



1 Inherent in this division is the issue of the role of Native  
2 Americans. The majority of Apache County is covered by the Navajo  
3 Nation. The Apache Tribe is in the lower portion. The rest of the  
4 County, comprising most of the south, is "Anglo," including St.  
5 Johns, the county seat. The traditional wing worked to  
6 disenfranchise Native Americans by instituting poll requirements.  
7 This resulted in a federal court consent order preventing  
8 disenfranchising. For decades, and even to this day, the Anglo  
9 south has controlled the County.

10 Defendant Michael Whiting and those he has hired, Platt, Young  
11 Hounshell, represent the old school, as does new Board of  
12 Supervisors member John Lee and County Manager Delwyn Wengert.  
13 Hounshell was Apache County Sheriff from 1999-2005 at which time he  
14 treated the office as if it were his personal fiefdom. He had his  
15 employees working on his home, driving his son around for personal  
16 and school events, tutoring his son, and going with him on paid  
17 fishing trips, among many other corrupt acts. See State v.  
18 Hounshell, CR2007-006466-001 (Maricopa Cty. Sup. Ct.).

19 Adverse to the traditional old school was Criss Candelaria,  
20 the reformist Apache County Attorney from 2002-2008. Candelaria  
21 hired special prosecutor, Grant Woods, who prosecuted Hounshell for  
22 corruption. In response, Hounshell manipulated the political split  
23 in the party by claiming to the Navajos that he was being  
24 prosecuted in retaliation for favoring them with services, such as  
25 stationing extra deputies on the reservation. In other words,  
26 Hounshell, although belonging to the old school wing, undermined  
27 the reform wing by claiming that the reformists were after him on  
28 nitpicking charges because he was empowering the Navajos, when

1 empowering all citizens, including Navajos, was the very thing the  
2 reformists wanted to do. However, his pleas resonated with certain  
3 leaders who not only ignored his corruption, but even testified for  
4 him at his sentencing hearing.<sup>1</sup>

5 At that time, Mr. Whiting was working for Candelaria as a  
6 deputy attorney. Although Whiting had nothing personal against and  
7 no personality conflicts with Candelaria, he thought Candelaria was  
8 doing a poor job, in particular, because of the prosecution of  
9 Hounshell. Whiting complained about how Candelaria was always  
10 talking about Hounshell's being corrupt, because of what, to  
11 Whiting, were nitpicking things. Whiting thought the prosecution  
12 was a waste. He called Hounshell the "Million Dollar Man," because  
13 of the amount of fees paid to Woods to reach a final plea agreement  
14 over the misuse of a trailer. The prosecution also resulted in a  
15 perjury conviction of Hugh Lynch, a deputy sheriff who participated  
16 in the corrupt acts and a Navajo political organizer. Whiting quit  
17 his job and testified for Hounshell. He then ran for County  
18 Attorney and Hounshell and Lynch campaigned heavily for him. The  
19 three lived out of a trailer.

20 Despite working as a Deputy County Attorney and for many years  
21 for a Flagstaff firm, where he apparently had not been offered  
22 partnership, Mr. Whiting had no jury trial or office management  
23 experience, but he did have important connections and financial  
24 support. He won by a landslide. His cousin, John Lee, won the seat  
25 on the Board of Supervisors traditionally held by the old school

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27 <sup>1</sup> Sentencing resulted in a felony conviction and a  
28 restriction never to hold office again. The felony could be reduced  
to a misdemeanor in May 2009.

1 wing. The position had been held by lawyer David Brown. While  
2 campaigning, Whiting worked for Brown. Whiting and Lee did campaign  
3 work together. Another person at that office active in the  
4 campaign was Brittany Rogers who is related to Whiting. She was  
5 there when Brian Hounshell stated he wanted Thompson's position.

6 Asked at his deposition whether he ever testified before,  
7 Whiting did not mention the Hounshell hearing and then feigned  
8 confusion about what was "testimony." Whiting also claimed he did  
9 not know Hounshell when he testified for him and did not even know  
10 which side called him to testify or why. The truth is he knew  
11 Hounshell from church. Both are LDS. Whiting had been a mentor to  
12 Hounshell's son, Beau Hounshell, and hung out with him regularly.  
13 Hounshell's counsel, Michael Kimerer, is one of Whiting's campaign  
14 donors. Whiting's false claim of not knowing Hounshell or why or  
15 by whom he was called to testify or what "testify" meant is an  
16 effort to hide their political and religious connection. As County  
17 Attorney, Whiting would know why people testify at sentences.

18 Once Whiting was elected, it was payback time for those who  
19 supported him or were of his faith. However, the highest paid  
20 incumbents, Henry Thompson, the Director of Victim Services  
21 ("DVS"), and Barbara Herreras, the Administrative Coordinator  
22 ("AC") (effectively, the Office Manager) were classified employees,  
23 protected from termination, unless for cause. The County suggests  
24 it has no merit system, but it argued to the Arizona Court of  
25 Appeals that it does have a merit system consistent with the state  
26 statute. See Hounshell v. White 1 CA-CV 06-0730. Defendants are  
27 judicially estopped from arguing otherwise now. Moreover, both  
28 County Manager Wengert and HR representative Glenn Joy have

1 testified the County has a policy AND a practice that classified  
2 employees, like Thompson, cannot be fired, unless for cause.

3 One way the County has attempted to get around the merit  
4 system is to eliminate the undesired employee's position.  
5 Defendants followed this route in this case. Before even taking  
6 office, Whiting obtained the job descriptions of several office  
7 employees by fax from Wengert or someone at his office.<sup>2</sup> Whiting  
8 reworded Thompson and Herreras's job duties, even though the actual  
9 functions were kept the same, and created two new positions, Grants  
10 Manager and Chief of Staff (Office Manager). Whiting did this by  
11 combining a portion of the Director of Victim Service's job  
12 functions with a portion of the Administrative Coordinator's job  
13 functions and assigned them as the Chief of Staff's job functions.  
14 He then combined the rest of the DVS's job functions with the rest  
15 of the AC's job functions and assigned them as the Grant Manager's  
16 job functions. He then gave them new job titles (Chief of Staff  
17 and Grants Manager) and hired two new persons he had already picked  
18 for the jobs, Marcor Platt and Platt's sister Valerie Young.  
19 Thompson and Herreras's declarations show their job functions and  
20 the Chief of Staff and the Grants Manager's job functions are the  
21 same.

22 Platt and Young are both LDS, like Whiting, Wengert, and Lee.  
23 Platt was out of work. The Platt family contributed financially  
24 to Whiting and also to Lee. Whiting testified those who gave their  
25 money to his campaign were his strongest supporters. Whiting's  
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28 <sup>2</sup> Joy's testimony shows the descriptions had to have been sent  
from the County Manager's office and not from HR.

