Case No. 16-7018

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PROCTOR ANDREW YOUNG,

Plaintiff/Appellant,

v.

CITY OF IDABEL & TINA FOSHEE THOMAS, in her individual and official capacities

Defendants/Appellees

APPELLEES' RESPONSE BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA, HONORABLE RONALD A. WHITE

ORAL ARGUMENT REQUESTED

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I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Was there racial discrimination or unequal treatment where: 1) there was indisputable probable cause showing that Plaintiff, a high ranking public official in a position of high public trust and duty, committed fraudulent conduct; 2) such conduct was already being investigated by separate law enforcement; 3) Plaintiff's municipal employer conducted an extensive internal City investigation conducted by a licensed attorney from another city; and 4) after an extensive hearing before the City Council, the Council decided it was best to terminate the official's employment consequently?
2. Can there be malicious prosecution when Plaintiff admits to his wrongdoing and there was a finding of probable cause as a matter of law?
3. Is there Intentional Infliction of Emotional Distress when the alleged conduct is a municipal internal investigation through a licensed attorney from another city into criminal conduct by Plaintiff that a separate law enforcement agency is already publicly

investigating; and where there is no evidence showing severe emotional distress?

II. STATEMENT OF THE CASE

Proctor Andrew Young, a high ranking official placed in public trust, was fired for cause—specifically, for improper, fraudulent, and potentially felonious conduct. He admitted to the improper conduct.[1] Mr. Young is now seeking to gain a benefit from his misconduct solely based on the color of his skin. Upon review of the undisputed facts in evidence, pure common sense and legal reason dictate that there is no cause of action. In fact, Mr. Young was indicted by a multi-county grand jury for seven felony counts. Of these seven, two survived the deeply contested evidentiary preliminary hearing to be bound over for trial. It was only after a severe departure from the accepted standards of criminal review under Oklahoma jurisprudence and an agreement between the State and the Defendant, Mr. Young, that the remaining charges were dismissed. Mr. Young now seeks to contort reality into a golden parachute.

The underlying facts of this case are clear, regardless of the extensive attempts by Plaintiff to obfuscate and confuse. After multiple

[1] Aplt. App. 187.

independent law enforcement agencies began publicly investigating and prosecuting the City of Idabel fire chief, the Mayor of Idabel hired an attorney to conduct their own investigation. The City Council ultimately decided to terminate the chief's employment after hearing the evidence and testimony at a termination hearing. Plaintiff was investigated for a multitude of different reasons, many of which eventually led to a grand jury indicting him on multiple felony counts involving fraud and a judge binding two felony charges over for trial. One of the primary reasons for the investigation and termination was that Plaintiff was engaging in action that was improper and appeared to be criminal, even felonious in nature. He was reporting time as being "worked" when he was also working a separate job and not doing anything related to being a fireman. This was improper doubling of his pay.[2]

There were clear, legitimate nondiscriminatory reasons for terminating Plaintiff. Moreover, as a matter of law, they cannot be characterized as "pretext" based on the material facts that are

[2] Plaintiff does not dispute the clear fact that Plaintiff listed hours he did not work. Instead of actually disputing it, Plaintiff attempts to explain it by stating that he was supposedly told by a prior City Mayor to do so, but has no proof of it other than his own self-serving testimony. This does not dispute that the improper conduct occurred and is not sufficient to show that the termination under new City leadership was somehow racially motivated.

undisputed. The undisputed facts conclusively demonstrate the existence of completely legitimate non-discriminatory reasons for termination. Indeed, if these reasons for termination could be considered "pretextual," and not worthy of credence, then it would be a dramatic change in the law and greatly hinder employers' decision-making power. It would moreover prevent employers from terminating an employee even though it appears likely he committed criminal conduct.

