

> In *Ricks*, we held that the proper focus is on the time of the *discriminatory act*, not the point at which the consequences of the act become painful. 449 U.S., at 258, 101 S.Ct., at 504. The fact of termination is not itself an illegal act. In *Ricks*, the alleged illegal act was racial discrimination in the tenure decision. *Id*., at 259, 101 S.Ct., at 504. Here, respondents allege that the decision to terminate was made solely for political reasons, violative of First Amendment rights. There were no other allegations, either in *Ricks* or in these cases, of illegal acts subsequent to the date on which the decisions to terminate were made. As we noted in *Ricks*, "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id*., at 257, 101 S.Ct., at 504.

> In the cases at bar, respondents were notified, when they received their letters, that a final decision had been made to terminate their appointments. The fact that they were afforded reasonable notice cannot extend the period within which suit must be filed.

Id. (emphasis in original).

In *Kuemmerlein v. Board of Educ. Of Madison Metropolitan School Dist.*, 894 F.2d 257 (7th Cir. 1990), plaintiffs filed reverse discrimination claims under Section 1983, alleging defendants used race as a determining factor for decisions regarding teacher layoffs. *Id*. at 258. In January 1982, the school board voted for a reduction in staff in the school district. *Id*. On March 2, 1982, plaintiffs were notified that they would be laid off at the end of the school year. *Id*. On August 23, 1982, at the beginning of the new school year, plaintiffs were not employed by the school district. *Id*. In subsequent years, plaintiffs were recalled back to work at the school district. *Id*. Plaintiffs filed suit on May 11, 1988. *Id*.

The applicable statute of limitations was six years. *Id*. at 259. The district court found plaintiffs' claims time barred, determining that plaintiffs' claims accrued on March 2, 1982, the date plaintiffs received their layoff notices. *Id*.

The Seventh Circuit Court of Appeals, relying on *Ricks* and *Chardon*, affirmed the district court, finding that plaintiffs' cause of action accrued on the date they received notice of the school district's layoff decision. *Id*. The Seventh Circuit explained that Plaintiffs' circumstances are:

> indistinguishable from those in *Ricks* and *Chardon*. The plaintiffs argue that their injury was incomplete until their actual termination, when classes began without them and with less senior minority teachers. Precedent, however, instructs us to focus on the discriminatory act, not the point at which the consequences of the act become painful. *Chardon*, 454 U.S. at 8, 102 S.Ct. at 29; *Ricks*, 449 U.S. at 258, 101 S.Ct. at 504[.] . . . Plaintiffs' actual termination only made painful the consequences of the discriminatory act: the allegedly illegal act was the layoff decision itself.

Id. at 260. Further, the Seventh Circuit noted that:

> Plaintiffs argue that when they received their layoff notices, they were not yet irrevocably terminated. Rather, given [the school district's] practice of soon rehiring fifty-four percent of the teachers given layoff notices, the plaintiffs could have been recalled back to work before the new school year began. This argument, however, would undermine the needed certainty behind the statute of limitations. . . . The statute of limitations is intended to provide a repose for those who might be the subject of litigation and to protect against stale lawsuits. To fulfill these purposes, bright lines need to be drawn. The plaintiffs' hopes of recall were not enough to prevent the start of the statute of limitations. No matter what the chance of recall, a plaintiff's cause of action for employment discrimination stemming from a layoff decision runs from the time of notice, not from the time of actual termination. The boundaries of the statute of limitations must be concrete.

Id.; *see also Kainrath v. South Stickney Sanitary Dist.*, No. 1:11-cv-00878, 2011 WL 3895142, at *1-*3 (N.D. Ill. Aug. 31, 2011) (determining that a Section 1983 First Amendment retaliation claim was time barred under the applicable statute of limitations, where the cause of action accrued from the date plaintiff was notified of his termination, not the actual date of his termination).

More recently, in *Humphrey v. Eureka Gardens Public Facility Board*, 891 F.3d 1079 (8th Cir. 2018), the Eighth Circuit Court of Appeals addressed the issue of the statute of limitations in a Section 1983 lawsuit. In *Humphrey*, in 2009, the Eureka Gardens Public Facility Board ("Board") decided to construct a new sewer system in the Eureka Gardens community. 891 F.3d at 1080-81. The initial design proposal provided that gravity sewer systems would be installed at all Eureka Garden residences. *Id*. at 1081. Later, the design was changed, requiring five residences to receive grinder sewer systems.[6] *Id*. Under the modified design plan, four of the five residences to receive

[6] "Unlike gravity systems, grinder systems use electric-powered pumps, making them more expensive to operate and maintain." *Humphrey*, 891 F.3d at 1081.

grinder sewer system belonged to African Americans. *Id*. The Humphreys, who were African American, owned two of the residences which were to receive the grinder sewer systems. *Id*. In October 2011, the Humphreys:

> signed a contract, which provided that grinder pumps would be installed at each of their Eureka Gardens properties. In the contract, the Board agreed to install the grinder pumps as well as lines connecting the pumps to the sewer system's main sewage lines, and to do so at no cost to the Humphreys. In return, the Humphreys agreed to install electrical lines to power each pump and to maintain the pumps once they were installed. Construction of the new sewer system was completed in November 2013. The City of North Little Rock Wastewater Department (NLRWD) operates, maintains, and repairs the new sewer system, and it charges all residents of Eureka Gardens—including the Humphreys and the other grinder pump recipients—a uniform rate to do so. It does not operate, maintain, or repair the grinder pumps.

Id.

Relying on *Ricks* and *Chardon*, the Eighth Circuit determined that "the Humphreys' claims accrued in October 2011, when they were notified of the allegedly discriminatory decision to install the grinder systems instead of gravity systems at their residences. The installation of the pumps and the Humphreys' continuing responsibility for the additional expenses they entail, like the professor's ultimate termination in *Ricks*, are delayed, but inevitable, consequences of that decision." *Id*. at 1082. Further, the Eighth Circuit disagreed with the Humphreys' argument that their claims did not accrue in October 2011 due to a lack of standing, explaining that "[w]hen the Humphreys learned of the allegedly discriminatory decision in October 2011, they could have sought declaratory or injunctive relief, and later added demands for compensatory damages once they incurred actual financial harm." *Id*.

