IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL CAMPBELL FIELDS,

Plaintiff,

v.

CITY OF TULSA; CHARLES W. JORDAN, individually and in his official capacity as Chief of Police, Tulsa Police Department; and ALVIN DARYL WEBSTER, individually and in his official capacity as Deputy Chief of Police, Tulsa Police Department,

Defendants.

Case No. 11CV-115-GKF-TLW

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

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INTRODUCTION

On February 21, 2011, Captain Paul Fields ("Plaintiff"), a loyal and dedicated police officer with a long and stellar career on the City of Tulsa Police Department, was summarily punished for exercising his constitutional rights. When Plaintiff questioned the lawfulness of an order compelling him and his fellow officers to attend a "Law Enforcement Appreciation Day" hosted by the Islamic Society of Tulsa ("Islamic Society") that included religious proselytizing, he was punitively transferred, subjected to an Internal Affairs ("IA") investigation, and ultimately suspended without pay for two weeks. Indeed, Major Julie Harris, Plaintiff's immediate supervisor, *candidly admitted during her sworn testimony that the Police Department retaliated against Plaintiff for exercising his constitutional rights*. (*See* n.3, *infra*).

As set forth below, Defendants' discriminatory treatment of Plaintiff violated his clearly established constitutional rights.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff is an officer on the Tulsa Police Department. (Fields Decl. at ¶¶ 1-2 at Ex. 1).

2. Plaintiff took a solemn oath to "defend, enforce, and obey the Constitution and laws of the United States." (Fields Decl. at ¶¶ 3-5, Dep. Ex. 2, at Ex. 1).

3. Plaintiff swore an oath to "obey the *lawful* orders of [his] superiors," "[t]o stand up for what [he] know[s] is right," and "[t]o stand up against wrongs in any form." (Fields Decl. at ¶¶ 4-5, Dep. Ex. 2, at Ex. 1) (emphasis added).

4. Pursuant to his sworn oath, Plaintiff has a duty to point out unlawful orders. (Jordan Dep. at 15 at Ex. 2; *see also* Fields Decl. at ¶ 6 at Ex. 1).

5. Defendant Jordan admits that Plaintiff did *not* violate his oath in this matter and was thus not punished for that. (Jordan Dep. at 90 at Ex. 2).

6. Defendant Jordan is the Chief of Police for the Tulsa Police Department and the person responsible for making policy for the department on behalf of Defendant City of Tulsa. (Jordan Dep. at 9 at Ex. 2).

7. Defendant Jordan is responsible for officer discipline for the Tulsa Police Department, and he exercises this authority on behalf of Defendant City. (Jordan Dep. at 10 at Ex. 2; *see also* Fields Decl. at ¶¶ 9, 50, Dep. Exs. 17, 18, at Ex. 1).

8. Defendant Webster is a Deputy Chief of Police for the Tulsa Police Department. (Jordan Dep. at 12 at Ex. 3).

9. At relevant times, Defendant Jordan, Defendant Webster, and Major Julie Harris were in Plaintiff's chain of command. (Fields Decl. at ¶¶ 7, 8 at Ex. 1; Jordan Dep. at 12, 13 at Ex. 2).

10. Major Harris, a senior officer for the Tulsa Police Department, was Plaintiff's division commander prior to Plaintiff's transfer. (Fields Decl. at ¶ 7 at Ex. 1; Jordan Dep. at 12 at Ex. 2).

11. On or about January 25, 2011, Defendant Webster announced in a staff meeting that the Islamic Society of Tulsa ("Islamic Society") was hosting a "Law Enforcement Appreciation Day" ("Islamic Event") that was scheduled for Friday, March 4, 2011. (Fields Decl. at ¶¶ 10, 11, Dep. Ex. 6, at Ex. 1; *see also* Webster Dep. at 37-38 at Ex. 3)

12. Friday is the "holy day" or "Sabbath" for Islam. (Fields Decl. at ¶ 12 at Ex. 1; Siddiqui Dep. at 75-76 at Ex. 4 [acknowledging that it is a "special day" for Islam and testifying that this day was chosen to give officers "the option to stay for the prayer," noting that "most of the officers [choose] to stay"]).

13. Similar to every other "appreciation" event hosted by a religious organization or held at a religious place of worship for *at least* the past seventeen years, the Islamic Event, as announced at the January 25, 2011 staff meeting, was voluntary. (Fields Decl. at ¶ 13 at Ex. 1; *see also*

Jordan Dep. at 40-41 at Ex. 2 [acknowledging that no similar event was ever mandatory in his thirty-plus years on the police department]).

14. Unlike many of these other "appreciation" events, the Islamic Event was *advertised* as involving religious content and religious activities, including proselytizing. (Fields Decl. at ¶¶ 14, 23, Dep. Ex. 8, at Ex. 1).

15. Plaintiff, who understands Islam and its "dawa" mission ("the call" or "invitation" "to Islam"), knew that this event would involve proselytizing that was contrary to his Christian faith.[1] (Fields Decl. at ¶¶ 15-21 at Ex. 1; Fields Dep. at 60-63, 66-70 at Ex. 6; *see, e.g.*, Siddiqui Dep. at 53 at Ex. 4 [acknowledging that Islam considers Jesus to be merely a prophet]).