1 affidavit states he did not offer employment to Platt before the  
2 election; by inference, after the election, but before any  
3 reorganization was submitted to the Board of Supervisors, Whiting  
4 did offer employment to Platt. This was admitted in response to  
5 requests for admissions. Whiting testified he made the decision in  
6 December.

7 Whiting and Wengert discussed hiring Platt before anything was  
8 said to the Board or to Thompson about terminating him. A jury can  
9 determine a decision to "reorganize" was devised to give Platt  
10 plaintiff's job and salary. Plaintiff was one of the highest paid  
11 in the Office since he was employed for 19-1/2 years. There is  
12 nothing in Platt's affidavit that indicates he was not told he  
13 would be hired before any reorganization was set in process. Platt  
14 would have stated the denial in his affidavit, if it were not the  
15 case, since he denies other points.

16 New Board member, John Lee, would regularly come into the  
17 County Attorney's Office and meet with Mr. Whiting behind closed  
18 doors. They used a sound blocking machine so no one could over  
19 hear their conversations. The Office had a policy that all visitors  
20 had to sign in, but Lee would just walk back to Whiting's office  
21 without stopping or signing in. After the election, Lee saw  
22 Barbara Herreras in the court house and asked her what she intended  
23 to do for a job. She was confused and stated she intended to stay  
24 in the job she had. He looked at her with surprise and asked her  
25 whether she had told Michael Whiting this. He also saw plaintiff  
26 Henry Thompson soon after the election and told him not to worry,  
27 his job was safe. The foregoing shows that Mr. Lee had to have

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1 been having conversations with Whiting about who was going to be  
2 terminated.<sup>3</sup>

3 On January 9, 2009, less than a week after Mr. Whiting took  
4 office, HR told Joy to attend termination meetings for Thompson and  
5 Herreras on January 16, 2009. This shows the County Manager knew  
6 and approved of the reorganization plan that would terminate  
7 Thompson and Herreras. On January 16, 2009, Whiting informed  
8 Thompson that HR was reorganizing and Tuesday (January 20, 2009)  
9 would be his last day of work. Whiting put up his hands and said  
10 "Sorry" and "I tried," as if to say it was not his doing. He stated  
11 there would be a new Chief of Staff position and he wanted Thompson  
12 to apply for it. To tell Thompson Tuesday would be his last day,  
13 Whiting had to have received word the termination would go through.

14 However, Lenora Johnson, the reformer County Recorder, also  
15 tried to reorganize at that same time and HR told her she could not  
16 as the positions were classified and she would have to wait until  
17 the employees voluntarily vacated their positions. A jury can  
18 determine county management allowed Whiting to replace classified  
19 employees with new ones, when such a reorganization was not  
20 allowed. Wengert testified a reorganization that eliminates a  
21 position, but keeps the job functions with a new job title and  
22 hires new employees is not a reorganization as it defeats the  
23 purpose.

24 On Saturday, January 17, 2009, still days before the Board  
25 supposedly was first aware of any proposal to reorganize, Whiting  
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27 <sup>3</sup> That Lee thought Thompson would not be terminated is  
28 irrelevant as a change of mind obviously occurred.

1 sent HR his job posting to hire a Chief of Staff, a position that  
2 did not exist. A jury can determine Whiting was acting on  
3 knowledge the reorganization would be approved. Although County  
4 policy allowed Whiting to restrict applications to those persons  
5 within his department, he opened up the position to the public. Of  
6 course, only by doing this, could he hire Platt. Whiting states he  
7 "thought" Thompson would get the job, but a jury could decide  
8 Whiting's not restricting applicants to within the department  
9 showed he did not plan on hiring Thompson. One might think opening  
10 the position up to the public would require a sufficient  
11 application period so prospective applicants could learn of the  
12 position and apply on time, but Whiting restricted the job postings  
13 to the two days following the Board's January 20, 2009 upcoming  
14 meeting. Platt was the very first applicant. A jury could decide  
15 Platt had his application ready to go in accordance with the  
16 conspirators' plan. Where the application asks whether any relative  
17 is presently employed by the County, Platt wrote in his sister  
18 Valerie Young's name, even though she was not employed and had not  
19 yet even applied for the Grants Manager position. A jury can  
20 conclude Platt knew Young was given the Grants Manager position,  
21 even though the process had not yet taken place.

22 At the January 20, 2009 Board meeting, Whiting stated the  
23 reorganization was going to save his office \$46,000.00. Lee avidly  
24 supported by the reorganization and moved to approve it. The other  
25 two members delayed the effective date to give Thompson the chance  
26 to apply for a position in Ganado, 128 miles away. There was no  
27 travel allowance, no gas allowance, no expenses for staying  
28 overnight. Plaintiff's expert David Orlowski has made clear no

1 employee can be expected to commute 260 miles a day to mitigate  
2 lost wages. Mr. Thompson applied for the Chief of Staff position.  
3 It was obvious from the outset the interview process was a sham.  
4 Approximately seven questions were asked of the most generic  
5 nature. Applicant Rhonda McQuaid saw Thompson and commented on how  
6 the process was a joke. Platt got the job.

7 Mr. Whiting's proffered reasons for the reorganization are all  
8 pretexts. Although Whiting claimed there would be budget savings,  
9 a review of his proposal shows there is no monetary savings because  
10 the two new positions are paid roughly the same as the two  
11 eliminated positions.<sup>4</sup> At his deposition, Whiting confessed his  
12 eliminating Thompson "wasn't a budget issue." He testified, "That  
13 wasn't, We've got to save money on Victims Services." Thus, as a  
14 matter of undisputed fact, budget savings and financial issues are  
15 not the reason for Thompson's termination. A jury is not required  
16 to believe the termination was done for budgetary reasons when the  
17 people hired are making the same pay and doing the same job  
18 functions as the people fired. As Thompson and Herreras attest, the  
19 job functions also are the same.

20 Instead of budget issues, Whiting claimed, for the first  
21 time, that he eliminated the Director of Victim Services "to  
22 provide better services to victims." This too was a pretext as  
23 Whiting admitted he did not know what Henry Thompson's job  
24 entailed, "other than if a victim wanted to apply for compensation,  
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26 <sup>4</sup> The "savings" actually come from reducing attorney III  
27 positions to attorney II and even that is misleading because the  
28 attorney positions were vacant. Mr. Whiting used these deceiving  
figures to argue the savings came from eliminating Mr. Thompson.

1 they needed to talk to Henry." Whiting reiterated, "I don't know  
2 what Henry did as Director of Victim Services \* \* \*." He also  
3 could not say which of the typical duties of the Grants Manager or  
4 of the Chief of Staff were previously performed by Mr. Thompson.  
5 With respect to Ms. Herreras, he again admitted he had no idea what  
6 she did for job duties and he could not say which of the job duties  
7 listed for Chief of Staff or Grants Manager were her former duties.  
8 A jury would decide that not knowing what Thompson or Herreras's  
9 job duties were, it would be impossible for Whiting to have  
10 concluded services needed to improve with respect to those two  
11 positions and their job duties.