Here it is undisputed that, on March 23, 2020, Plaintiff received both formal and informal notice of the Firefighter Transition Task Force's Transition Plan, which

provided that if Plaintiff did not choose one of three options for moving forward, including cross-training for a Public Safety Officer position, applying for another position with the City, or receiving severance, he would be laid off on June 22, 2020. (Doc. 30-1 at 9-10; Doc. 30-2 at 295-96.) Thus, like in *Ricks*, *Chardon*, *Humphrey*, *Kuemmerlein*, and *Kainrath*, Plaintiff's Section 1983 claims accrued on March 23, 2020, the date he was notified that he would be laid off on June 22, 2022 unless he chose one of three options outlined in the Transition Plan. The Transition Plan and notice, which Plaintiff received on March 23, 2020 were definitive and clear that, if none of the three options were chosen, Plaintiff would be placed in layoff status on June 22, 2020.

In a similar case, *Mogley v. Chicago Title Ins. Co.*, 719 F.2d 289 (8th Cir. 1983) (per curiam), the plaintiff brought an age discrimination claim under the ADEA which the district court dismissed for failing to file the claim with the EEOC within 180 days of the alleged discriminatory act. *Id.* at 290. On July 27, 1981, the plaintiff was notified that the office where the plaintiff worked was closing on July 31, 1981, and he would be terminated. *Id.* In the notice, the plaintiff was given the option of accepting early retirement. *Id.* The plaintiff decided to take early retirement and executed an agreement with his employer on August 19, 1981, requiring him to accept early retirement as of January 31, 1982. *Id.* The plaintiff "filed his age discrimination claim with the EEOC on February 16, 1982, more than 180 days after the letter notifying him of his termination, but within 180 days of both signing the agreement with the company and actually being terminated." *Id.* The district court determined that the operative date for the 180-day filing limitation was July 27, 1981. *Id.* The Eighth Circuit agreed, noting that the "180-day period begins to run when the allegedly improperly-motivated decision to terminate an employee is made and communicated to the employee, notwithstanding that the employee continues working until some later date." *Id.* (citing *Ricks*, 449 U.S.

250; *Chardon*, 454 U.S. 6; *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 593 (9th Cir.1981)). The Eighth Circuit explained that:

> The discrimination, if any, occurred when the company gave [the plaintiff] the option of accepting termination or remaining on the payroll until he was entitled to early retirement. Appellant cites no persuasive authority in the case law that an employer's holding out of alternatives to the employee—here termination or early retirement—and the employee's acceptance of the most favorable terms offered constitute a basis for tolling of the limitations period.

Id. at 291. Like *Mogley*, the retaliation, if any, occurred when the City gave Plaintiff the options of cross-training for a Public Safety Officer position, applying for another position with the City, or receiving severance; or being laid off effective on June 22, 2020, if he did not choose any of three options presented by the City.

Plaintiff suggests that because the formal notification provided to him contains the sentence "[b]etween the date of this notice and the effective date of the layoff, unless circumstances change, you will be on paid administrative leave," the notification was not definitive. (Doc. 43 at 31.) I am unpersuaded. The sentence Plaintiff relies on refers to Plaintiff's status of being on paid administrative leave between March 23, 2020 and June 22, 2020. "Unless circumstances change" refers to Defendant's selection among the options presented and the default of being laid off. This language does not imply a possible change in the Council's decision that made it indefinite. In other words, Plaintiff would be laid off effective June 22, 2020, unless he elected an option that resulted in his retention in some position. Indeed, the next sentence in the notification states, "During this time, you will need to be considering the options that have been laid out for you by the Firefighter Transition Task Force and approved by City Council on March 16, 2020."

Furthermore, Plaintiff's reliance on *Allen v. Colgate-Palmolive Co.*, 539 F.Supp 57 (S.D.N.Y 1981) is misplaced. Plaintiff argues that in *Allen*, "the plaintiff was given

a choice as to whether to continue as an employee in a different, lesser, position, or retire" and the plaintiff had to make his choice by a certain deadline because after the deadline, "the employer would not continue him on payroll unless he accepted a demotion." (Doc. 43 at 27.) (Citing *Allen*, 539 F.Supp. at 57, 67.) In determining when the statute of limitations began to run, the district court determined that the plaintiff's "right to seek relief cannot be said to have been complete until plaintiff exercised his choice, because until then, the 'essential allegation' of his complaint—discriminatory demotion or discriminatory constructive discharge—did not become clear." *Allen*, 539 F.Supp. at 67. Plaintiff asserts that *Allen*:

> . . . mirrors the case here. [Plaintiff] was given, here, a series of choices—to either apply to become a [Public Safety Officer], to apply to another position within the City of Cedar Falls, accept a severance package in exchange for waiving certain fundamental rights, or be laid off—and the only limitation on his freedom of choice here was that he had to make his decision known by June 22, 2020, because after that date he would be laid off[.]

(Doc. 43 at 31.) Plaintiff's argument lacks merit because the limitations accrual period in *Allen* has been distinguished in the Southern District of New York. In *Russo v. Trifari, Krussman & Fishel, Inc.*, 659 F.Supp. 194 (S.D.N.Y. 1987), *rev'd on other grounds*, 837 F.2d 40 (2d Cir. 1988), the district court found:

> plaintiff's reliance on *Allen* misplaced. There, the employee, at age 60, was notified that he would have to accept a demotion effective three months hence. Prior to that date, he began discussing early retirement. Shortly before the demotion was to become effective, the employee took some vacation days, and then allegedly became ill. He did not return to work for several months, but continued receiving his regular salary. Finally, the employer gave him the choice of returning to work in the demoted position (at the same salary), taking unpaid leave time, or taking early retirement. The employee chose early retirement, but later alleged he had been discriminatorily forced to retire. On a motion to dismiss or for summary judgment, the employer argued that Allen's cause of action had accrued on

> the date his demotion was to become effective. However, unlike the case at bar, Allen had not initially been offered a choice between demotion or early retirement. He was only advised that a demotion would occur on a specified date, and even that date was extended. On those facts, the district court was unwilling to rule that Allen's cause of action accrued on the initial date set for his demotion. Here, however, when Russo was advised in November 1983 that he would have to choose between transfer or termination, either choice to be effective January 1, 1984, he had full notice of the action upon which he bases his allegations herein of age discrimination.