16. According to the Islamic Society's constitution, which is available to the public on the Internet, "The aims and purposes of [the Islamic Society] shall be to serve the best interest of Islam in the greater Tulsa area including the Tulsa city and its satellite towns in northeastern Oklahoma, so as to enable Muslims to practice Islam as a complete way of life." (Fields Decl. at ¶ 17, Dep. Ex. 39, at Ex. 1; Siddiqui Dep. at 54-55 at Ex. 4 [testifying that it is the "aim and purpose" of the Islamic Society "to promote the goals of Islam" during "outreach programs").

17. To carry out its mission, including its "dawa" mission, the Islamic Society "shall" work "in cooperation with ISNA [Islamic Society of North American]" to "carry out Islamic programs and projects within the guidelines of the Quran and Sunnah." (Siddiqui Dep. at 22, 23, 58, 59,

[1] There is a webpage on "How to become Muslim" that is available to the public, that claims to be from the Islamic Society of Greater Oklahoma City and the Islamic Society of Tulsa, that lists Sheryl Siddiqui as the "[o]utreach director," and which quotes from the Quran the following: "Islam is the universal message of God to mankind, and Muhammad (peace be upon him) is the final and last messenger of God. Our creator will not accept any other way of life as He Himself asserts: '*If anyone desires a religion other than Islam* (submission to Allah-(God)) *never will it be accepted of Him*.' (The Qur'an 3:85)." (Fields Decl. at ¶ 16, Dep. Ex. 43 [emphasis added], at Ex. 1). Plaintiff understands that this is a fundamental precept of the Islamic "dawa" mission; a mission that the Islamic Society promotes. (Fields Decl. at ¶ 16 at Ex. 1).

61, 62, Dep. Ex. 39, at Ex. 4; *see also* Fields Decl. at ¶ 18, Dep. Ex. 39, at Ex. 1).

18. The "dawa" mission of the Islamic Society, including its goal of "disseminating Islamic knowledge," was promoted by the Islamic Event. (Siddiqui Dep. at 61, 62 at Ex. 4; *see also* Fields Decl. at ¶¶ 14-18, Dep. Exs. 39, 43, at Ex. 1; *see also* ¶¶ 68-71, *infra*).

19. *Plaintiff is prohibited from proselytizing his faith while in uniform*. (Jordan Dep. at 37 at Ex. 2; *see also* Fields Decl. at ¶ 19 at Ex. 1).

20. Attending the Islamic Event would place Plaintiff in a moral dilemma that violates his religious beliefs. (Fields Decl. at ¶¶ 15-21 at Ex. 1; Fields Dep. at 60-63, 66-70 at Ex. 6).

21. It would violate Plaintiff's conscience and his religious beliefs to order any of his subordinates to attend the Islamic Event who share Plaintiff's religious beliefs. (Fields Decl. at ¶ 20 at Ex. 1; Fields Dep. at 60-63, 66-70 at Ex. 6).

22. On February 16, 2011, an email approved by Defendant Webster was sent to "All TPD users," which included Plaintiff and the officers under his command, stating, "Please see attached flier and rsvp if attending to ensure there is plenty of great food *and tour guides*." (Fields Decl. at ¶ 22, Dep. Ex. 7 [emphasis added], at Ex. 1; Webster Dep. at 37-38 at Ex. 3).

23. Attached to the February 16, 2011 email was a flyer from the Islamic Society, announcing that the Islamic Event would include religious content and activities, including "Mosque Tours," "Meet[ing] Local Muslims & Leadership," "Watch[ing] the 2-2:45 pm weekly congregational prayer service," and receiving "Presentations" on Islamic "beliefs." (Fields Decl. at ¶ 23, Dep. Ex. 8, at Ex.1; Webster Dep. at 38 at Ex. 3).

24. On or about February 17, 2011, Plaintiff received an email from Major Harris that had the subject line, "Tour of Mosque – March 4." The email stated, in relevant part, "We are directed by DCOP [Deputy Chief of Police] to have representatives from each shift—2nd, 3rd,

and 4th to attend [the Islamic event]." (Fields Decl. at ¶ 24, Dep. Ex. 9, at Ex. 1).

25. This email contained the directive (*i.e.*, mandatory order) from Defendant Webster, which was pasted into the text of the email. (Fields Decl. at ¶ 25, Dep. Ex. 9, at Ex. 1; *see also* Jordan Dep. at 48 at Ex. 2 [admitting that the directive was an order]).

26. As a result of the order, attendance at the Islamic Event was no longer voluntary. (Fields Decl. at ¶ 26 at Ex. 1; Jordan Dep. at 48, 50, 51 at Ex. 2; *see also* Harris Dep. at 48 at Ex. 5).

27. After receiving the email with the mandatory order from Defendant Webster, Plaintiff met with Major Harris to discuss the order. (Fields Decl. at ¶ 27 at Ex. 1).

28. Plaintiff advised Major Harris of his belief that the order was unlawful based on his personal religious beliefs and convictions. (Fields Decl. at ¶ 28 at Ex. 1; Harris Dep. at 73-74 at Ex. 5).

29. With the approval of Major Harris, Plaintiff responded to the order by email. (Fields Decl. at ¶¶ 29-30, Dep. Ex. 10, at Ex. 1).