An additional statement must now be made about Plaintiff's increasingly inaccurate representations of the actual record, which factor heavily in this appeal, particularly as to what actually occurred in the underlying criminal case that multiple independent state law enforcement agencies pursued against Plaintiff for a lengthy period of time. Defendants pointed out to the District Court that Plaintiff was relying on misstatements of the record and wholly irrelevant arguments. For example, Plaintiff attempted to include arguments that a fact issue on race discrimination could be created because the rural southern county at issue here (like nearly all others, unfortunately) has a number of alleged racist events in its history. These events occurred either before this Plaintiff was born, or when he was a child, and certainly not when

he was the Chief of the Idabel Fire Department in 2011. Plaintiff has previously, and continues currently, to grasp at wildly inappropriate and illogical causal connections in any attempt to fashion a purported "fact issue."

This pattern continues in Plaintiff's current misstatement of the nature of the underlying criminal case against plaintiff. Proctor Andrew Young was indicted by a multi-county grand jury. Charges were pursued by the district attorney. Plaintiff is correct in stating that there was, in fact, a hotly contested preliminary hearing which was *solely to determine the evidentiary validity of the charges against Mr. Young*. It was not a contested finding of fact. Rather than some grand finale in which the criminal judge dismissed all the counts outright, as Plaintiff desperately needs this Court to believe, Plaintiff was, in fact, bound over for trial on two felony charges. In Oklahoma, this means that after such a hotly contested hearing, the judge found that a crime was probably committed and Mr. Young probably committed those crimes. No matter how Plaintiff contorts the record, there are unassailable realities presented: Mr. Young was bound over for trial on two felonies. Nearly a year passed between the end of the preliminary hearing and the second motion to

quash the remaining two felony counts. This motion was summarily denied in a single sentence order. It was only after some unknown and undiscoverable discussion and/or chain of events which lead, as Judge Brock stated in his order from August 31st, 2015, to an agreed motion between the defense and the District Attorney that he reconsidered Young's prosecution in an entirely unusual and unorthodox manner. Specifically, Judge Brock considered the evidence not under the "preponderance of the evidence" standard universally applied for preliminary hearings in Oklahoma, but rather under the much more difficult "beyond a reasonable doubt" standard. Additionally, the District Attorney requested that the presumption, granted to all prosecutors, that his case would improve up to the point of trial be removed. Under these *specific circumstances alone*, Proctor Young had his remaining felony counts dismissed by the Court. It was not after a bench trial. It was not an acquittal by a jury of his peers. Rather it was via an extraordinarily unorthodox and frankly inexplicable agreement between the defense and the prosecution.

III. Summary of the Argument

Plaintiff claims Idabel violated Title VII and §§ 1981 and 1983 during his employment and when he was terminated. The same analytical framework applies to all of the claims. *Carney v. City and County of Denver*, 534 F.3d 1269, 1273 (10th Cir. 2008), *Thomas v. Denny's, Inc.*, 111 F. 3d 1506, 1509 (10th Cir. 1997) (*McDonnell Douglas* analytical framework applies to both Title VII and Section 1981 claims). A plaintiff may demonstrate actionable discrimination under Title VII with either direct or circumstantial evidence. *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1225 (10th Cir. 2000). Here, Plaintiff relies only on circumstantial evidence. When a plaintiff's discrimination claim relies solely on circumstantial evidence, as in this case, the court applies the *McDonnell-Douglas* burden-shifting analysis. *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1113 (10th Cir. 2007); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Thus, the plaintiff bears the burden of proving a prima facie case through evidence supporting the essential elements of that claim. *McDonnell Douglas*, 411 U.S. at 802-04. Plaintiff must demonstrate not only (1) that he is a member of a protected class; (2) that he was qualified for his job; but also (3) that he suffered an

adverse employment consequence even though he was performing his job satisfactorily. *Perry v. Woodward*, 199 F.3d 1126, 1183 (10th Cir. 1999). If the plaintiff can establish a prima facie case, the employer may articulate a legitimate, non-discriminatory reason for the adverse employment decision. *McDonnell Douglas*, 411 U.S. at 803; *Tex. Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The burden then shifts back to Plaintiff to show the City's stated non-discriminatory reason is mere pretext for unlawful discrimination; in other words, that the reason is so suspect that it is unworthy of credence. *Rivera v. City & Co. of Denver*, 365 F.3d 912, 920 (10th Cir. 2004). Plaintiff made no prima facie case showing, because as a matter of law he was not performing his job satisfactorily as shown by the probable cause finding that he committed felonies and his own admissions that he engaged in fraud.