659 F.Supp. at 199 n.10. On appeal, the Second Circuit Court of Appeals upheld the district court's determination of when the plaintiff's claim accrued in *Russo*, the case distinguishing *Allen*. The Second Circuit explained that the plaintiff's claim "accrued on November 1, 1983, when he was informed of [the defendant's] decision to require him either to move to East Providence or leave its employ." *Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 42-43 (2d Cir. 1988) (citing *Chardon*, 454 U.S. at 7; *Ricks*, 449 U.S. at 258-59).

Like both *Russo* decisions (and like *Ricks*, *Chardon*, *Humphrey*, *Mogley*, *Kuemmerlein*, and *Kainrath*) and unlike *Allen*, Plaintiff's Section 1983 claims accrued on March 23, 2020, when he was informed of the Transition Plan requiring Plaintiff to choose one of the three options to remain employed or be laid off effective on June 22, 2020, if no option was selected. Accordingly, because Plaintiff filed his Complaint on June 21, 2022, more than two years after his claims accrued on March 23, 2020, Plaintiff's Section 1983 claims are time-barred and are dismissed against all Defendants.

C. Legislative Immunity

1. Parties' Arguments

Defendants Gaines, DeBuhr, Darrah, Miller, Kruse, and Taiber (collectively, "individual Defendants") argue that they are each entitled to absolute legislative immunity

as to Plaintiff's Section 1983 claims.[7] (Doc. 15-3 at 6.) The individual Defendants argue that the City Council members by voting for and passing Resolution No. 21,893 performed a "quintessentially legislative" action; and are thus, entitled to absolute legislative immunity. (*Id.* at 9.) Further, the individual Defendants assert that Mr. Olson and Mr. Gaines, by participating in the creation of and deliberation on Resolution No. 21,893, are also entitled to absolute legislative immunity. (*Id.*)

Plaintiff argues that "although the City Council claimed to be eliminating the Firefighter position through Resolution 21,893, the City, in fact did not eliminate the position"; but instead, "the Firefighter position was kept on the books in the City for years following the passage of Resolution 21,893." (Doc. 21 at 6.) Plaintiff maintains that "the City's dismissal of its eight remaining Firefighters in 2020, was not the elimination of a position, but rather the targeted dismissal of eight specific employees." (*Id.*) Further, Plaintiff argues that even if the Firefighter position was eliminated, "all [the individual Defendants] did was transfer the duties of Firefighters to Public Safety Officers who were then assigned to the very same fire shifts in the Fire Division." (*Id.* at 7.) Plaintiff contends that the individual Defendants "were acting administratively when they laid off the Firefighters" and are "not entitled to legislative immunity." (*Id.*)

2. Applicable Law

"A local legislator is entitled to absolute legislative immunity for acts undertaken within the 'sphere of legitimate legislative activity.'" *Leapheart v. Williamson*, 705 F.3d 310, 313 (8th Cir. 2013) (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)). In determining whether an act is legislative, courts apply a functional test. *Leapheart*, 705 F.3d at 313. Recently in *Ashley v. City of Benton, Arkansas*, the district court succinctly summarized the functional test:

[7] The individual Defendants' brief also includes Olson as being entitled to legislative immunity even though Olson is not represented by the individual Defendants' attorneys.

> "Under this functional test, '[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing.'" [*Leapheart*, 705 F.3d at 313] (quoting *Bogan*, 523 U.S. at 55). Action is legislative if it "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Leapheart*, 705 F.3d at 313. A legislator's potential or alleged motives are "wholly irrelevant to [the] determination of whether [a legislator is] entitled to legislative immunity." *Id*. (quoting *State Emps. Bargaining Agent Coal v. Rowland*, 494 F.3d 71, 90 (2d Cir. 2007)) (alterations in original).

No. 4:21-cv-1179-KGB, 2022 WL 4133340, at *5 (E.D. Ark. Sept. 12, 2022) (first, third, and fourth alterations in original). Similarly, "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54. "[I]t simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Id*. at 55 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)). Voting for an ordinance is a "quintessentially legislative" act. *Bogan*, 523 U.S. at 55; *see also Young v. Mercer County Commission*, 849 F.3d 728, 733 (8th Cir. 2017) ("Certain actions—such as voting for an ordinance—are by their nature quintessentially legislative.") (Quotation omitted). Additionally, "[a]n action that 'reflect[s] a discretionary, policymaking decision implicating the budgetary priorities of the [county]' falls within the sphere of legislative activity." *Young*, 849 F.3d at 733-34 (quoting *Bogan*, 523 U.S. at 55-56) (second and third alterations in original); *see also Baraka v. McGreevey*, 481 F.3d 187, 196 (3d Cir. 2007) (providing examples of legislative activities such as "'voting for a resolution, subpoenaing and seizing property and records for a committee hearing, preparing investigative reports, addressing a congressional committee, and, of course, speaking before the legislative body in session'") (quoting *Youngblood v. DeWeese*, 352 F.3d 836, 840 (3d Cir. 2004))).

3. Application

In addition to Plaintiff's Section 1983 claims being time-barred, the individual Defendants are all entitled to legislative immunity on Plaintiff's 1983 claims. The City Counsel members, DeBuhr, Darrah, Miller, Kruse, and Taiber, by voting to pass Resolution 21,893 for the immediate implementation of the Public Safety Program and reorganization of the Public Safety Department, performed a "quintessentially legislative" act. *See Bogan*, 523 U.S. at 55; *Young*, 849 F.3d at 733. Similarly, Mr. Gaines and Mr. Olson are also entitled to legislative immunity based on their participation in crafting Resolution 21,893 and participating in the deliberations surrounding Resolution 21,893. *See Bogan*, 523 U.S. at 55 (legislative immunity applicable to a mayor who signed a city council's ordinance into law and participated in the "integral steps in the legislative process"); *Green v. DeCamp*, 612 F.2d 368, 371 (8th Cir. 1980) (extending legislative immunity to counsel for a state senate committee where "the conduct of the (aid) would be a protected legislative act if performed by the Member himself"); *Ways v. City of Lincoln*, No. 4:00CV3216, 2002 WL 87068, at *6 (D. Neb. Jan. 23, 2002) (finding that legislative immunity applies to mayor, city attorney, and police chief due to involvement in drafting, debating, and passing of ordinance); *Baraka*, 481 F.3d at 195-96 ("Legislative immunity shields from suit not only legislators, but also public officials outside of the legislative branch when they perform legislative functions.").