12 Whiting also testified he had no information that Thompson was  
13 doing a poor job or that Thompson was not getting his job done. As  
14 far as he knew, the job was getting done. Whiting would have  
15 proceeded pursuant to the merit system in disciplining Thompson for  
16 poor performance, if the job was not getting done. In fact,  
17 Thompson was doing a good job serving victims as the attached  
18 affidavits of both former County Attorneys Chriss Candelaria and  
19 Stephen Udall attest. Thompson had a superb reputation in the  
20 field, not just for the County but throughout the nation,  
21 especially in victim services on Indian reservations. He received  
22 numerous commendations throughout his career.

23 Whiting also presented to the Board a false organizational  
24 chart to make the office look as if it was unorganized while his  
25 new structure would be hierarchical and accountable, when there  
26 actually was no change. Whiting testified the investigators, the  
27 Chief Deputy, the Grants Manager, and the Chief of Staff (Office  
28 Manager) also all report to him directly. Under Candelaria, the

1 investigators, the Chief Deputy, the Director of Victim Services,  
2 and the Administrative Coordinator (Office Manager) all reported  
3 directly to him. Structurally, nothing changed. There was no  
4 reorganization. There were no new job functions. There were no  
5 eliminated job functions. There were no budgetary savings. There  
6 were only two persons terminated and two persons were hired.

7 Defendants next argue the office needed someone with a strong  
8 financial background, given the budget crisis. This too is a  
9 pretext. Whiting testified the budget had nothing to do with  
10 terminating plaintiff. Second, Herreras already was competently  
11 doing the finances. The office was operating within budget.  
12 Herreras did a great job to cut the last budget and the office was  
13 prepared for future cuts. Nothing suggests a need for greater  
14 financial expertise than the competent employees already doing the  
15 job. The pretext is further shown by the fact that Platt was soon  
16 called to active duty and his job was taken over by Stephanie  
17 McCarthy, a secretary. She apparently is doing the job  
18 competently, just as Herreras did. No one needed to be a CPA or to  
19 have an accounting firm background. The idea behind the  
20 reorganization was simply to hire Platt and Young. Indeed, even  
21 though Platt is no longer there, Whiting has kept Platt on the  
22 payroll by moving him to a contractor's status, thus, continuing to  
23 take care of him. When Young worked previously at the Office she  
24 assisted Thompson and she would frequently complain that she was  
25 doing so much of Thompson's work she should be getting his high  
26 salary, not her low one. She and her brother got his salary. The  
27 foregoing shows the reasons for terminating classified employees

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1 are pretexts. However, there also is evidence of discrimination  
2 and constitutional violations.

3 **LEGAL ARGUMENT**

4 **A. Defendants' Termination Violates the Free Speech Clause.**

5 As Director of Victim Services, Thompson, in large part,  
6 worked independently from the County Attorney. What he had to do  
7 in his job function was largely determined by Arizona Criminal  
8 Justice Commission and the Attorney General's office. Thompson was  
9 required to keep certain information confidential from the  
10 attorneys such as files on victim compensation and, conversely, the  
11 attorneys kept certain information restricted from Thompson such as  
12 criminal history. Thompson was neither a policy maker of the  
13 County Attorney's Office, where he established policy or supervised  
14 key (or any) employees, nor was he a "confidential" employee where  
15 he worked, for example, as a right hand man to the County Attorney.  
16 He did not interview applicants. He did not advise the County  
17 Attorney on hiring. He did not provide confidential information on  
18 the employees or what they were doing. He was never used as a  
19 witness for conversations the County Attorney had with other  
20 employees, he did not issue performance reports and he did not act  
21 on behalf of the County Attorney in the County Attorney's absence.  
22 He did not know what personnel decisions the County Attorney might  
23 make. Instead, he met with victims and determined what their needs  
24 were. He helped them fill out written forms for compensation. He  
25 submitted those forms to a committee of outsiders, who did not work  
26 at the Office, for approval of the compensation. He went to court  
27 and sat with victims so that they had somebody with them. He

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1 informed victims of how the process worked and gave them telephone  
2 numbers of resources to call.

3 Whiting admits not knowing Thompson's job duties other than  
4 people came to him for compensation. Defendants are precluded from  
5 claiming Thompson was a policy maker or a confidential employee,  
6 the two exceptions to a government's firing an employee for  
7 political reasons. Whiting also testified he had no conflicts with  
8 Candelaria. There was no personal grudge. Candelaria also had  
9 nothing personal against Hounshell. There were however key policy  
10 differences in how Hounshell and Whiting viewed the operation of  
11 government and how Candelaria viewed it. Whiting testified how  
12 Candelaria was always complaining of Hounshell's acts of corruption  
13 and that Candelaria squandered \$1,000,000.00 on trying to prosecute  
14 minor matters. A jury can decide Whiting's dismissive attitude to  
15 Candelaria's concerns show key policy differences in how the Office  
16 should be run and what should be the focus. Whiting calls  
17 Hounshell the "Million Dollar Man" because the County paid Grant  
18 Woods that amount in fees.

19 Candelaria and Whiting also have key differences on the use of  
20 diversion, instead of prosecution. Whiting used diversion in most  
21 cases, especially in drug cases. Whiting is willing to let  
22 criminals off, if they pay into the kitty. Candelaria believes in  
23 stronger law enforcement and punishment. The foregoing are key  
24 policy differences.

25 In Elrod v. Burns, 427 U.S. 347 (1976) a new sheriff fired all  
26 the employees of another party who were not protected by civil  
27 service rules. The Supreme Court held that the wholesale patronage  
28 dismissals, beyond policymaking and confidential employees,

1 encroached upon employees' first amendment rights. In Branti v.  
2 Finkel, 445 U.S. 507 (1980), an incoming public defender fired  
3 assistant public defenders who were politically malaligned with  
4 him. These were not classified positions. The Supreme Court held  
5 that firing them was unconstitutional and it was based upon their  
6 political beliefs and affiliation. Id. at 518.

7 Defendants do not claim that being the Director of Victim  
8 Services is more effectively performed by one's political  
9 affiliation. Thompson's work did not make his support for the  
10 outgoing prosecutor or his support for the incoming prosecutor "an  
11 appropriate requirement for effective performance of the public  
12 office." Thompson is a supporter of clean government and  
13 identifies with Candelaria and the reformers, but he did not  
14 campaign for either candidate. While Thompson had access to  
15 confidential information of victims "that information has no  
16 bearing whatsoever on partisan political concerns." Branti at 519.  
17 Thompson made it clear he was not a political supporter of Whiting.  
18 Moreover, Thompson was a classified employee protected by the merit  
19 system.