30. In his response, Plaintiff stated that he believed that the order directing officers to attend the Islamic Event was "an unlawful order, as *it is in direct conflict with my personal religious convictions*, as well as to be conscience shocking." He concluded, "Please consider this email my official notification to the Tulsa Police Department and the City of Tulsa that I intend not to follow this directive, nor require any of my subordinates to do so *if they share similar religious convictions*." (Fields Decl. at ¶¶ 30-31, Dep. Ex. 10 [emphasis added], at Ex. 1).

31. Plaintiff sent his response to Major Harris and copied his chain of command, including Defendants Jordan and Webster. (Fields Decl. at ¶¶ 32, 33, Dep. Ex. 10, at Ex. 1).

32. On February 18, 2011, Defendant Webster sent an interoffice correspondence to Plaintiff by email that requested Plaintiff to reconsider his position and warned him of the consequences

for not doing so. (Fields Decl. at ¶ 34, Dep. Ex. 31, at Ex. 1).

33. Plaintiff again told Defendants that he could not comply with the mandatory order based on his religious beliefs and convictions. (Fields Decl. at ¶ 35, at Ex. 1).

34. As a result of Plaintiff's refusal to compromise his religious beliefs, Defendant Webster ordered Plaintiff to appear in Defendant Jordan's conference room on Monday, February 21, 2011 for a meeting. (Fields Decl. at ¶ 36, at Ex. 1).

35. Plaintiff complied, and the meeting was held. (Fields Decl. at ¶¶ 36, 37 at Ex. 1).

36. During this meeting, Plaintiff again explained to Defendants that he believed the order was unlawful and that he could not, in good conscience, obey the order or force officers under his charge who shared his religious beliefs to obey it. (Fields Decl. at ¶ 37 at Ex. 1).

37. Defendants understood that Plaintiff would have no objection if the Islamic Event was voluntary. (Jordan Dep. at 52 at Ex. 2; *see also* Harris Dep. at 74, 107 at Ex. 5).

38. Defendants understood that Plaintiff's objection to the order was based on his religious beliefs. (Jordan Dep. at 54-55 at Ex. 2; *see also* Fields Decl. at ¶¶ 30, 31, Dep. Ex. 10, at Ex. 1).

39. During the February 21, 2011 meeting, which Plaintiff recorded to ensure that he had an accurate record of what was said, Defendant Webster asked Plaintiff whether he sought volunteers, and Plaintiff responded, "Yes, I have." Defendant Webster then asked, "Okay, and the response?" to which Plaintiff responded, "Is zero." Defendant Webster then stated, "Alright. And so that makes this fairly easy. Are you prepared to designate two officers and a supervisor *or yourself* to attend this event?" Plaintiff responded, "No." Defendant Webster then stated, "If ordered?" Plaintiff responded, "No, Chief, I am not." Defendant Webster then stated, "Okay," and referred to Defendant Jordan, stating, "Is there anything else you'd like to add, Chief?" to which Defendant Jordan stated, "No, sir." Plaintiff then reiterated that he had no objection if the

event was made voluntary and that to make it mandatory violated his religious convictions. (Fields Decl. at ¶ 40 at Ex. 1).

40. Moments after reasserting his religious objection to the order at the February 21, 2011 meeting, Defendant Webster served Plaintiff with a prepared order transferring him to the Mingo Valley Division and with a notification that Defendants were initiating an IA investigation of Plaintiff for allegedly violating Rule 6 of the Tulsa Police Department Rules and Regulations ("Duty to be Truthful and Obedient"). The order and notification were signed by Defendant Jordan. (Fields Decl. at ¶¶ 41, 42, Dep. Exs. 11, 12, at Ex. 1).

41. The transfer order stated, "This action is taken in reference to an Internal Affairs administrative investigation regarding the refusal to follow a direct order." (Fields Decl. at ¶ 43; Dep. Ex. 11, at Ex. 1).

42. Prior to being punitively transferred, Plaintiff was the shift commander for 26 officers and 5 supervisors. (Fields Decl. at ¶ 44 at Ex. 1).

43. The transfer order is a permanent part of Plaintiff's record. (Fields Decl. at ¶ 45 at Ex. 1).

44. On March 10, 2011, Plaintiff received a notification via email stating, "You are hereby notified that Chief Chuck Jordan has requested IA to conduct an administrative investigation *in regards to your refusal to attend* and refusal to assign officers from your shift, *who shared your religious beliefs*, to attend the 'Law Enforcement Appreciation Day' on March 4, 2011, at the Tulsa Peace Academy." (Fields Decl. at ¶ 46, Dep. Ex. 16 [emphasis added], at Ex. 1).

45. An IA investigation was conducted. (Fields Decl. at ¶ 47 at Ex. 1).

46. It is the policy of the department that if an officer makes a false statement during the course of an IA investigation, or in any documentation related to it, the officer is subject to dismissal. (Jordan Dep. at 16-18 at Ex. 2; Fields Decl. at ¶ 48, Dep. Exs. 3, 4, at Ex. 1).

47. Major Harris gave a statement during the IA investigation in which she stated, "[I]f . . somebody had some deep, deep, deep religious conviction, and as long as there was no crime that they needed to investigate, there's no need for me to force this [*i.e.*, attendance at the Islamic Event] on anybody." (Harris Dep. at 113-14, Dep. Ex. 48, at Ex. 5; *see also* Fields Decl. at ¶¶ 47, 49, Dep. Ex. 48, at Ex. 1).