Plaintiff's contention that the City Council members performed an administrative act in passing Resolution 21,893 is unpersuasive. Resolution 21,893 provided for the "immediate implementation of the Public Safety Program including reorganization of the Public Safety Department." (Doc. 15-5 at 225.) In regard to the creation of the Transition Plan and Firefighter Transition Task Force, the Mayor of Cedar Falls noted that "[d]uring the City Council Special Meeting of February 20, 2020, the City Council

resolved to immediately carry out full implementation of the [C]ity's Public Safety Officer Model"; thus, requiring "immediate elimination of the Firefighter job classification." (*Id.* at 235.) These are legislative, not administrative actions. *See Leapheart*, 705 F.3d at 313 (providing that an action is legislative if it "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power").

Plaintiff emphasizes that after the passing of Resolution 21,893, the Firefighter job classification remained "on the books"[8] and therefore was not eliminated. Plaintiff's emphasis is misplaced. Regardless of whether the Firefighter job classification remained "on the books" for some purposes, the record demonstrates that the Firefighter position was eliminated. First, Resolution 21,918, the creation of the Firefighter Transition Task Force and Transition Plan, states that that the Task Force was charged with "determining and recommending a plan of equitable outcomes for former firefighters displaced as a result of the ***elimination*** of the Firefighter job classification." (Doc. 15-5 at 237.) (Emphasis added.) Second, the eight remaining firefighters employed by the City were placed on paid administrative leave and given approximately three months to choose among three options (training for a public safety officer position, applying for a different job withing the City, or taking severance) or be laid off because their position was eliminated. Third, the 2023 City "Public Safety Services – Fire Division" organization chart shows only Public Safety Officers and no firefighters. (Doc. 21-9 at 75.) Thus, even if the firefighter position remained "on the books" for purposes of identifying and paying those positions until completion of the transition, practically speaking, the position was eliminated under the Transition Plan. Further, to the extent that Plaintiff complains

[8] Plaintiff makes repeated references to the position being "on the books." From the context of his arguments, he seems to argue that any evidence that the City or any of the Defendants acknowledged the existence of the position of "firefighter" constitutes the presence of the position "on the books" of the City.

that the passing of Resolution 21,893 simply transferred the duties of Firefighters to Public Safety Officers, Plaintiff's complaint is unpersuasive. Unlike cases where a city eliminates a position and then immediately creates a new position nearly identical to the eliminated position, here, the Public Safety Officer position was not newly created and entailed greater and different work duties than the firefighter position.

Based on the foregoing, I find that the City Council members, Mr. Gaines, and Mr. Olson were acting legislatively, not administratively, when passing and implementing Resolution 21,893. Indeed, the actions of all the individual Defendants in creating and passing Resolution 21,893 involved "a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents" and "involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office." *Bogan*, 523 U.S. at 55-56. Accordingly, I find that all the individual Defendants and Mr. Olson are entitled to legislative immunity and summary judgment on Plaintiff's Section 1983 claims.

D. Section 1983 Claims Against the City and Individual Defendants

1. Parties' Arguments

At the outset, the City notes that "Plaintiff's Section 1983 claims are premised upon his layoff from his firefighter position with the City, which Plaintiff has continually attributed to the passage of Resolution 21,893 providing for the immediate implementation of the Public Safety Program." (Doc. 33 at 19.) The City maintains that the "only action which is arguably supportive of Plaintiff's claims would be Plaintiff's layoff, which resulted not from Resolution 21,893 but rather from Plaintiff's response (or lack thereof) to the City's passage of 21,918 adopting the Transition Task Forces' Transition Plan for affected firefighters." (*Id.*) Thus, the City argues that Plaintiff's Section 1983 claims "may only be premised upon the City Council's passage of

Resolution 21,918." (*Id.* at 26.) The City contends that the City Council's passage of Resolution 21,918, which provided "options for affected firefighters aside from lay-off . . . shows the City Council's actions were legitimate and undermines Plaintiff's claim that this lay-off was retaliatory." (*Id.* at 37.) The City asserts that "Plaintiff is unable to establish the legitimate reasons for the Defendants' actions are pretextual." (*Id.* at 39.)

Plaintiff argues that Defendants "misstate what is at issue in this case—it is not the legitimacy of the implementation of the public safety model at any time and in any way. . . . What is at issue is the ***immediate*** implementation of the public safety model in early 2020[.]" (Doc. 43 at 43.) (Emphasis in original.) Plaintiff asserts that Defendant Olson "offered false and pretextual economic rationales," claiming that replacing firefighters with public safety officers "would generate millions in savings for the City[.]" (*Id.* at 44.) Plaintiff also contends that "the 'efficiencies' Olson claimed . . . were in reality quite limited." (*Id.*) Plaintiff maintains that the "City's economic rationale simply did not explain the necessity of abruptly laying off the City's eight remaining Firefighters after years of backfilling Firefighters through attrition . . . nor explain why the exact same economic rationale did not apply to the non-cross-trained Police Officers, Fire Supervisors, or Police Supervisors[.]" (*Id.* at 44-45.) Further, Plaintiff's argues that Defendants' claim that they "were motivated by concerns over an alleged hostile work environment . . . is threadbare." (*Id.* at 45.) Plaintiff notes that "as of January 2020, the City was still assigning [him] to lead training in the Fire Division" and for Defendants "to claim that, just a month later, conditions were so bad in the Fire Division that it legitimately justified initiating actions to remove the Firefighters, including [Plaintiff], from their positions en masse, is preposterous and belied by the record." (*Id.* at 45-46.)