But more importantly, Plaintiff fails to show pretext in light of the clear reason for termination. Thus, there is no disparate treatment claim to survive summary judgment. Plaintiff also fails to create a fact issue on the hostile work environment claim for the same reason, and his purported evidence on this issue is facially insufficient, particularly after a review of the record he actually cites.

Plaintiff also fails to create a fact issue as to violation of equal protection rights given the clear justification for the City's actions. Plaintiff's purported evidence on the equal protection claim is also based on inaccurate record citations, or no evidentiary support at all.

Finally, the malicious prosecution claim fails as a matter of law given that probable cause existed for the criminal conduct as determined by the underlying criminal judge. And, as a matter of law, the Intentional Infliction of Emotional Distress Claim (IIED) as to Mayor Foshee is insufficient. No reasonable minds could find "extreme and outrageous" behavior based upon Foshee's alleged conduct, where such conduct simply consists of initiating an internal investigation into a public figure's behavior already under public investigation by law enforcement. In any event, no evidence exists as to severe emotional distress. The judgment of the District Court should be upheld.

IV. Argument & Authorities

A. No Disparate Treatment Because the Evidence Failed to Establish Pretext.

Plaintiff's Proposition No. I fails as a matter of law. Plaintiff admits that he must show that the nondiscriminatory reasons for terminating

him were pretext. The evidence is insufficient to create a fact issue in this regard.

To show that the Defendant's proffered race-neutral reasons were actually a pretext for discrimination, the 10th Circuit has held that the plaintiff must demonstrate that the defendant's "proffered [race-neutral] reasons were so incoherent, weak, inconsistent, or contradictory that a rational factfinder could conclude the reasons were unworthy of belief." *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004). The reason for this rule is plain: the Court's role is to prevent intentional discriminatory practices, not to act as a "super personnel department," second guessing employers' honestly held (even if erroneous) business judgments. *See Jones v. Barnhart*, 349 F.3d 1260, 1267 (10th Cir.2004).

"[A] challenge of pretext, requires a court to look at the facts as they appear to the person making the decision to terminate, not the aggrieved employee." *Green v. New Mexico*, 420 F.3d 1189, 1191 n. 2 (10th Cir.2005); *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1231 (10th Cir. 2000). In this case, the relevant eyes through which to view the termination decision are those of the Council. "The relevant inquiry is not whether [their] proffered reasons were wise, fair or correct," but

rather whether they believed that reason to be true and "acted in good faith upon those beliefs." *Rivera v. City and County of Denver*, 365 F.3d 912, 924-25 (10th Cir.2004). Even a mistaken belief can be a legitimate, non-pretextual reason for an employment decision. *EEOC v. Flasher Co.*, 986 F.2d 1312, 1322 n. 12 (10th Cir.1992).

To prevail and survive summary judgment, the plaintiff must demonstrate the defendant's proffered explanation is pretextual or unworthy of credence due to specific identifiable reasons, not mere conjecture or subjective belief. *E.E.O.C. v. Flasher Co. Inc.*, 986 F.2d 1312, 1320 (10th Cir. 1992).

As in the briefing below, Plaintiff continues to ignore the many other municipal employees and elected officials (including Plaintiff's own brother on the City Council) who were African American. Further, the fact that the Plaintiff was the Chief with control over the department and the ability to terminate and discipline other firefighters below him demonstrates the lack of disparate treatment as to Plaintiff. In and of itself, it negates any inference that Plaintiff was subject to disparate treatment in his department. Plaintiff still offers nothing to show how Plaintiff was treated disparately in comparison to any others.