20 Whiting alleges Thompson was a Whiting political supporter.  
21 This material fact is denied. Whiting spoke to Thompson about  
22 running for County Attorney, to which Thompson responded "go for  
23 it." It was not a statement of support or opposition. Thompson  
24 realized when Whiting left the Office to testify for Brian  
25 Hounshell that Whiting was a defender of corrupt practices; an  
26 establishment member. When Whiting ran with Hounshell as his  
27 political sponsor, Thompson realized where Whiting stood within the  
28 Democratic party.

1 Whiting's allegation Thompson would call him and tell him  
2 about Candelaria's political operations is false. It is suspected  
3 that Stephanie McCarthy was taking these actions, and she was  
4 rewarded when Whiting took office. Whiting's allegation Thompson  
5 offered to connect Whiting with a person who could get Whiting  
6 radio time also is false. A woman on the Victims Compensation  
7 Board wanted to speak on Whiting's behalf. She asked Thompson to  
8 pass on her message, which Thompson did as a favor to her. Thompson  
9 made his disapproval of Whiting clear at an event members of the  
10 County Attorney's Office attended when Whiting's father began a  
11 conversation about supporting Michael Whiting. Thompson made it  
12 clear that he would not be supporting Whiting. Mr. Whiting's  
13 father stopped talking, looked like he had just been offended, and  
14 turned and abruptly walked away in the direction of Mr. Whiting.  
15 The allegation that Thompson offered to circulate a petition for  
16 Whiting also is completely false. Thompson is a resident of Navajo  
17 County and is ineligible to circulate petitions in Apache County.  
18 He never offered to do so. The allegation that Barbara Herreras  
19 supported Whiting is equally trumped up and false. She opposed his  
20 being elected as her affidavit shows.

21 Whiting feigned not knowing Marcor Platt, but then admitted  
22 they live next to another, they attend the same LDS church on  
23 Sunday, and Platt's family was Whiting's strongest political  
24 supporters. These include Jay Platt and Trish Platt. One Jay Platt  
25 is apparently Marcor Platt's father, the other is his brother.  
26 Platt and Young's family also contributed to Lee. Whiting  
27 previously worked for Platt's uncle. Platt and Young and Whiting

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1 and Lee are all related.<sup>5</sup> These are strong political connections  
2 Platt and Young had to get their new jobs.

3 Young stated she wanted Thompson's salary. Hounshell stated  
4 he wanted Thompson's job. Whiting gave Hounshell, a convicted  
5 felon, an investigator position, firing the incumbent to do so and  
6 he gave Young part of Thompson's job. He also hired Hounshell's  
7 Navajo campaign organizer, Hugh Lynch, a convicted perjurer.  
8 Perjurers and those who commit felonies are prohibited from County  
9 employment.

10 It also is significant that while approving Whiting's  
11 reorganization, the Board imposed a hiring freeze and any applicant  
12 had to pass by Mr. Wengert and only then the Board would vote, on  
13 a case by case basis, whether to hire the applicant. This gave  
14 Wengert unbridled authority on every single person seeking to be  
15 hired. Yet, in Madrid v. County of Apache, 289 Fed.Appx. 155 (9th  
16 Cir. 2008) the Ninth Circuit held that there was sufficient  
17 evidence of Wengert's acting capriciously and with pretext in  
18 retaliating against an employee to create a question of fact for  
19 the jury.

20 The County's action is similar to what took place in Rutan v.  
21 Republican Party of Illinois, 497 U.S. 62 (1990). In Rutan,  
22 Governor James Thompson issued an executive order proclaiming a  
23 hiring freeze for every agency subject to his control. The order

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25 <sup>5</sup> Mrs. LaVelle Gibbons Whiting DeSpain is the mother of Mr.  
26 Ken Whiting, Mr. Michael Whiting's father. Mrs. Lavelle Gibbons  
27 Whiting DeSpain has a brother by the name of Mr. Jack Gibbons. Mr.  
28 Jack Gibbons has a son-in-law by the name of Marcor B. Platt, Mr.  
Marcor B. Platt has a sister by the name of Valerie Platt Young.  
Jack Gibbons and LaVelle Gibbons Whiting DeSpain have a sister  
named Katie Gibbons. Katie Gibbons is John Lee's mother.

1 prohibited the hiring of any employee without the Governor's  
2 "express permission after submission of appropriate requests to his  
3 office." Id. at 65. The Supreme Court held that the foregoing  
4 allowed the Governor to operate a political patronage system.<sup>6</sup> The  
5 Supreme Court held that the first amendment prevents the government  
6 from wielding its power to interfere with its employees' freedom to  
7 believe and associate or to not believe and not associate.

8 This power was abused as shown by who the Board hired and who  
9 it did not. The Board lifted the hiring freeze despite knowing that  
10 Whiting intended to hire Hounshell, who was Whiting's political  
11 sponsor. The public spoke up and accused Whiting of intending to  
12 hire Hounshell. Whiting then falsely claimed he did not know what  
13 Hounshell. Yet, Whiting testified he essentially hand delivered  
14 the investigator position to Hounshell, so he knew Hounshell's  
15 interest. The matter was temporarily tabled, but then the Board  
16 went ahead and approved Whiting's request with full knowledge it  
17 was hiring Whiting's political sponsor. Thus, the Board approved  
18 of the political hiring while maintaining the hiring freeze for  
19 others. For example, Lenora Johnson, the reform oriented County  
20 Recorder sought to hire two new employees to register voters on the  
21 Navajo Nation. The positions previously had been mandated by a  
22 federal order to offset Apache County's long history of  
23 discriminating and disenfranchising Navajo voters.<sup>7</sup> Despite the  
24 importance of these two positions, Lee blocked the hiring of the

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26 <sup>6</sup> One of the plaintiffs claimed that he was laid off and not  
recalled after lay off because of his party affiliation.

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28 <sup>7</sup> This history resembles what took place in the South during  
the Civil Rights Era.

1 employees. At that time, a unanimous decision was necessary to  
2 lift the hiring freeze. Lee refused to give his consent.

3 Likewise, the conversations Lee had with both Herreras and  
4 Thompson show he fully expected a political revamping at the County  
5 Attorney's Office. He could not be telling Thompson the status of  
6 whether his job was safe, or suggesting to Herreras hers was not,  
7 unless there were discussions of political turnover. For the  
8 foregoing reasons, there is at least a question of fact about  
9 whether Thompson was terminated for political reasons in violation  
10 of his first amendment rights.