2. Applicable Law

A First Amendment retaliation claim under Section 1983 is "analyzed under a burden shifting framework which requires [a plaintiff] to establish a prima facie case of retaliation by showing that (1) [he or] she engaged in a protected activity, (2) [he or] she suffered an adverse employment action; and (3) a causal connection existed between the two." *Butler v. Crittenden County, Ark.*, 708 F.3d 1044, 1050-51 (8th Cir. 2013) (citing *Takele v. Mayo Clinic*, 576 F.3d 834, 839 (8th Cir. 2009); *Davison v. City of Minneapolis, Minn.*, 490 F.3d 648, 655 (8th Cir. 2007)). "An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage. This might include termination, cuts in pay or benefits, and changes that affect an employee's future career prospects." *Charleston v. McCarthy*, 926 F.3d 982, 989 (8th Cir. 2019) (quoting *Wagner v. Campbell*, 779 F.3d 761, 766 (8th Cir. 2015), in turn quoting *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007)). Showing a causal connection between the protected activity and adverse employment action requires a plaintiff to demonstrate that "the protected activity was a '"but-for cause" of the adverse action, "meaning that the adverse action against the plaintiff would not have been taken absent [a] retaliatory motive."'" *De Rossitte v. Correct Care Solutions, LLC*, 22 F.4th 796, 804 (8th Cir. 2022) (alteration in original) (quoting *Graham v. Barnette*, 5 F.4th 872, 889 (8th Cir. 2021), in turn quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019)); *see also Morris v. City of Chillicothe*, 512 F.3d 1013, 1018 (8th Cir. 2008) ("In order for an employee to state a claim under the First Amendment, he [or she] must show that his [or her] conduct was constitutionally protected and that the protected conduct was a 'substantial' or 'motivating' factor in the defendant's action which resulted in dismissal.") (Citing *Green v. St. Louis Housing Authority*, 911 F.2d 65, 70 (8th Cir. 1990)).

Under the burden shifting framework, if the plaintiff makes a prima facie case, "the burden shifts to the employer to show a legitimate, nondiscriminatory reason for [its] actions." *Morris*, 512 F.3d at 1019 (citation omitted). "If the employer meets this burden, the burden shifts back to the [plaintiff] to show that the employer's actions were a pretext for illegal retaliation" and "[t]his third step of showing that a defendant's justification for firing is unworthy of credence is harder to overcome than the prima facie case because evidence of pretext is viewed in the light of the employer's justification." *Id*. (citations omitted); *see also Sherman v. Berkadia Commercial Mortgage LLC*, 956 F.3d 526, 532 (8th Cir. 2020) (requiring plaintiff to "show that the reason offered was mere pretext, and that, in fact, retaliatory animus motivated the action"). "Evidence of pretext is viewed in light of the employer's justifications and may be established by 'evidence the employer's explanation lacked basis in fact, evidence the employee recently received favorable reviews, evidence the employer's proffered reason for its employment decision changed over time, or with evidence the employer treated similarly situated employees who engaged in the protected activity more favorably.'" *Ackerman v. State of Iowa*, 19 F.4th 1045, 1060-61 (8th Cir. 2021) (quoting *Henry v. Johnson*, 950 F.3d 1005, 1014–15 (8th Cir. 2020)).

"Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Clinton v. Garrett*, 551 F.Supp.3d 929, 955-56 (S.D. Iowa 2021) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978)). "[A] municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id*. at 956 (citations omitted). "Instead, '[a] municipality may only be liable for a constitutional violation resulting from (1) an official municipal

policy; (2) an unofficial custom, or (3) failure to train or supervise.'" *Id*. (quoting *Robbins v. City of Des Moines*, 984 F.3d 673, 681-82 (8th Cir. 2021)).

3. Application

In addition to Plaintiff's Section 1983 claims being time-barred and the individual Defendants and Mr. Olson having legislative immunity, all Defendants—the City, individual Defendants, and Mr. Olson—are entitled to summary judgment on Plaintiff's Section 1983 claims because Plaintiff is unable to demonstrate that Defendants' actions were pretext for retaliation. For purposes of the instant motions for summary judgment only, the Court presumes that Plaintiff has set forth a prima facie case of retaliation. I also find that Defendants have articulated legitimate nondiscriminatory reasons for the passing and implementation of Resolutions 21,893 and 21,918. Specifically, Defendants state that the Public Safety Program was implemented "to improve and address performance, efficiency, departmental, and budgetary concerns relating to public safety within the City, and to assist in remedying the divisive, hostile work environment which was present with the Public Safety Department." (Doc. 33 at 36; Doc. 30-2 at 217 & 220 (outlining advantages of Public Safety Program), 223-25 (City Council Work Session minutes regarding implementation of Public Safety Program), 325-26 (Deposition of DeBuhr noting that one of the reasons she voted for Resolution 21,893 was "the work environment had gotten toxic . . . for many employees and there was a need to make a change . . . to implement the full public safety division" and "[t]he goal was that there would be a better teamwork and a better work environment"), 340 (Deposition of Miller noting that one of the reasons he voted for Resolution 21,893 was "the departments were not getting along and in a number of different situations, and it . . . led me to feel like I needed to try and do something as a Council member"), 372 (Affidavit of Kruse, stating "I also believed, and still believe, the implementation of the Public Safety Officer model was necessary to alleviate and improve the working environment within the Public Safety

Department" and "At the time of passing Resolution 21,893 and Resolution 21,918, I believed, and still believe, the Public Safety Officer model is the most efficient and cost-effective way to provide safety services to the City of Cedar Falls and its citizens.")).

Plaintiff cannot demonstrate that Defendants' legitimate reasons were mere pretext and that Defendants actually retaliated against Plaintiff for his public comments through the Local 1366 Union's Facebook account or articles written by Plaintiff in *The Waterloo-Cedar Falls Courier*. The individual Defendant City Council members each testified in their depositions that they were aware of critical Facebook posts on the Union's Facebook page, but none of them knew who the author of the posts was. (Doc. 30-2 at 323, 333, 337, 341, 372.) Moreover, Plaintiff directs the Court to various undisputed statements of fact, *see* Doc. 34-1 at ¶¶ 105, 109, 141, 146-48, 151-52, 162, 164, 166-69, 172, 189-92, 193, with each paragraph pertaining to statements from various City Council members. However, after reviewing each fact offered by Plaintiff, not a single paragraph cited pertains specifically to Plaintiff. Instead, each paragraph references a variety of statements, some vague, some generic, and others more specific, which relate to firefighters in general or the Local 1366 Union. Plaintiff also cites other comments about the Union, though none of these comments specifically relate to Plaintiff's speech in opposition to the Public Safety Program. (Doc. 34-1 at ¶¶ 141, 147, 189, 193; *see also id*. at ¶¶ 33, 36, 82, 106 (discussing things the Union did but failing to demonstrate how such actions by the Union relate to Plaintiff's speech or being laid off)). Based on the foregoing, I find that Plaintiff has failed to demonstrate a genuine issue of fact on the existence of pretext on his Section 1983 free speech claim. *See Barnard v. Jackson County, Mo.*, 43 F.3d 1218, 1226 (8th Cir. 1995) (citing *O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1368 (7th Cir. 1993), *abrogated on other grounds*) ("[T]he mere fact that protected speech precedes an employment decision does not create the inference that the speech motivated the employment decision.").