Plaintiff now tries to make arguments he did not make below in the District Court. That is, Plaintiff points to his own self-serving statement that he believes a Caucasian employee was treated differently, Mr. Steve Surratt. Plaintiff suggests that Surratt was a "similarly situated" employee treated differently, while no such statement or argument was made in the briefing below. In fact, Plaintiff admitted the exact opposite to the District Court. Plaintiff admitted that there were no similarly situated employees in this particular case. Aplt. App. 299-300.

Plaintiff's last-attempt-resort to argue about a purportedly similarly situated employee, when the facts on this matter were not explored in the summary judgment briefing or even the summary judgment record, is insufficient to create a fact issue. Plaintiff also confuses the burdens of proof—Plaintiff has the burden to show that Surratt was similarly situated and that he was actually treated differently by the same municipal agents who allegedly treated Plaintiff differently. Plaintiff does not offer any such showing and attempts to dodge this by stating that Defendants have not disproven these allegations, when they were never even made in the briefing below.

On top of this, his new "Surratt" allegation itself is not supported by the actual record, even that to which he cites. The record shows that he has no evidence as to what exactly occurred with Surratt. *See* Part C, infra; Aplt. App. 354 through 364.

Plaintiff also now spins together, for the first time, what Defendants can only describe as a convoluted kaleidoscope of assertions incorrectly drawing from several sources in the record in an attempt to portray Mayor Foshee as having made "inconsistent statements."

First, there is no inconsistency, though Plaintiff puts Defendants' and the Court to quite the task to follow their attenuated chain of logic and record citations to determine the inaccuracies of their own representations. If the Court finds it necessary to delve into and untangle the bundled assertions, the footnote below[3] sets out the clearer reality

[3] Without any actual evidence, Plaintiff tries to contort the record to portray that Mayor Foshee made statements to attorney Margaret Love that were inconsistent with those she made at the criminal preliminary hearing (even though the preliminary hearing resulted in two felony counts being bound over for trial). There is no inconsistency, nor is the any supporting evidence for Plaintiff's point. Broken down and parsed out, Plaintiff does the following: he cites to Aplt. App. 393-394 for his new and unsupported assertion that Foshee "testified in the criminal case that she had no knowledge of what the Plaintiff's shift was supposed to be and how many hours he worked." The record not only fails to support these assertions but shows the opposite. Foshee explained in that very testimony that she did know about the general nature of Plaintiff's work shift; he worked shifts, and could not get double pay for working only one job. Foshee did not change her story in the criminal proceeding as Plaintiff vaguely seems to suggest. Further, then Plaintiff tries to

based on the record. That is not necessary, however, because Plaintiff's effort to create such confusing assertions in the guise of fact issues is actually self-defeating. Plaintiff, pointing to the criminal preliminary hearing, only further establishes one of Defendants' key dispositive, uncontroverted facts: that there is no evidence that Foshee knew about the supposed (and improper to begin with) agreement between Plaintiff and the prior Mayor at all. Aplt. App. 262-264 (Affidavit of Foshee). Plaintiff's argument and evidence here in Proposition I conclusively demonstrates this. Indeed, it shows that Mayor Foshee was trying to root out corruption and improper conduct by officials. She knew that Plaintiff was *not* supposed to be getting paid for time not worked, which is common sense. Aplt. App. 393-394. It was the age-old business practice as Foshee correctly understood it. Aplt. App. 393-394. Yet at the same time, the evidence remains uncontroverted that she did not know about any personal agreements between Plaintiff and a prior Mayor that improper conduct was allowed.

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fabricate yet another purported "inconsistency" by citing to deposition testimony from Ms. Love for the proposition that Foshee did not tell Ms. Love about Plaintiff's alleged prior "permission" under previous City leadership and management but with no evidence that Foshee knew about any such facts in the first place. The entire assertion is an erroneous tangle of inferences without basis in the record and it is self-defeating in any event.