48. Upon her review of the IA investigation, Major Harris recommended that the allegations against Plaintiff should not be sustained. (Harris Dep. at 19-20 at Ex. 5).

49. As a result of her unwillingness to sustain the IA investigation's recommendations, Major Harris was subjected to retaliation. (Harris Dep. at 18-20, 26 at Ex. 5).

50. On June 9, 2011, Defendants officially punished Plaintiff for his refusal to obey the order by suspending him without pay for 80 hours/10 days, subjecting him to the possibility of "more severe disciplinary action, including dismissal," prohibiting him from being "considered for future promotions for a period of . . . at least one (1) year," and making his temporary transfer to the Mingo Valley Division permanent. (Fields Decl. at ¶ 50, Dep. Exs. 17, 18, Ex. 1).

51. The personnel orders setting forth Plaintiff's punishment and transfer are a permanent part of Plaintiff's record. (Fields Decl. at 51 at Ex. 1).

52. As further punishment, Defendants assigned Plaintiff to the "graveyard" shift. (Fields Decl. at ¶ 52 at Ex. 1).

53. According to Personnel Order #11-80, Defendants punished Plaintiff in part due to his "actions and writings that were made public" because they allegedly "brought discredit upon the department," although Plaintiff never personally made a public statement prior to being punitively transferred and punished.[2] (Fields Decl. at ¶ 53, Dep. Ex. 18, at Ex. 1).

[2] While this court denied Plaintiff's request to amend his complaint to add a First Amendment

54. In his official "Sworn-Employee Performance Evaluation," it states, "Captain Fields was disciplined during this rating period for *refusing to attend* and refusing to direct that officers attend a law enforcement appreciation day at a local mosque." (Fields Decl. at ¶ 54, Decl. Ex. 1A [emphasis added], at Ex. 1).

55. *Major Harris testified that Defendants retaliated against Plaintiff for exercising his constitutional rights*.[3] (Harris Dep. at 118 at Ex. 5).

56. Defendants' actions altered the terms and conditions of Plaintiff's employment, which also violated the Tulsa Police Department's policy prohibiting retaliation for exercising First Amendment rights. (Fields Decl. at ¶ 56, Dep. Ex. 23, at Ex. 1).

57. Defendants admit that Plaintiff had a deeply held religious belief opposing the order to attend the Islamic Event. (Jordan Dep. at 74-75 at Ex. 2 [testifying that he "*absolutely*" believed Plaintiff's religious objection was sincere (emphasis added)]; Harris Dep. at 17-18, 73 at Ex. 5; *see also* Webster Dep. at 20 at Ex. 3 [acknowledging Plaintiff's right to invoke a religious objection to his order and not questioning the sincerity of Plaintiff's objection]).

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freedom of speech claim based on futility since the court concluded that the speech in question did not address "matters of public concern" (Op. & Order at 2-5 [Doc. No. 25]), the undisputed facts uncovered during discovery reveal that the "speech" for which Plaintiff was punished was not his own, but that of his counsel. (Jordan Dep. at 93-96 at Ex. 2; Harris Dep. at 94-95 at Ex. 5). And, according to Defendant Jordan's testimony, this speech addressed a matter of public concern. (*See* Jordan Dep. at 94-96 at Ex. 2 [testifying that the speech for which Plaintiff was punished related to accusations that Defendant Jordan was promoting "global jihad"]); *see Connick v. Myers*, 461 U.S. 138, 1432 (1983) (holding that speech that "fairly [may be] considered as relating to" issues "of political, social, or other concern to the community" is speech involving "matters of public concern"); *see generally* Fed. R. Civ. P. 15(b)(2) ("A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue.").

[3] Major Harris testified as follows:

Q: Do you believe the Department took adverse action against [Plaintiff] for exercising his rights?

A: Yes.

(Harris Dep. at 118 at Ex. 5).

58. Major Harris testified that because Plaintiff had a deeply held religious conviction opposing the order, he had a right to object to that order.[4] (Harris Dep. at 17 at Ex. 5).

59. Defendants' punishment of Plaintiff was inconsistent with other similarly situated officers of his rank in that he was punitively transferred for invoking his constitutional rights. (Harris Dep. at 36-38 at Ex. 5).

60. Plaintiff was the top performing shift commander in his division prior to being punitively transferred for invoking his constitutional rights. (Harris Dep. at 40 at Ex. 5).

61. Defendants have yet to replace the shift commander position that became vacant once Defendants transferred Plaintiff. (Harris Dep. at 40-41 at Ex. 5).

62. Defendant Harris would not have made attendance at the Islamic Event mandatory. (Harris Dep. at 48 at Ex. 5).

63. On February 22, 2011, the day following Plaintiff's punitive transfer, Major Harris made the Islamic Event voluntary for Plaintiff's former shift. (Harris Dep. at 77, 94 at Ex. 5).

64. On February 24, 2011, Defendant Webster made the Islamic Event voluntary for the entire department. (Fields Decl. at ¶ 55, Dep. Ex. 13, at Ex. 1; Harris Dep. at 93-94 at Ex. 5).