Similarly, Plaintiff cannot demonstrate that Defendants' legitimate reasons were mere pretext and that Defendants actually retaliated against Plaintiff for his union activities. The parties agree that union membership is protected by the right of association under the First and Fourteenth Amendments. (Doc. 33 at 30; Doc. 43 at 40.) Thus, Plaintiff must show that his "union activity was a 'motivating factor' behind the adverse employment action[] that [he] allege[s]." *Lunow v. City of Oklahoma City*, 61 Fed. App'x 598, 606 (10th Cir. 2003). In support of his claim, Plaintiff simply directs the Court to portions of his statement of undisputed facts outlining actions taken by the Union and comments by various City Council members critical of the number of Union grievances and frustration with the Union's lack of cooperation with public safety officers. (Doc. 34-1 at ¶¶ 82, 88, 107, 120, 143-44, 146-47, 190-91.) Plaintiff offers no explanation or evidence that the Union's activities were a motivating factor in Defendants' decision to implement the Public Safety Program. Furthermore, it is not even clear that Plaintiff was involved (or perceived by Defendants to have been involved) in some of the enumerated activities. Accordingly, based on the foregoing, I find that Plaintiff has failed to demonstrate pretext on his Section 1983 freedom of association claim.

Finally, Plaintiff cannot demonstrate that Defendants' legitimate reasons were mere pretext and that Defendants actually retaliated against Plaintiff for exercising his First Amendment right to petition. Plaintiff's freedom to petition claim rests on his filing an affidavit with the Union's June 2019 lawsuit against the City, the filing of grievances in November and December 2019, and the filing of a prohibited practice charge in February 2020. (Doc. 43 at 42.)

In *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379 (2011), the Supreme Court held that in a claim under the Petition Clause of the First Amendment, a plaintiff must show that the petition was on a matter of public concern. *Id*. at 382-83. Grievance issues

related to employment matters concerning an individual employee such as "working conditions, pay, discipline, promotions, leave, vacations, and terminations" are not matters of public concern. *Id*. at 391. "The Petition Clause is not an instrument for public employees to circumvent" statutory and regulatory mechanisms adopted by the government "when pursuing claims based on ordinary workplace grievances." *Id*. at 392. "[W]hether an employee's petition relates to a matter of public concern will depend on 'the content, form, and context of [the petition], as revealed by the whole record.'" *Id*. at 398 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48, and n.7 (1983)) (second alteration in original). "The right of a public employee under the Petition Clause is a right to participate as a citizen, through petitioning activity, in the democratic process. It is not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts." *Id*. at 399.

Here, both the November 2019 and December 2019 grievances related to individual employment matters, not matters of public concern. The November 2019 grievance involved Plaintiff's concern that the City's investigation and written reprimand of him after complaints that he had been engaging in harassing behavior was conducted improperly. *See* Doc. 34-5 at 1-2. The December 2019 grievance concerned a request to investigate statements made by the mayor at that time, Jim Brown, regarding allegations that Mr. Brown stated at various meetings that Plaintiff abused his sick leave. *See id*. at 3-4. These are not matters of public concern but rather matters of Plaintiff's prior discipline by the City and issues relating to his use of sick leave. Similarly, the February 2020 prohibited practice charge involved allegations that the City failed to properly bargain changes to the firefighters' vacation policy. *See* Doc. 34-6 at 19-21. Because none of these involve matters of public concern, but rather matters of everyday employment disputes, I find that the November 2019 grievance, December 2019

grievance, and February 2020 prohibited practice charge do not support Plaintiff's retaliation claim based on his freedom to petition.

As for the affidavit Plaintiff filed with the Union's June 2019 petition for injunctive and declaratory relief brought against the City, Plaintiff offers no evidence that Defendants' actions in passing Resolution 21,893 was in retaliation for Plaintiff providing an affidavit in the Union's lawsuit, or that the passing of Resolution 21,893 had anything to do with the affidavit Plaintiff provided for the Union's lawsuit. Plaintiff seems to be suggesting that merely providing the affidavit for the Union's lawsuit proves retaliation on the part of Defendants in passing Resolution 21,893. I am not persuaded by Plaintiff's suggestion and find Plaintiff has failed to demonstrate pretext on his Section 1983 freedom to petition claim. *See Reasonover*, 447 F.3d at 578 ("Evidence, not contentions, avoids summary judgment"); *see also Williams*, 889 F.3d at 931 (explaining that in order to survive summary judgment, "the nonmoving party must substantiate his [or her] allegations with sufficient probative evidence [that] would permit a finding in [his or her] favor based on more than mere speculation, conjecture, or fantasy") (second alteration in original) (quotation omitted).

Additionally, the passing of Resolution 21,893 and immediate implementation of the Public Safety Program for all practical purposes eliminated the firefighter position within the Public Safety Department and led to the passage of Resolution 21,918 and the implementation of the Transition Plan. The Transition Plan outlined three options for firefighters moving forward: (1) cross-train for a Public Safety Officer position; (2) apply for another position with the City; or (3) receive severance. The Transition Plan provided that if none of the three options were selected by June 22, 2020, the employee would be laid off. Options one and two afforded Plaintiff and the other firefighters the opportunity to remain employed by the City. This supports the legitimacy of the City Council's actions and undermines Plaintiff's claim of retaliation.

Based on the foregoing, I find that Defendants are entitled to summary judgment on Plaintiff's Section 1983 claims because Plaintiff has failed to demonstrate that Defendants' actions in passing Resolution 21,893 were pretext for retaliation.