Regardless, in light of the public criminal investigation by the OSBI already ongoing at the time of Plaintiff's termination, the point is irrelevant. Mayor Foshee's conduct and that of the City was entirely proper, and Plaintiff's need to resort to complex misperceptions of the record speaks volumes as to their lack of evidence proving race discrimination. The complex misstatements of the record were also not raised in the District Court.

In any event, none of this changes the fact that the City had a nondiscriminatory reason: a public criminal investigation of potentially felonious misconduct by a supervisory City employee in a position of public trust in addition to an investigation conducted by an attorney from Oklahoma City and Plaintiff's own admissions to the City that he engaged in the improper conduct. Aplt. App. 187 (admissions to criminal conduct before City Council). Plaintiff's evidence and new confounding arguments are not enough to show that the termination was racially motivated. Plaintiff's Proposition I fails as a matter of law.

B. As a Matter of Law, the Evidence Does Not Establish a Hostile Work Environment

It is Plaintiff's burden to point to the actual proof of a hostile work environment that Plaintiff experienced during his time employed. *E.g.,*

Jones v. Barnhart, 349 F.3d 1260, 1268 (10th Cir. 2003). Title VII is not meant to remedy "the ordinary tribulations of the workplace." *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998). Isolated incidents or incidents which are not severe are not sufficient. *See id.* Statements made outside of a plaintiff's presence are not sufficient if the plaintiff does not have knowledge of the statements during the relevant time period. *See Edwards v. Wallace Commt'y Coll.*, 49 F.3d 1517, 1522 (11th Cir. 1995).

As an initial matter, Plaintiff's efforts to use the *investigation* and related decisions and conduct by the City as "evidence" of a racially hostile work environment is facially deficient for the same reasons as explained above. The OSBI determined that crimes were most likely committed. The Grand Jury felt the same, indicting the Plaintiff on seven different felony counts. The McCurtain County District Court felt that at least two of those counts warranted a trial. Independent, neutral, and substantial governmental bodies felt (as did the City) that Proctor Andrew Young committed a series of crimes. This cannot be considered pretext or a hostile work environment; the consequences of holding such would be disastrous in terms of flooding the courts with frivolous claims

enabling employees to try to benefit from improper and even criminal conduct.

Aside from this, Plaintiff simply references limited and non-severe behavior by his own subordinates, who he had the control over and ability to discipline or terminate. There is no evidence that Plaintiff himself took any action directly against his subordinates. He offers no evidence of exercising or even trying to exercise his power as Fire Chief whatsoever, which is a patent failure to create any semblance of a fact issue as to a hostile work environment claim.

Further, Plaintiff now asserts new arguments about conduct "outside" the workplace as being sometimes sufficient to create a fact issue. This is irrelevant as the only conduct in that context is a hearsay statement about a racial epithet outside the workplace, which without additional sufficient evidence. *See Edwards*, 49 F.3d at 1522; and Aplt App. 660, Order, p. 7, ¶1). The evidence was insufficient to create a fact issue on a hostile work environment claim.

C. No Equal Protection Claim as to Mayor Foshee or the City.

Plaintiff asserts that alleged "customs" or "policies" of the Mayor and/or City, consisting of treating him differently than purportedly

similarly situated Caucasian employees, violated § 1983. He further alleges that such actions deprived him of equal protection of the laws and his liberty and property interests without due process of the law in violation of the Fourteenth Amendment to the U.S. Constitution, for which he seeks to impose liability on Defendants through § 1983. Section 1983 provides the exclusive remedy for damages against a state actor for civil rights claims. *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989); *Bolden v. City of Topeka*, 441 F.3d 1129, 1137 (10th Cir. 2006). Accordingly, "damages claims against state actors for § 1981 violations must be brought under § 1983." *Bolden*, 441 F.3d at 1137.