65. Pursuant to the policy and practice of the Tulsa Police Department, a division commander, on behalf of the department, could excuse an officer from the mandatory Islamic Event if he raised a medical objection, for example, or some other non-religious grounds for not attending. It was up to the division commander to make a subjective, case-by-case evaluation of the circumstances. (Harris Dep. at 51-53 at Ex. 5).

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[4] Major Harris testified as follows:

Q: * * * If you believe Captain Fields had a deeply held religious conviction opposing that order, [then] he would have a right to oppose that order based on that conviction?

A: Yes.

(Harris Dep. at 17 at Ex. 5).

66. The Tulsa Police Department's policy and procedure for addressing religious objections by employees is one in which case-by-case inquiries are made such that there is an individualized assessment of the reasons for the relevant conduct that invites consideration of the particular circumstances involved in the particular case.[5] (Jordan Dep. at 77 at Ex. 2; *see also* Fields Decl. at ¶ 33 at Ex. 1; Webster Dep. at 108-09 at Ex. 3 [testifying that the department accommodates officers' religious beliefs "when possible . . . so long as we could do so consistent with fulfilling the mission of the police department"]).

67. The mission of the Tulsa Police Department was fulfilled by making the Islamic Event voluntary. (Webster Dep. at 108-09 at Ex. 3).

68. The Islamic Event promoted the religion of Islam. (Burrell Decl. at ¶ 3 at Ex. 7; Ballenger Decl. at ¶¶ 4-8 at Ex. 8; *see* Siddiqui Dep. at 45-53 at Ex. 4 [explaining the tours]).

69. During the Islamic Event, the Muslim hosts discussed Islamic religious beliefs; they discussed Mohammed, Mecca, why Muslims pray, how they pray, and what they say when they are praying; they showed the officers a Quran; and they showed the officers Islamic religious books and pamphlets that were for sale and encouraged the officers to purchase them. (Burrell Decl. at ¶ 3 at Ex. 7; *see also* Siddiqui Dep. at 45-53 at Ex. 4; Ballenger Decl. at ¶¶ 4-8 at Ex. 8).

70. Officers were present during the Islamic worship services and were photographed observing these services. (Burrell Decl. at ¶ 4, Ex. A, at Ex. 7).

71. The Islamic Society posted a photograph of police officers sitting at a table with members of the mosque and below the photograph was written, "Discover Islam Classes for Non-

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[5] Defendant Jordan testified as follows:

Q: And so what is the – what are the procedures or policy of the police department for dealing with situations where somebody raises a sincerely held religious objection to something they're being directed to do?

A: Take it through the chain of command and *review each one on a case-by-case basis*.

(Jordan Dep. at 77 at Ex. 2) (emphasis added).

Muslims." (Fields Decl. at ¶ 57, Dep. Ex. 24, at Ex. 1).

72. Defendant Jordan testified that he "would not be surprised" that the Islamic Society posted photographs of the Islamic Event. (Jordan Dep. at 128 at Ex. 2).

73. Defendant Jordan admitted that the photograph of the officers sitting at a table with members of the mosque (Dep. Ex. 24) "would certainly imply that our officers were there taking classes." (Jordan Dep. at 128 at Ex. 2).

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Rule 56 "standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Moreover, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotations omitted).

ARGUMENT

I. Plaintiff Does Not Surrender His Constitutional Rights upon Accepting Employment with the Government.

Plaintiff does not surrender his constitutional rights upon accepting employment with the City of Tulsa Police Department. *See Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006); *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004); *see also Fraternal Order of Police Newark Lodge No. 12*

v. City of Newark, 170 F.3d 359, 367 (3rd Cir. 1999) (Alito, J.) (striking down a police department's policy because it violated the plaintiff officers' right to free exercise of religion). "[T]he theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967). Consequently, as a government employee, Plaintiff retains his rights protected by the United States Constitution, and those rights were violated by Defendants.

II. Defendants' Actions Violated Plaintiff's Right to the Free Exercise of Religion.

The Free Exercise Clause states that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. The Free Exercise Clause is made applicable to the states and their political subdivisions, which includes Defendants, through the Fourteenth Amendment. *Cantwell v. Conn.*, 310 U.S. 296, 303-04 (1940).

The right to free exercise of religion protected by the First Amendment embraces two concepts: the freedom to believe and the freedom to act. *Cantwell*, 310 U.S. at 303. Under the First Amendment, the government may not impose special restrictions, prohibitions, or disabilities on the basis of religious beliefs. *See McDaniel v. Paty*, 435 U.S. 618 (1978). "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id*. at 626. Indeed, "[t]he principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). In short, when government conduct burdens a person's religious beliefs, the Free Exercise Clause is implicated.

A. Plaintiff Invoked His Sincerely Held Religious Beliefs.

In *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981), the Supreme Court stated that "beliefs rooted in religion are protected by the Free Exercise Clause. . . ." The

Court further stated that "[c]ourts are not arbiters of scriptural interpretation." *Id*. at 716. Rather, what matters for a free exercise claim is whether the record is clear that the person asserting the claim acted "*for religious reasons*." *Id*. (emphasis).

As in *Thomas*, the record in this case is undisputed: Plaintiff acted "for religious reasons"—and was punished for it. Indeed, Defendants admit that Plaintiff objected to the order based upon his sincerely held religious beliefs, and Defendants do not question the sincerity of Plaintiff's beliefs. Thus, there is no dispute as to this aspect of Plaintiff's free exercise claim.