E. Intentional Infliction of Emotional Distress Claim

1. Parties' Arguments

Defendants argue that Plaintiff's intentional infliction of emotional distress ("IIED") claim fails as a matter of law. (Doc. 15-3 at 11.) Specifically, Defendants argue that the conduct complained of by Plaintiff "does not constitute outrageous conduct to support a claim of IIED. (*Id.*) Defendants maintain that any comments or statements identified by Plaintiff which relate to the "creation, passing and implementation of the Resolution[s] come nowhere near the level of outrageousness required by Iowa law." (*Id.* at 15.) Defendants conclude that "[t]here is no evidence by which a reasonable jury could determine any sufficiently 'outrageous' conduct has occurred" and "[t]his claim should, therefore, be dismissed on summary judgment." (*Id.* at 18.)

Plaintiff argues that "the primary, though not sole, action comprising the named [D]efendants' shared outrageous conduct is their selective layoff of the City of Cedar Falls' Firefighters . . . and their blatant expressions of animus toward Local 1366 and [P]laintiff, specifically." (Doc. 21 at 9.) Plaintiff maintains that Defendants "knew or should have known that they acted with no legitimate purpose in selectively laying off the Firefighters, including [P]laintiff, based on anti-union animus and in retaliation for their protected conduct." (*Id.*) Plaintiff asserts that Defendants' "reliance on pretextual economic arguments to legitimize suddenly laying off the City's few remaining Firefighters was outrageous." (*Id.* at 10.) Plaintiff contends that Defendants "all publicly denigrated the Firefighters generally, Local 1366 and/or [Plaintiff] in the years, months, and days leading up to the Firefighter layoffs." (*Id.*)

2. Applicable Law

Under Iowa law, "[a] claim of intentional infliction of emotional distress requires the plaintiff to prove: (1) the defendants engaged in extreme and outrageous conduct; (2) the defendants intentionally caused, or recklessly disregarded the likelihood of causing, severe or extreme emotional distress to the plaintiff; (3) the plaintiff in fact suffered severe or extreme emotional distress; and (4) the defendants' extreme and outrageous conduct was the actual and proximate cause of the sever or extreme emotional distress." *White v. Harkrider*, 990 N.W.2d 647, 652 (Iowa 2023) (citing *Lennette v. State*, 975 N.W.2d 380, 391-92 (Iowa 2022); *Hedlund v. State*, 930 N.W.2d 707, 723-24 (Iowa 2019)). "To be actionable, the allegedly tortious conduct must be 'so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *White*, 990 N.W.2d at 652 (quoting *Fuller v. Loc. Union No. 106 of the United Bhd. of Carpenters & Joiners*, 567 N.W.2d 419, 423 (Iowa 1997), in turn quoting *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 801 (Iowa 1984)). "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his [or her] resentment against the actor and lead him [or her] to exclaim, 'Outrageous!'" *Smith v. Iowa State University of Sci. and Tech.*, 851 N.W.2d 1, 26 (Iowa 2014) (quoting *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156-57 (Iowa 1996)).

The standard for outrageous conduct is not easily met and such conduct must be extremely egregious. *Hedlund*, 930 N.W.2d at 724 (quotation omitted). Insults, bad manners, or hurt feelings are insufficient. *Id.*; *see also McClinton v. Iowa Methodist Medical Center*, 444 N.W.2d 511, 514 (Iowa Ct. App. 1989) ("The liability [for IIED claims] clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . Restatement (Second) of Torts § 46 Comment d."). Substantial evidence of extreme conduct is required. *Id.* (citing *Vinson v. Linn-Mar*

Cmty. Sch. Dist., 360 N.W.2d 108, 118 (Iowa 1984)). "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort." *Vinson*, 360 N.W.2d at 118 (quoting Restatement (Second) of Torts § 46 Comment d).

Courts determine, "in the first instance, as a matter of law, whether the conduct complained of may reasonably be regarded as outrageous." *White*, 990 N.W.2d at 652 (quoting *Hedlund*, 930 N.W.2d at 724, in turn quoting *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 183 (Iowa 1991)). "It is a simpler matter to discover what kinds of behavior the Iowa Supreme Court has held insufficiently outrageous to sustain the tort than it is to find out what kind of behavior is sufficiently egregious." *Chester v. Northwest Iowa Youth Emergency Services Center*, 869 F.Supp. 700, 710 (N.D. Iowa 1994). *See White*, 990 N.W.2d at 654 ("The defendants' show of force for a limited period of time outside the home in effecting an arrest of a potentially armed suspect for a serious crime, where the home was not breached, where no shots were fired, where the plaintiff was not the target of the conduct, where the plaintiff was not arrested, and where the plaintiff was not physically restrained or touched was not so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community") (quotation omitted); *Hedlund*, 930 N.W.2d at 725-26 (alleging supervisors repeating known falsehoods regarding the plaintiff's threat to public safety, repeating these alleged falsehoods to the governor and the governor publicly addressing the plaintiff's termination being for department morale and public safety were not sufficiently outrageous); *Fuller*, 567 N.W.2d at 421, 423 (falsely accusing the plaintiff to the police of driving while intoxicated and falsely accusing the plaintiff to fellow union members that the plaintiff once attempted to kill his relatives and

was fired from a previous job in law enforcement "in no way" constituted outrageous conduct); *Van Baale*, 550 N.W.2d at 157, *abrogated on other grounds* (terminated police officer deciding to plead guilty on domestic abuse charges instead of going to trial where police chief "guaranteed" the officer would not lose his job if he pleaded guilty was not sufficiently outrageous); *Northrup v. Farmland Industries, Inc.*, 372 N.W.2d 193, 198-99 (Iowa 1985) (finding plaintiff's termination for alcoholism not outrageous even though his supervisor had yelled at him, told him he would not tolerate his behavior, suggested he had falsified documents, and accused him of lying); *Vinson*, 360 N.W.2d at 119-20 (deliberate campaign by employer to "badger and harass" the plaintiff even where the defendants' actions were "petty and wrong, even malicious" did not constitute sufficient outrageous behavior).