A municipality like Idabel cannot, however, be held liable for the actions of its employees under the theory of *respondeat superior*. *Seamons v. Snow*, 206 F. 3d 1021, 1029 (10th Cir. 2000). Instead, it must be shown the unconstitutional actions of an employee were representative of an official policy or custom of the municipal institution, or were carried out by an official with final policy making authority with respect to the challenged action. *Id.*; *Murrell v. School Dist. No.* 1, 186 F. 3d 1238, 1249 (10th Cir. 1999). All issues of custom and policy are the same for both § 1981 and § 1983 claims. *Randle v. City of Aurora*, 69 F. 3d 441, 446 n. 6

(10th Cir. 1995). To subject a governmental entity to liability, "a municipal policy must be a 'policy statement, ordinance, regulation, or decision officially adopted and promulgated by [a municipality's] officers.'" *Murrell*, 186 F. 3d at 1249. Absent such an official policy, a municipality may also be held liable if the discriminatory practice is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.*

Plaintiff's summary judgment evidence fails to show that Idabel or the Mayor engaged in an official policy of deliberate indifference to racial discriminate.[4] A plaintiff's conspicuous "failure to allege the existence of similar discrimination as to others seriously undermines [his] claim that the City maintained a custom of discriminatory personnel practices." *Randle*, 69 F. 3d at 447 (*citing City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 130, [1988] for the proposition that "custom" requires the illegal practice be "widespread" — i.e., involving a "series of decisions"). The few alleged instances of discrimination Plaintiff alleges in this case fail to

[4] Contrary to Plaintiff's appellate brief's statements, a review of the summary judgment briefing and the District Court's Order makes clear that Defendants and the District Court analyzed these claims as to both Mayor Foshee and the City of Idabel. There was no custom or policy established as to either, and the District Court noted this. (Aplt. App. 662).

establish that the City had a "custom" of discriminatory practices. *See id.* (where the plaintiff's allegations contained few incidents of discrimination, all of which were all directed against the plaintiff, the plaintiff failed to establish custom).

Mayor Foshee did not have "final policymaking authority" required for purposes of establishing municipal liability under §§ 1981 and/or 1983 on the basis of a decision specific to a particular situation. *See Murrell*, 186 F. 3d at 1250. Three elements help determine whether an individual is a "final policymaker": (1) whether the official is meaningfully constrained "by policies not of that official's own making;" (2) whether the official's decision are final — i.e., are they subject to any meaningful review; and (3) whether the policy decision purportedly made by the official is within the realm of the official's grant of authority. *Randle*, 69 F. 3d at 448 (*citing Praprotnik*, 485 U.S. at 127).

Because Idabel is an aldermanic form of city government, all policy is made by the City Council, not the mayor, and the District Court points out that the Mayor did not have the final decisional authority here. OKLA. STAT. ANN. tit 11, §9-108 (West Supp. 2015). Any personnel decisions made by the mayor are subject to review by the City Council. OKLA. STAT.

ANN. tit 11, §9-118 (West Supp. 2015). The District Court also correctly noted that Plaintiff received such review of the decision to terminate his employment, (Aplt. App. 661-662), and that review was meaningful and comprehensive. The Mayor simply was not a "final policymaker" for purposes of §§ 1981 and 1983.

Plaintiff has further failed to show that the City of Idabel, in deciding to terminate him for improper and fraudulent conduct (which he was charged with independently as well as by law enforcement), acted based on a policy or custom of racial animus.

Plaintiff's appellate brief speaks only to two other supposed instances showing Caucasians being treated differently. But Plaintiff is misrepresenting the actual record. Plaintiff's evidence of Mr. Surratt (a white male) being treated more favorably consists of testimony by Mayor Foshee at Aplt. App. 354 through 364. Completely contrary to the statements in the appellate brief of Plaintiff, Foshee merely testified that at some point a long time before she became the mayor there was an issue raised about Surratt getting paid double for working as a volunteer firefighter during hours he was, allegedly, supposed to be working the water department. Aplt. App. 354 through 364. She did not testify that

the matter was raised before the City Council, and moreover, she testified that she did not have actual knowledge one way or the other as to whether Surratt was working as a firefighter when he was supposed to be working in the water department. Aplt. App. 354 through 364. Foshee's testimony, however, is the sole evidence Plaintiff has ever offered to support this undeveloped and hollow unequal treatment argument based on Surratt. The evidence is simply unclear what occurred with Mr. Surratt.