B. Defendants Impermissibly Burdened Plaintiff's Religious Beliefs.

In *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), the Court held that the State's denial of unemployment benefits to an employee who refused to work on Saturdays because of her religious beliefs was an impermissible burden on her free exercise of religion because it "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." And in *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), the Court held that the State's denial of unemployment compensation benefits because the employee voluntarily terminated his employment with a roll foundry that produced armaments, claiming that the production of armaments was contrary to his religious beliefs, placed a substantial burden on the employee's right to free exercise of religion. By denying employment benefits because the employee refused, on religious grounds, to work in a plant that produced armaments, the State imposed a substantial burden on the employee's exercise of religion by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id*. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."). Indeed, in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450

(1988), the Court stated, "It is true that this Court has repeatedly held that *indirect coercion or penalties* on the free exercise of religion, *not just outright prohibitions*, are subject to scrutiny under the First Amendment." (emphasis added); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) (concluding, based on Supreme Court precedent, that a religious exercise is "substantially burdened" when the government, *inter alia*, "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief").

Similar to *Sherbert* and *Thomas*, Plaintiff was denied "employment benefits" for invoking his religious beliefs in that he was punitively transferred, subjected to an IA investigation, and then suspended without pay for two weeks as a result. In short, there can be no question that the burden in the form of coercion, pressure, and actual penalties imposed upon Plaintiff for invoking his religious beliefs is a burden prohibited by the Free Exercise Clause.

C. *Smith* Does Not Preclude Finding a Constitutional Violation.

In 1990, the Supreme Court decided *Emp't Div. v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court was faced with the issue of whether the Free Exercise Clause could prohibit the application of Oregon drug laws to the ceremonial ingestion of peyote and thus permit the State to deny unemployment compensation for work-related misconduct based on the use of this drug. The Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and *neutral law* of *general applicability* on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id*. at 879 (quotations and citation omitted) (emphasis added). This was considered by Congress and others to be a departure from the Court's prior precedent. *See, e.g.*, 42 U.S.C. § 2000bb (enacting the "Religious Freedom Restoration Act" to "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to

guarantee its application in all cases where free exercise of religion is substantially burdened."). "The *Smith* Court, however, did not overrule its prior free exercise decisions, but rather distinguished them." *Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d at 363 (Alito, J.) (citing *Smith*, 494 U.S. at 881-84).

In 1993, the Court again addressed a free exercise claim in the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). The Court preliminarily found that Santeria is a "religion" under the First Amendment and that the practice of animal sacrifice is protected by the Free Exercise Clause. The Court ultimately held that the law at issue burdened this religious practice in violation of the First Amendment.

In *Lukumi*, the Court stated that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." *Id*. at 546. The Court reviewed several municipal ordinances regulating the slaughter of animals, one of which prescribed punishment for "whoever . . . unnecessarily . . . kills any animal"—a facially neutral ordinance. *Id*. at 537. The Court explained that this ordinance could not be applied to punish the ritual slaughter of animals when the ordinance was not applied to secular killings:

> [B]ecause [the ordinance] requires an evaluation of the particular justification for the killing, this ordinance represents a system of individualized governmental assessment of the reasons for the relevant conduct. As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of "religious hardship" without compelling reason. Respondent's application of the ordinance's test of necessity *devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons*. Thus, *religious practice is being singled out for discriminatory treatment*.

Id. at 537-38 (emphasis added) (quotations and citations omitted).

As the Court noted, "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial

harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Id*. at 546-47.

In short, a law that burdens a religious belief or practice that is not neutral or generally applicable must survive strict scrutiny. The level of scrutiny applicable to such a law was described by the Tenth Circuit as follows: "[I]f a law that burdens a religious practice or belief is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is *narrowly tailored* to advance a *compelling* government interest." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) (internal quotations and citation omitted) (emphasis added). Because the order at issue here is not a neutral rule of general applicability, it must survive strict scrutiny.

1. Defendants' Order is Not a "Neutral Rule of General Applicability."

A "rule," or as in this case, a mandatory order,[6] "that is discriminatorily motivated and applied is not a neutral rule of general applicability." *Id*. And it is not necessary that the "discrimination" be "motivated by overt religious hostility or prejudice" to be actionable under the Free Exercise Clause. *See Shrum v. City of Coweta*, 449 F.3d 1132, 1144 (10th Cir. 2006). Rather, "the animating ideal of the constitutional provision is to protect the 'free exercise of religion' from unwarranted governmental inhibition whatever its source." *Id*. As the Tenth Circuit noted, "[T]he Free Exercise Clause has been applied numerous times when government

[6] In *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), the court stated that free exercise claims are not limited to challenges involving a law, regulation, or ordinance. The court noted that the use of the word "rule" included "regulations, or other policies." *Id*. at 1294, n.17. In *Axson-Flynn*, the plaintiff brought an action under § 1983 against the staff of a public university's actor training program, alleging, in part, that the staff forced her to say offensive words contrary to her religious beliefs in violation of the First Amendment. The court reversed the grant of summary judgment in favor of the university staff, finding a genuine issue of material fact as to whether the staff's requirement was a neutral rule of general applicability. *Id.; see Shrum v. City of Coweta*, 449 F.3d 1132, 1140 (10th Cir. 2006) ("[T]he First Amendment applies to exercises of executive authority no less than it does to the passage of legislation.").

officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons, such as . . . maintaining morale on the police force . . . ." *Id*. at 1144-45.