3. Application

In Iowa, the statute of limitations for injuries to a person is two years. Iowa Code Section 614.1(2). Therefore, Plaintiff's claim for intentional infliction of emotional distress has a two-year statute of limitations. *See Borchard v. Anderson*, 542 N.W.2d 247, 249 (Iowa 1996) (applying a two-year statute of limitations to IIED claims). The parties agree that the applicable statute of limitations for Plaintiff's IIED claim is two years. (Doc. 33 at 16; Doc. 43 at 32.) I find that Plaintiff's IIED claim accrued no later than March 23, 2020, the date Plaintiff was notified that he would be laid off unless he chose one of three options outlined in the Transition Plan. In his Complaint, Plaintiff's allegations relating to his IIED claim all stem from actions taken prior to March 23, 2020. (Doc. 1 at 4-20, 26-27.) Therefore, because Plaintiff filed his Complaint on June 21, 2022, more than two years after his claims accrued, Plaintiff's IIED claim is time-barred.

Even if Plaintiff's IIED claim was timely, Defendant's are entitled to summary judgment on the claim because Plaintiff cannot prove that the Defendants engaged in extreme and outrageous conduct. In support of his IIED claim, Plaintiff relies on the

following facts: (1) Defendant Taiber referring to "problematic" members of the Union; (2) City officials complaining to the business agent for the Teamsters regarding the Teamsters issuing a proclamation support of the Firefighter's Union; (3) a letter to the Teamsters describing Plaintiff as "a problem and an obstacle when it comes to improving the working relationship between management and Local 1366" (Doc. 21-10 at 28); (4) a text message from Nick DeBuhr, son of Defendant Susan DeBuhr, claiming that his mother had told him that the firefighters had a system for calling in sick to get overtime hours; (5) Defendant Miller complaining about the cost of Union complaints and grievances; (6) Defendant Darrah dismissing firefighter safety concerns related to Public Safety Officer training as "weak"; (7) Defendant Miller disparaging a Union social media post at a City Council meeting; (8) Defendant Taiber asking Defendant Olson whether he thought the reason more firefighters had not chosen to become public safety officers was because they feared the polygraph or modified Cooper's test; (9) Defendant Olson blaming the Union for not wanting to follow PERB rules; (10) Defendant Miller complaining that Union was unwilling to work with Defendant Olson and expressing frustration that firefighters did not follow policy set by the City Council; (11) Defendant Darrah claiming that the firefighters had not given "positive suggestions"; (12) Defendant Taiber insinuating that the firefighters did not get along with the public safety officers; (13) Defendant Kruse complaining about the number of grievances filed by firefighters over a two-year period; (14) Defendant Miller indicating part of his reasoning for moving forward with the Public Safety Officer model was a "union issue"; (15) Defendant Miller complaining that firefighters and public safety officers would not work together; (16) Defendant Miller blaming Plaintiff for attitude of firefighters regarding public safety officers;[9] (17) Defendant Miller referring to a grievance meeting where eight people

[9] While not specifically stated in Plaintiff's Statement of Additional Facts, presumably Defendant Miller was indicating that the firefighters had a bad attitude toward the public safety officers.

alleged Plaintiff had created a "harassing condition"; (18) Defendant Miller placing blame for conflict between firefighters and public safety officers on Plaintiff; (19) Defendant Miller saying "the fire union won't work this out" in context of the Public Safety Officer model; (20) "Kruse said that the City had to resolve the alleged 'hostile environment'" (Doc. 21-3 at 11, ¶ 81)[10]; (21) Defendant Miller emailing a community member indicating that community members support the Public Safety Officer model but fear retaliation, again presumably from the firefighters, for publicly supporting the model; (22) Defendant Taiber blaming Union "brass" for resistance to Public Safety Officer model; (23) Defendant Taiber complaining about the Union's overuse of the grievance procedure and overtime; (24) Defendant Taiber complaining about the "drawback" of collective bargaining; and (25) Defendant Darrah saying that "something" was in the way of the firefighters cooperating with the Public Safety Officer model. (Doc. 21-3 at ¶¶ 16, 20-21, 23-24, 29, 36, 42, 53, 56, 61-66, 72-75, 77, 80-81, 86, 91-95.)

While the actions listed may have constitute a basis for Defendant to feel upset and aggrieved by Defendants' behavior, none of these facts, statements, complaints, concerns, comments, or actions, individually or taken together, constitute conduct that is "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *White*, 990 N.W.2d at 652 (quotation omitted). None of these facts, statements, complaints, concerns, comments, or actions, individually or taken together, would cause "an average member of the community [to] arouse his [or her] resentment against the actor and lead him [or her] to exclaim, 'Outrageous!'" *Smith*, 851 N.W.2d at 26. Indeed, the standard for outrageous conduct is conduct that is extremely egregious and the facts, statements,

[10] It is not entirely clear what this additional statement of fact is referencing, as it is quoted in its entirety, but presumably the alleged hostile work environment was between firefighters and public safety officers.

complaints, concerns, comments, or actions presented by Plaintiff, individually or taken together, are insufficient to meet the standard of outrageous conduct and are nothing more than insults, bad manners, or hurt feelings, which are also insufficient. *Hedlund*, 930 N.W.2d at 724; *see also McClinton*, 444 N.W.2d at 514 ("The liability [for IIED claims] clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."). Moreover, Plaintiff has failed to offer evidence, let alone substantial evidence of extreme conduct. *Hedlund*, 930 N.W.2d at 724; *see also Taggart v. Drake University*, 549 N.W.2d 796, 802 (Iowa 1996) (finding actions by a supervisor losing his temper, yelling at a female employee in a sexist and condescending manner, referring to her as a "young woman," accusing her of causing trouble and making his life difficult, verbally berating her, getting out of his chair and leaning over the table glaring at her in a threatening manner and intending to cause her to fear for her physical safety and suffer emotional distress and anxiety was not outrageous conduct for an IIED claim). Accordingly, I find that Defendants are entitled to summary judgment on Plaintiff's IIED claim.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion for Partial Summary Judgment **(Doc. 15)** is **granted**; Defendants' Motion for Summary Judgment **(Doc. 30)** is **granted**; and Plaintiff's Motion for Summary Judgment **(Doc. 34)** is **denied**. Because this order disposes of all claims, the Clerk shall enter judgment in favor of Defendants and the trial in this matter shall be canceled.

IT IS SO ORDERED this 5th day of January, 2024.

Mark A. Roberts, United States Magistrate Judge
Northern District of Iowa