The only other "event" Plaintiff points to for evidence of a custom of supposed racial animus as to the City involves the termination of Billy Mack ("Mack"). Yet again, based on Plaintiff's actual evidence cited, this could not be further from the truth. Plaintiff's evidence is again testimony of Mayor Foshee. Plaintiff actively misstates the reality of the Mayor's deposition testimony. She stated, clearly, that it was not known by the city, nor agreed to, that Mack was taking Department of Corrections inmates out to do personal jobs on the weekends for his lawn care business in violation of multiple sections of DOC's Guidelines and Rules regarding the Public Works Program. Aplt. App. 351-53. Upon discovery thereof the City and Mayor were presented with two options:

they could either refuse to terminate Mack and lose the contract with DOC or terminate and maintain the contract. Aplt. App. 351-53.

Moreover, for the reasons discussed previously, Plaintiff has failed to show that the City's non-discriminatory reasons for its and the mayor's actions are mere pretext. There simply was no unequal treatment shown in this case as a matter of law. Accordingly, Plaintiff's §1983 claim similarly fails and summary judgment was appropriate.

D. **No Malicious Prosecution as a Matter of Law**

Plaintiff evades the dispositive flaw in the malicious prosecution claim with more confounding language that departs from the actual record and what indisputably occurred in the underlying criminal matter. Again he incorrectly states there was "inconsistency" between statements made by Mayor Foshee to Ms. Love and Foshee's subsequent testimony at trial. As addressed above, they are not "inconsistencies" based on the record, so the argument itself is simply wrong and insufficient. But moreover, and independent of this, is another dispositive ground for judgment on the claim: There was probable cause.

Plaintiff was bound over for trial on two of the felony charges. In other words, the indisputable evidence negates the third requisite for a

malicious prosecution claim—lack of probable cause. Plaintiff must show that "there was no probable cause to support the original arrest, continued confinement, or prosecution." *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008). The mere act of binding Plaintiff over for trial after hearing the entirety of the evidence, including statements made by Mayor Foshee which Plaintiff desperately restates, repeatedly and inaccurately, is fully conclusive as a matter of law that there *was* probable cause for the prosecution of Proctor Young.

The Judge heard the totality of testimony during the hotly contested preliminary hearing. Plaintiff's defense counsel, which is one and the same as his current counsel, had every opportunity to examine and cross examine the witnesses which lead to Plaintiff's prosecution. In fact, it is through this action that the "discrepancy" between statements was developed. Even after hearing all of it, Judge Brock still felt that two felonies had probably been committed and Proctor Andrew Young probably committed them. The malicious prosecution claim fails due to the existing of the inescapable probable cause.

Further, and in the alternative, Plaintiff's argument here is premised on the allegation that Mayor Foshee falsified, omitted or

suppressed evidence. There is a void of proof in the record on this point as well. Plaintiff admitted that he engaged in the wrongful conduct the OSBI independently investigated, Aplt. App. 187 (admissions to criminal conduct before City Council). Nothing was falsified, and there is no evidence of that. There is nothing showing that Mayor Foshee initiated the criminal investigation. The evidence is the opposite and it is uncontroverted. Aplt. App. 262-264 (Affidavit of Foshee). Furthermore, as noted before, the evidence simply does not show that Mayor Foshee had any knowledge of the alleged "prior agreement" between Plaintiff and the prior Mayor and it does not show she had any involvement in the independent prosecution aside from cooperating when asked to by law enforcement. Aplt. App. 262-264 (Affidavit of Foshee).[5]

E. The IIED Claim is Insufficient as a Matter of Law

The decisions of the Oklahoma Supreme Court demonstrate its disfavor of the tort of outrage. The tort "is governed by the Restatement of Torts (Second)." *Eddy v. Brown*, 1986 OK 3, &5, 715 P.2d 74, 77.