Here, the undisputed evidence shows that not once in the past thirty years was ***any*** Tulsa Police Department officer ***ever*** ordered to attend a similar "appreciation" event hosted by a religious organization or held at a place of religious worship (*see* Jordan Dep. at 40-41 at Ex. 2) until the March 4, 2011 event hosted by the Islamic Society. And consequently, no Tulsa Police Department officer other than Plaintiff was ever punished for objecting on religious grounds to an order mandating attendance at such an event. In fact, the day following Plaintiff's punitive transfer and the commencement of his IA investigation, attendance at the event was made voluntary. In short, the order was discriminatorily applied to Plaintiff.

Thus, as a matter of undisputed fact and law, the mandatory order is not a "neutral rule of general applicability." Therefore, Defendants must show that the order survives strict scrutiny, which they cannot do, as discussed further below. (*See* sec. D., *infra*).

2. Even if the Mandatory Order Is a "Neutral Rule of General Applicability," the "Individualized Exemption" Exception Applies.

Even if the order is considered by this court to be a "neutral rule of general applicability," the "individualized exemption" exception following *Sherbert v. Verner*, 374 U.S. 398 (1963) would apply. *See Axson-Flynn*, 356 F.3d at 1294-95 (describing the "'individualized exemption' exception" of *Sherbert* as an "exception[] to the *Smith* rule"). This exception is as follows: "where a state's facially neutral rule contains a system of individualized exemptions, a state may not refuse to extend that system to cases of religious hardship without compelling reason." *Id.* at 1295 (internal quotations and citations omitted).

As stated by the Tenth Circuit,

> Our Circuit has held that a system of individualized exemptions is one that gives rise to the application of a *subjective test*. . . . Such a system is one in which *case-by-case inquiries* are routinely made, such that there is an individualized governmental assessment of the reasons for the relevant conduct that invites considerations of the particular circumstances involved in the particular case.

Axson-Flynn, 356 F.3d at 1297 (internal quotations and citations omitted) (emphasis added). Moreover, it is not necessary that the "system of individualized exemptions" be contained in a written policy. *Id*. at 1299. To do so, as the Tenth Circuit noted, "would contradict the general principle that greater discretion in the hands of governmental actors makes the action taken pursuant thereto more, not less, constitutionally suspect." *Id*.

In sum, controlling precedent clearly establishes "that if a defendant has in place a system of individualized exemptions, it must extend that system to religious exemptions or face strict scrutiny review. . . . It is also clearly established in this circuit that a system of individualized exemptions is one that is designed to make *case-by-case subjective determinations* on exemptions from generally applicable rules." *Id.* at 1300-01 (emphasis added).

Here, there is no dispute that Defendants have a policy and practice whereby they make "case-by-case subjective determinations on exemptions from generally applicable rules," including the mandatory order at issue. As Defendant Jordan testified:

> Q: And so what is the – what are the procedures or policy of the police department for dealing with situations where somebody raises a sincerely held religious objection to something they're being directed to do?
> A: Take it through the chain of command and *review each one on a case-by-case basis*.

(Jordan Dep. at 77 at Ex. 2) (emphasis added). Major Julie Harris confirmed the application of this policy in the context of the mandatory order at issue here when she testified that as a division commander, she has the authority on behalf of the police department to make subjective, case-

by-case exceptions to such orders based on non-religious grounds, such as a medical reason. (Harris Dep. at 51-53 at Ex. 5).

Indeed, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3rd Cir. 1999), then Circuit Judge Alito, writing for the court, held that the Newark Police Department's policy regarding the prohibition on the wearing of beards was unconstitutional under the Free Exercise Clause of the First Amendment because the department made exceptions from its policy for secular reasons, such as medical reasons, but refused to exempt officers whose religious beliefs prohibited them from shaving their beards. In so ruling, the court rejected the department's claim "that permitting officers to wear beards for religious reasons would undermine the force's morale and esprit de corps." *See id*. at 366-67.

Similarly here, there is no legitimate reason (compelling or otherwise) for ordering Plaintiff to attend an "appreciation" event that he objects to based on his sincerely held religious beliefs, but allowing others to be excused from the event for secular reasons.

D. Defendants' Actions Cannot Withstand Strict Scrutiny.

In order to survive constitutional scrutiny, Defendants must show that their mandatory order was "*narrowly tailored* to advance a *compelling* government interest," *Axson-Flynn*, 356 F.3d at 1294, which they cannot do. As the undisputed evidence shows, the very day following the punitive transfer of Plaintiff (which was effective immediately) and his receipt of the notice of an IA investigation, the mandatory order was rescinded and the Islamic Event became voluntary for Plaintiff's shift. (Harris Dep. at 77, 93-94 at Ex. 5). Within a matter of days (which was still more than a week prior to the event), the Islamic Event became voluntary for the entire Police Department. Moreover, there were more than enough officers who were willing to volunteer to attend the Islamic Event such that Plaintiff's objection had no impact on the police

department's interests. (*See* Webster Dep. at 108-09 at Ex. 3). Thus, by punishing Plaintiff because he refused to engage in conduct that was contrary to his religious beliefs, Defendants burdened those beliefs without a compelling reason for doing so. Indeed, whatever interest Defendants had in providing a sufficient number of officers to attend the event so as not to upset the Islamic Society (an interest that is hardly compelling or substantial for that matter), the mandatory order to Plaintiff was not the least restrictive means to promote such an interest, as evidenced by the following facts: the order was no longer mandatory the day after Defendants punitively transferred Plaintiff; within a couple of days a sufficient number of officers volunteered; and the police department was willing to excuse other officers for non-religious reasons. Indeed, all Defendants had to do to avoid the constitutional conflict was to make the event voluntary (*see* Harris Dep. at 48 at Ex. 5), as it had for every other similar event in the past.