11 **B. Religion was a Cause for Thompson's Termination.**

12 In Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133  
13 (2000) the Supreme Court reiterated the "evidentiary burden borne  
14 by plaintiffs who attempt to prove intentional discrimination  
15 through indirect evidence." Id. at 146. The Court held,

16 [T]he trier of fact can reasonably infer from  
17 the falsity of the explanation that the  
18 employer is dissembling to cover up a  
19 discriminatory purpose. Such an inference is  
20 consistent with the general principle of  
evidence law that the fact finder is entitled  
to consider a party's dishonesty about a  
material fact as 'affirmative evidence of  
guilt.'

21 \* \* \*

22 Moreover, once the employer's justification  
23 has been eliminated, discrimination may well  
24 be the most likely alternative explanation,  
25 especially since the employer is in the best  
26 position to put forth the actual reason for  
the decision \* \* \*. Thus, a plaintiff's prima  
facie case, combined with sufficient evidence  
to find that the employer's asserted  
justification is false, may permit the trier  
of fact to conclude that the employer  
27 unlawfully discriminated.

28 Id. at 147.

1 Thompson, who is a classified employee, who could only be  
2 terminated for cause unless defendants attempted a subterfuge of  
3 the merit system, has made out a prima facie case: (1) he was  
4 subjected to an adverse employment action, (2) his job performance  
5 was satisfactory at the time, and (3) Whiting was aware of  
6 Thompson's religious views and replaced him with those persons of  
7 Whiting's own faith through acts of deception. Fisher v.  
8 Forestwood Co, 525 F.3d 972 (10<sup>th</sup> Cir. 2008). Thompson also has  
9 shown that each of defendants' proffered reasons for terminating  
10 him are pretextual. First, Whiting confessed he did not terminate  
11 Thompson for financial reasons. The combined salaries for the two  
12 new positions are the same as the combined salaries for the  
13 eliminated positions showing no budget savings. Second, the job  
14 functions of the new positions are the same as the job functions of  
15 the old positions. Third, there was no change in the office  
16 structure; all positions that reported directly to Candelaria now  
17 reported directly to Whiting, except the Director of Victim  
18 Services tasks were now known as the Grants Manager's position.  
19 Fourth, there was no need for an employee with strong finances to  
20 do the same jobs Herreras and Thompson were doing because the  
21 finances were in good shape. When Platt soon left, yet another  
22 secretary took over the job. Young left too and there is no  
23 evidence an experienced grants person took her job. Indeed, the  
24 evidence is that she could not handle doing Thompson's job, which  
25 was already obvious from the first time she was assisting him, so  
26 she was less qualified than Thompson. Last, Whiting's claim he  
27 wanted to deliver better services is a pretext because he admits he  
28

1 does not know what either eliminated employee was doing. But he  
2 also admits that whatever they were doing, they were doing well.

3 All the foregoing evidence about obtaining job descriptions,  
4 offering the jobs to persons of his faith, conspiring with persons  
5 of his faith in management and government before any reorganization  
6 was submitted and agreeing with them to hire persons of their faith  
7 also apply to Thompson's rebuttal of the pretexts and as direct  
8 evidence of animus as does the fact that Platt knew his sister got  
9 the Grants Manager job before the process began.

10 However, there is also evidence of discriminatory intent and  
11 unfairness in how non-LDS were treated compared to LDS and there is  
12 deception about who is LDS and who is not. For example, Whiting  
13 was deceptive in whether Hounshell was LDS. He went so far as to  
14 infer Hounshell was Catholic, then, a Christian evangelist. The  
15 court had to order him to report who he saw at the LDS churches  
16 causing Whiting to admit Hounshell is LDS like him. His claims he  
17 did not know Hounshell are false as he knew him well from church  
18 activities and he mentored Hounshell's son. Whiting was  
19 dissembling the truth.

20 Whiting claims that Herreras is LDS, but he knows Herreras  
21 left the church when she was 18 years old. She has not been to  
22 church since, except to attend certain events, like funerals.  
23 Whiting would tell Herreras that she needed to go back to church  
24 and start attending services. When Whiting fired Herreras, she  
25 asked to take one of the 5 open less-paying positions. He refused.

26 Whiting also fired Mary Secord who was an attorney. He says  
27 he fired her because of budgetary considerations since she was an  
28 attorney III and he wanted to make her position an attorney II.

1 Yet, he fired her at the very beginning of fiscal year 2010 when  
2 his budget was already set and funds abundant. She asked to keep  
3 her job and take a pay cut by being moved to an attorney II. Mr.  
4 Whiting refused. Instead, he made her interview for the attorney  
5 II position to do the job duties that she already had been  
6 performing as an attorney III for a year's time. He then had his  
7 committee interview her in what was a sham process, similar to the  
8 interview process for the Chief of Staff position. Despite the  
9 fact that Secord already was the incumbent for the job and the most  
10 experienced lawyer in the office having graduated from law school  
11 over a decade earlier, she was asked questions such as "What was  
12 your favorite subject in law school?" and nothing as it related to  
13 the job itself.

14 Whiting testified he also fired Secord because there were  
15 negative statements being made about her. He says that he told  
16 Secord this at the time he terminated her. However, her attached  
17 declaration makes clear this is false. Not only did he never tell  
18 her that anybody was complaining about her, but she had never been  
19 criticized at any time by anyone. A jury could determine that  
20 Whiting made up a story that he told Mary Secord about criticisms  
21 in doing her job in order to hide his religious discrimination in  
22 firing her. Secord was replaced by Michael Latham, a member of the  
23 LDS church.

24 The manner of the termination of Secord can be further seen as  
25 a discriminatory, because Whiting also hired Garrett Whiting, a  
26 member of the LDS church as an attorney III and then moved Garrett  
27 Whiting down to a II, but he did so without requiring him to  
28

1 interview. Whiting simply asked the Board to move Garrett Whiting  
2 to a II.

3 Whiting also hired Attorney Joe Young, who is LDS. Young is  
4 no longer physically at the County Attorney's office. He lives in  
5 Utah. Despite that, he is on a contract so he is still being paid  
6 by the County Attorney's Office though he is not working at the  
7 office.

8 Whiting also fired or forced out Courtney Pappe, a secretary.  
9 Ms. Pappe was heavily pressured into not drinking coffee or smoking  
10 cigarettes by the new Chief of Staff Marcor Platt who is LDS and by  
11 Stephanie McCarthy who is not LDS. Whiting relies on his favoring  
12 McCarthy as a sign he does not discriminate against non-LDS.  
13 However, as Pappe's affidavit makes clear, McCarthy quit smoking  
14 and drinking coffee when Whiting came into office. Whiting liked  
15 this compliance and McCarthy advanced from secretary to Chief of  
16 Staff. Not drinking coffee and not smoking are two hallmarks of  
17 the LDS faith. Pappe did not quit smoking cigarettes or drinking  
18 coffee. She soon was fired. Hounshell referred to her as an  
19 "outsider," which she understood in the context meant she was not  
20 LDS.