[5] Also, as the District Court pointed out, assuming arguendo that there was evidence that the Mayor provided facts initiating the investigation (the opposite of what the evidence shows), "the mayor's actions of providing facts upon which a criminal prosecution was based were essentially those of a private citizen and thus were not performed under color of state law. *See Norton v. Liddel*, 620 F.2d 1375 (10th Cir. 1980)." Aplt. App. 668.

Conduct is actionable only when the defendant "by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another." *Id*. For recklessness to suffice, it must be "deliberate disregard of a high degree of probability that the emotional distress will follow." RESTATEMENT (SECOND) OF TORTS § 46 (comment i)(1965). Our High Court has gone to the unusual end of expressly detailing the type of conduct that does not constitute the tort:

> Liability for the tort of outrage does not extend "to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind . . . ."

Eddy, 1986 OK 3, &7.

Further, Oklahoma requires "extreme and outrageous conduct" causing "severe emotional distress" for IIED as recognized by the RESTATEMENT (SECOND) OF TORTS § 46. That requirement excludes many kinds of conduct even though they are extremely offensive. The Oklahoma Supreme Court, in explaining the meaning of "extreme and outrageous" conduct, has stated that "[c]onduct which, though unreasonable, is neither "beyond all possible bounds of decency" in the

setting in which it occurred, nor is one that can be "regarded as utterly intolerable in a civilized community," falls short of having actionable quality. *Eddy v. Brown*, 1986 OK 3, &7, 715 P.2d 74, 77. The Oklahoma Supreme Court further stated: "the tort of outrage protects emotional tranquility *against serious invasion only*. *Extraordinary* transgression of the bounds of civility is required. *Id*. at n.6. (emphasis in original).

In Plaintiff's Proposition V, it is clear the facts are insufficient to create a fact issue withstanding summary judgment. Plaintiff accuses Mayor Foshee of acting "outrageously" by hiring a licensed attorney to conduct an investigation for the City of Idabel after a law enforcement's independent and public investigation into Plaintiff's apparent criminal conduct had already begun. Mayor Foshee had no control over the law enforcement agencies, and there is no evidence to the contrary. Further, it is difficult to imagine how Mayor Foshee could not have at least hired an attorney to conduct an investigation so the Council could decide. Finally, Plaintiff has no evidence whatsoever for the shocking statement that Mayor Foshee "withheld exculpatory evidence" from Plaintiff. There is, in addition, no evidence whatsoever that Plaintiff suffered severe

emotional distress under Oklahoma law. The IIED claim fails as a matter of law.

V. Conclusion

Wherefore, for the reasons stated above, Appellees urge that the Court uphold the Order of the Trial Court below.

Respectfully submitted,

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Certificate of Service

_X_ I hereby certify that on the 25th day of July 2016, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Daniel E. Smolen danielsmolen@ssrok.com
Attorney for Plaintiff

___ I hereby certify that on the _____ day of _____ 2016, I served the attached document by U.S. Mail, postage fully prepaid, on the following who are not registered participants of the ECF System:

N/A

/s/ Clark W. Crapster
of Steidley & Neal,
P.L.L.C.

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I, Clark Crapster, certify that this brief complies with Fed. R. App. P. 32(a)(7)(B), in that it is proportionally spaced and contains 6,521 words, including Table of Contents, Table of Authorities and Certificates of Compliance and Digital Submissions.

I relied upon my word processor, Microsoft Word, to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Clark W. Crapster
Of Steidley & Neal, P.L.L.C.

CERTIFICATE OF DIGITAL SUBMISSIONS

I further certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program and, according to the program are free of viruses.

s/ Clark W. Crapster
Of Steidley & Neal, P.L.L.C.

Statement Regarding Oral Argument

Appellees request oral argument because they believes that it would assist the Court in its determination on the issues raised by Appellant on appeal, and because Appellant has requested oral argument as well.

s/ Clark W. Crapster
Of Steidley & Neal, P.L.L.C.