21 The County also argues Whiting has fired LDS employees. This  
22 must be a reference to Misty Bond. She was fired for having  
23 tattoos. Whiting fired her because of her bearing a characteristic  
24 contrary to LDS faith. Thus, while Ms. Bond may be LDS, her  
25 behavior is not consistent with the faith and she was fired for  
26 that very reason.

27 In all, Whiting, immediately or within the first few months of  
28 his administration, terminated the following non-LDS: Henry

1 Thompson, Barbara Herreras, Courtney Pappé, Paul Kirkham, Mary  
2 Secord, Anna Attencio and conversely he hired the following  
3 replacements all believed to be LDS: Marcor Platt, Valerie Young,  
4 Garrett Whiting, Joe Young, Brian Hounshell, Michael Latham,  
5 Cynthia Blevins, and Melody Capps. The staff change cannot be  
6 explained by the fact that there is a large LDS population in  
7 Apache County as there is an even larger (majority) population of  
8 Navajos in Apache County. The only Native American hired was ex-  
9 convict Hugh Lynch, Hounshell's right hand man.

10 The County states it hired as the chief deputy a non-LDS  
11 lawyer. This is true, but he was the only non-LDS hired and he was  
12 the former County Attorney of La Paz County and was needed because  
13 he was the only one with jury experience. He too has since been  
14 terminated; his replacement is understood to be LDS.

15 In light of the foregoing *prima facie* case, and the evidence  
16 that rebuts defendant's proffered reasons for the discharge, and  
17 the actual direct evidence of differences in treatment, and in the  
18 efforts to hide religious connection and outright falsify them,  
19 there is substantial evidence which which a jury could conclude  
20 that the proffered reasons are pretexts are the real reasons are  
21 discriminatory.

22 Likewise, there is evidence that Whiting conspired with  
23 Wengert and with Lee and that they participated in the  
24 reorganization fiction so the County is liable. The County also  
25 knew Whiting was going to hire Hounshell and approved it. Prior to  
26 any claim of reorganization, Lee, who would meet with Whiting  
27 behind closed doors with sound machines on, clearly knew of  
28 Whiting's proposed moves as he told Barbara Herreras how surprised

1 he was that she intended to stay on the job and that she had to  
2 tell Whiting. Accordingly, a jury could determine that Lee and  
3 Wengert participated in the wrongdoing and the County is liable.

4 **C. Whiting Conspired to Deprive Thompson Of His Rights**

5 There is sufficient evidence from which a jury can determine  
6 that Whiting conspired with others to terminate Thompson. Section  
7 1985(3) creates a cause of action where "two or more persons in any  
8 state \* \* \* conspired \* \* \* for the purpose of depriving \* \* \* any  
9 person or class of persons of the equal protection of the laws, or  
10 of equal privileges and immunities under the law." 42 U.S.C. §  
11 1985(3). Plaintiff must show that "class-based, invidiously  
12 discriminatory animus [lay] behind the conspirators' action."  
13 Griffin v. Blackenridge, 403 U.S. 88, 102 (1971). Proof that the  
14 defendant's impetus was the plaintiffs' religion suffices. See  
15 LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 427 (2d Cir. 1995);  
16 Jews for Jesus, Inc. v. Jewish Community Relations Counsel of New  
17 York, Inc., 968 F.2d 286, 291 (2d Cir. 1992); Taylor v. Gilmartin,  
18 686 F.2d 1346, 1356-58 (10th Cir. 1982), cert den'd. 459 U.S. 1147  
19 (1983); Ward v. Connor, 657 F.2d 45, 48 (4th Cir. 1981), cert  
20 den'd. 455 U.S. 907 (1982); Cooper v. Molko, 512 F.Supp. 563, 568-  
21 71 (N.D. Cal. 1981); see also Cong. Globe, 42nd Cong. 1st Sess.  
22 567 (1871) (remarks of Senator Edmunds during debate preseatng  
23 passage of Civil Rights Act of 1871) (If a "conspiracy was formed  
24 against [a] man \* \* \* because he was a Catholic, or because he was  
25 Methodist \* \* \* then this section could reach it.").

26 A conspiracy need not be shown by proof of an explicit  
27 agreement but can be established by showing that the parties have  
28 a tacit understanding to carry out the prohibited conduct.

1 LeBlanc-Sternberg, 67 F.3d at 427; Snell v. Tunnell, 920 F.2d 673,  
2 702 (10th Cir. 1990) (conspiracy established because "participants  
3 in the conspiracy \* \* \* share the general conspiratorial  
4 objective"), cert den'd. 499 U.S. 976 (1991). In the present case,  
5 there is sufficient evidence from which a jury could decide that  
6 Whiting conspired with Lee, Wengert and even Platt and Young to  
7 terminate plaintiff and others and to replace them with members of  
8 the conspirators' faith. First, it is undisputed that Wengert and  
9 Whiting discussed hiring Platt and eliminating Thompson and  
10 Herreras. Whiting admits he made his decision even before taking  
11 office. He gave Platt the position before submitting the  
12 reorganization. He obtained the job descriptions from Wengert.  
13 Brittany Rogers was part of the meetings where the conspiracy took  
14 place. As a member of the group, she informed Barbara Herreras  
15 that Hounshell wanted Thompson's job. Ms. Rogers' statement is  
16 admissible as an admission against party opponent. See Fed. R.  
17 Evid. 801(d)(2)(D) & (E). Moreover, when Young previously worked at  
18 the Office assisting Thompson, she would openly complain that she  
19 should be getting Thompson's high salary since she was doing the  
20 work. After Whiting took office, she got Henry's salary.

21 Wengert testified Whiting reorganized for budget reasons. A  
22 jury could decide since Wengert discussed with Whiting the idea of  
23 hiring Platt and eliminating Thompson, Wengert's claiming the  
24 reorganization was for budgetary reasons is his participating in  
25 covering up the conspiracy. Likewise, Lee made several statements  
26 that could only be taken as meaning he was talking with Whiting  
27 about Herreras and Thompson.

28

1 All of the evidence previously cited about the pretexts on the  
2 need to reorganize, is evidence from which a jury can determine  
3 that a decision was made by Whiting, Wengert, Platt, Lee and others  
4 that persons who were not LDS would be terminated, despite being in  
5 classified positions, and those who were LDS would be hired to  
6 replace them. Summary judgment on plaintiff's § 1985 claim should  
7 be denied.

8 **D. The County Violated 42 U.S.C. § 1986**

9 Defendants argue that the County did not have knowledge of any  
10 conspiracy and therefore could not have prevented one from taking  
11 place. However, the County actually participated in the conspiracy.  
12 Whiting and Wengert, who are both LDS, conspired to hire Platt to  
13 take over Thompson's job functions and pay even before Whiting  
14 submitted his "reorganization" to the Board.<sup>8</sup> A cursory review of  
15 the positions demonstrates there is no difference between the  
16 Administrative Coordinator (Office Manager) and Director of Victim  
17 Services position job functions combined compared to the Chief of  
18 Staff (Office Manager) and Grants Manager positions combined.  
19 Moreover, the County told Lenora Johnson she could not similarly  
20 reorganize because it was unlawful, yet they knowing allowed  
21 Whiting to do the unlawful act.

22 Whiting knew ahead of time County management and the Board  
23 were going to terminate Thompson. The Board knew Whiting's  
24 reorganization was going to result in the termination of classified  
25 positions like Johnson's but the Board allowed it. Lee showed he

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26  
27 <sup>8</sup> Mr. Wengert has a history of conspiring with others to  
28 retaliate against employees. See Madrid v. County of Apache, 289  
Fed.Appx. 155 (9th Cir. 2008).

1 was privy to the plan. There is substantial evidence of direct  
2 involvement by the County showing it knew about and failed and  
3 refused to block implementation of the conspiracy.

4 **E. Mr. Thompson Will Be Entitled to Attorney Fees**

5 Plaintiff's entitlement to fees under 42 U.S.C. § 1988,  
6 depends upon the jury's determination on the merits. Therefore,  
7 summary judgment should be denied.

8 **F. Breach of Contract for Termination**

9 The County argues there is no breach of contract action under  
10 state law. The County is wrong. Public employees are fully  
11 protected. Section 23-1501 of the Arizona Revised Statutes first  
12 states the employment relationship is contractual in nature. It  
13 then reads, "Nothing in this paragraph shall be construed to affect  
14 the rights of public employees under the constitution of Arizona in  
15 the state and local laws of the state \* \* \* ." Id. Accordingly,  
16 the statute has not changed the governing law of public employees.

17 The County admits it has judicially argued it has a merit  
18 system which is the equivalent of a limited merit system under  
19 section 11-356(A). The County is judicially estopped from arguing  
20 a different position now. Throughout the policy and procedures  
21 manual, it provides when certain protections apply to classified  
22 employees and when they apply to unclassified employees. The manual  
23 states, "Nothing in this policy modifies or waives the 'at will'  
24 status of an unclassified employee." Disciplinary procedures  
25 specifically apply to classified positions, not unclassified  
26 positions. Addressing classified employees, the policy reads, "an  
27 employee may be terminated for cause." Clearly, unclassified  
28 positions are "at will," classified are "for cause." Both

1 Wengert's and Joy's testimony confirm the foregoing. They make  
2 clear the County's practice is consistent with its policy. Years  
3 ago, the County signed a letter to Thompson informing him he was  
4 being converted to a classified position with all the rights of  
5 classified employees. Thus, he could be terminated only for cause.

6 The foregoing establishes the existence of defendant's merit  
7 protection system as a matter of law. However, even where there is  
8 confusion (and there could not be any here) the question of whether  
9 the employment relationship is "at will," or "for cause," becomes  
10 a question of fact. Loffa v. Intel Corp., 153 Ariz. 539, 544, 738  
11 P.2d 1146, 1151 (Ct. App. 1987) (company handbooks that merely  
12 state that described policies should not be interpreted to be  
13 contrary to the at will status of the employees, creates a question  
14 of fact).

15 The County specifically has stated it has a merit system, its  
16 policies disclose a promissory intent, and it is one that an  
17 employee reasonably would conclude constitutes commitment by the  
18 employer when it expressly uses the word "cause" as being needed to  
19 terminate a classified employee. Demasse v. ITT Corp., 194 Ariz.  
20 500, 505, 984 P.2d 1138, 1143 (1999). Since the statute expressly  
21 provides that it does not change state law for public employees,  
22 the controlling case still is Fleming v. Pima County, 131 Ariz.  
23 149, 685 P.2d 1301 (1984) which holds that a plaintiff has a breach  
24 of contract action when the County terminates him as a subterfuge  
25 of the merit system. In Fleming, the County wanted to get rid of  
26 an employee who was classified and protected by the County merit  
27 system. It knew, however, that it would not be successful because  
28 it had no cause for the termination. The County then tried to get

1 around the merit system by eliminating the employee's position,  
2 just as Whiting does here. The employee sued for breach of  
3 contract of employment and that the elimination of the position was  
4 a subterfuge of the merit system. The Arizona Supreme Court held  
5 the employee had a breach of contract action for all of his wages.

6 The elimination of Thompson's position also was a subterfuge.  
7 Both the County Manager and the HR Specialist had to and did  
8 testify that an elected official cannot "reorganize" by officially  
9 eliminating a position and its incumbent while hiring a replacement  
10 to do the same job functions at the same pay but with a new job  
11 title. That is not a reorganization. As Wengert testified, it  
12 defeats the purpose to hire someone new. Whiting confessed  
13 eliminating Henry Thompson's position had nothing to do with the  
14 budget or saving money. He now claims, for the first time  
15 eliminating plaintiff's position was to give better service to  
16 victims while he admits he has no idea what Thompson's job did and  
17 he believed plaintiff was competently doing his job.

18 Whiting believes he was a step smarter, but the result was the  
19 same. He terminated Thompson and Herreras, split the job duties to  
20 create two new positions doing the same tasks, kept the job  
21 functions, kept the salaries, but changed the job titles, and hired  
22 persons of his faith. However, a jury can see they have the same  
23 job functions, the same pay, and the same structure.

24 Whiting had no idea what Thompson did other than process  
25 compensation claims. He testified he does not know either  
26 Thompson's or Herreras' job functions or duties even to this day.  
27 It therefore would be impossible for him to think he was improving  
28 services. A jury can conclude that the termination was not for

1 budget concerns, nor for efficiency purposes, but simply as a means  
2 to get rid of a high paid employee whose salary could be given to  
3 allies.

4 Whiting admitted that if there were more grants he wanted his  
5 office to apply for, he could have simply told Thompson or Herreras  
6 to apply for them as both already were working with grants. All of  
7 the facts outlined in this brief showing deception and pretext  
8 apply as evidence to this issue. Thus, pursuant to Fleming v. Pima  
9 County, 131 Ariz. 149, 685 P.2d 1301 (1984) Mr. Thompson has  
10 asserted substantial evidence defendants breached the contract.

11 **G. Plaintiff's Wrongful Termination Claim is Viable**

12 The County claims plaintiff's wrongful termination claim is  
13 preempted by § 23-1501 and that there is no statutory provision  
14 allowing Thompson's suit. The County ignores subsection(3) (d) which  
15 states,

16 An employee has a claim against an employer  
17 for termination, \* \* \*

18 (d) In the case of a public employee, if the  
19 employee has a right to continued employment  
20 under the United States Constitution, the  
21 Arizona Constitution, the Arizona Revised  
22 Statutes, any applicable regulation, policy,  
23 practice, or contract of the State, any  
24 subdivision of the State or any other public  
25 entity or any ordinances of any political  
26 subdivision of the state.

27 Ariz. Rev. Stat. § 23-1501(3) (d).

28 Thompson is a public employee with the right to continued  
employment unless he did something wrong and there was cause to  
terminate him. The evidence shows not only a written policy, but  
by the testimony of Wengert and Joy make clear there is a County

1 practice that classified employees can be terminated only for  
2 cause.<sup>9</sup> The testimony of Candelaria states the same.

3 The Arizona Supreme Court in Fleming v. Pima County, held an  
4 employee has a tort cause of action for violation of public policy  
5 when he shows that the elimination of his position was a subterfuge  
6 of the merit system. The whole point of having a merit system is  
7 to protect employees from no cause terminations. If employers were  
8 allowed to feign a reorganization to eliminate an unwanted  
9 employee, it would defeat the purpose of having a merit system.

10 Defendants argue Fleming does not hold that "an employee who  
11 believes his layoff was an attempt to circumvent a merit system has  
12 a right to sue for wrongful discharge. There is no authority for  
13 such a claim under the EPA." However, defendants cite the wrong  
14 Fleming opinion. The correct opinion, issued by the Arizona  
15 Supreme Court, was cited in the complaint and it holds that a  
16 termination that is a subterfuge of the merit system is actionable.  
17 Fleming v. Pima County, 141 Ariz. 149, 152-53, 685 P.2d 1301, 1304-  
18 05 (1984) ("It is essential for the proper functioning of a true  
19 merit system that pretext discharges should not be used to  
20 circumvent its rules."). Accordingly, the law of Arizona allows

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22  
23  
24 <sup>9</sup> The complaint does not specifically cite the statute.  
25 Plaintiff requests leave to amend the complaint to cite the  
26 statute, but plaintiff notes the complaint not need cite the  
27 statute, as Judge Teilborg held in Breeser v. Menta Group, Inc.,  
28 CV10-01592-PHX-JAT (D. Ariz. April 18, 2011) (holding that while  
plaintiffs should state the controlling law, for wrongful  
termination claims, it is unnecessary, because only one statute is  
at issue, § 23-1501, and, thus, "the law that defendants are  
accused of violating is clear.").

1 suits for wrongful termination when public employees try to  
2 circumvent the merit system.

3 **H. Trebling of Wages**

4 When an employee is wrongfully discharged before the  
5 expiration of his term, one long established remedy is to "treat  
6 the contract as continuing, and recover damages for breach thereof"  
7 Old Dominion Copper Mining and Smelting Co., v. Andrews, 6 Ariz.  
8 205, 210, 56 P. 969, 970 (1899). Thompson refused to leave his job.  
9 On February 4, 2009, Whiting instructed him to leave and not to  
10 work any further. Thompson was ready, willing, and able to work but  
11 was prevented from doing so. The contract should be deemed as  
12 though Mr. Thompson did work since it was defendants who ordered  
13 him to leave the premises. On this basis, the back wages should be  
14 trebled. However, defendants have cited the case Nineto-Santos v.  
15 Fletcher Farms, 743 F.2d 638 (9th Cir. 1984) which holds that the  
16 trebling of wages can only be applicable to work actually performed  
17 even when there has been a premature termination of the employment  
18 contract. The district court has recently relied on and reiterated  
19 the holding. See Ufheil v. Carrabba's Italian Grill, LLC, CV-11-  
20 0659-PHX-DGC (D. Ariz., August 22, 2011). Plaintiff agrees that  
21 wages for the hours actually worked (except for the morning of  
22 February 4, 2009) were timely paid.

23 **I. Punitive Damage Claim**

24 The County states that it is not liable for punitive damages.  
25 The complaint does not seek punitive damages against the County.  
26 Thompson is eligible for punitive damages for violations of his  
27 civil rights against Whiting. A jury can determine that  
28 purposefully terminating a person, ruining their income and their

1 living, especially when they are a classified employee and  
2 committing this wrong because of religious or political reasons  
3 constitutes an evil mind justifying an award of punitive damages.

4 **J. Claim for Prejudgment Interest and Attorneys Fees**

5 Summary judgment is inappropriate on Thompson's claims for  
6 interest and fees because if plaintiff is successful, he will be  
7 entitled to interest and fees.

8 **K. After Acquired Evidence**

9 Defendants seek to prejudice the court against plaintiff.  
10 Thompson already has informed defendants he is limiting his damages  
11 to six months when plaintiff planned on retiring.<sup>10</sup> Plaintiff was  
12 terminated after 19½ years of employment. He made clear he was  
13 going to retire when he hit the 20 year mark which was only 6  
14 months away. The effective date, the date defendants allege they  
15 "discovered" the alleged after acquired evidence, is October 2009.  
16 The effective date is after Mr. Thompson would have been retired  
17 which would be July 2009.

18 The incident on which defendants rely is not as they assert,  
19 whether or not Thompson used good judgment, but the issue is  
20 irrelevant in its entirety in any case and it should be excluded  
21 because Thompson would have been retired and not employed by the  
22 effective date. Plaintiff moves to strike these arguments and  
23 evidence. They were submitted only to prejudice the court and not  
24 to seek judgment. Whiting has committed all sorts of wrongs  
25 himself, he has hired felons and convicted perjurers, he has  
26

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27 <sup>10</sup> Assuming the Court prohibits evidence of an event that was  
28 "discovered" after plaintiff would have been retired.

1 purposefully violated civil rights and constitutional rights, what  
2 action Whiting actually would have taken against Thompson for  
3 inviting someone to his hotel when off duty in his private life  
4 would be a question of fact. However, even consideration of the  
5 matter should not be allowed as an issue in this case since  
6 Thompson would have been retired by July 2009. Any effort by  
7 defendants to make it an issue would only be to prejudice the court  
8 and the jury against Mr. Thompson when it does not have any  
9 probative value to an issue in this case.

10 **Conclusion**

11 In light of the foregoing, there is a dispute in material fact  
12 on each claim. The issue of whether Mr. Thompson can recover  
13 treble damages under section 23-255 of the Arizona Revised Statutes  
14 is one of law. All other issues contain material factual disputes.  
15 Therefore the defendants' motions should be denied.

16 RESPECTFULLY SUBMITTED this 1st day of October, 2011.

17 THE CHARLAND LAW FIRM

18 S/

19 \_\_\_\_\_  
20 John E. Charland  
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21 I hereby certify that on October 1, 2011, I electronically  
22 transmitted the attached document to the Clerk's Office using the  
CM/ECF System for filing.

23 Copy of the foregoing was electronically  
24 delivered this 1st day of October, 2011, to:

25 Katherine E. Baker, Esq.  
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