E. Summary of Free Exercise Violation.

The undisputed material facts show: (1) that Plaintiff has sincerely held religious beliefs; (2) that Plaintiff objected to Defendants' order based on these religious beliefs; (3) that by punitively transferring Plaintiff, subjecting him to an IA investigation, and suspending him without pay for two weeks, Defendants substantially burdened Plaintiff's religious beliefs and placed substantial pressure on him to engage in conduct contrary to his beliefs; (4) that the order at issue is not a "neutral rule of general applicability" because it was discriminatory on its face, and in its application, in that attending "appreciation" events held by other religious organizations or at other places of worship has never been mandatory nor has an officer, other than Plaintiff, ever been punished for not attending; and (5) that even if the order was a "neutral rule of general applicability," Defendants have in place an individualized, case-by-case exemptions policy and practice for such directives, and they failed to extend such an exemption

to Plaintiff's *religious* objection without a compelling reason. Consequently, Defendants violated Plaintiff's clearly established right to the free exercise of religion as a matter of law.[7]

III. Defendants' Actions Violated Plaintiff's First Amendment Right of Association.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Additionally, the "[f]reedom of association . . . plainly presupposes *a freedom not to associate*." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (emphasis added). Thus, the freedom to not engage in an association for the advancement of beliefs is an inseparable aspect of the protections afforded by the First Amendment. (*See* Am. Compl. at ¶¶ 77-81 [Doc. No. 11]).

Here, by compelling Plaintiff to engage in an association that he opposed since it was contrary to his deeply-held religious beliefs, Defendants not only violated his right to the free exercise of religion, but they also violated his right to expressive association, both of which are guaranteed under the First Amendment.

IV. Defendants' Actions Violated the Establishment Clause.

The Supreme Court has warned that "the Constitution . . . requires that [courts] keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded, and that [they] guard against other different, yet equally important, constitutional injuries." *Santa Fe*

[7] The individual Defendants do not enjoy qualified immunity for their actions since the law at issue was "clearly established." *Axson-Flynn*, 356 F.3d at 1300-01.

Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (internal citation and quotations omitted). Indeed, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984). As the case law demonstrates, government action that is "*sufficiently likely to be perceived*" as an approval or disapproval of religion violates the Establishment Clause. *Cnty. of Allegheny v. A.C.L.U.*, 492 U.S. 573, 597 (1989) (stating that "the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether 'the challenged governmental action is *sufficiently likely to be perceived*" as an approval or disapproval of an individual's "religious choices") (citations omitted) (emphasis added).

Throughout its decisions, the Supreme Court has consistently described the Establishment Clause as forbidding not only state action that promotes or "advance[s]" religion, *see, e.g., Cnty. of Allegheny*, 492 U.S. at 592, but also actions that tend to "disapprove of," "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("disapprove"); *Lynch*, 465 U.S. at 673 ("hostility"); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"). Indeed, our Constitution prohibits government action that "foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995). Even *subtle departures from neutrality* are prohibited. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534. As the Supreme Court noted, government endorsement of a particular religion is prohibited because the endorsement of one religious faith acts as a tacit disapproval of other faiths. Thus, a government-sponsored message of disapproval of the religious beliefs and practices of one faith cannot pass constitutional muster

any more than the implied condemnation resulting from the endorsement of another. As Justice O'Connor explained in *Lynch*:

> Endorsement *sends a message* to nonadherents that they are outsiders, not full members of the political community, and an *accompanying message* to adherents that they are insiders, favored members of the political community. Disapproval *sends the opposite message*.

Lynch, 465 U.S. at 688 (O'Connor, J., concurring) (emphasis added). When determining whether the challenged government action has the "impermissible effect of communicating a message of governmental endorsement or disapproval of religion," the court views the evidence "through the eyes of an objective observer." *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1119 (10th Cir. 2010) (internal quotations and citations omitted). And as the Tenth Circuit observed,

> [G]overnments may not make adherence to a religion relevant in any way to a person's standing in the political community. And actions which have the effect of communicating governmental endorsement or disapproval, *whether intentionally or unintentionally*, make religion relevant, in reality or public perception, to status in the political community.

Id. at 1119 (internal punctuation, quotation, and citations omitted) (emphasis added).

Here, the Tulsa Police Department ordered[8] its officers to attend an event at a mosque (note: this was not a call for service requiring any police duties and never before have officers been ordered to attend such an event hosted by a religious organization at a religious venue) that involved proselytizing tours of the worship space, observing religious worship services, and discussions on Islamic religious beliefs. When Plaintiff objected based on his Christian beliefs, he was punished. Moreover, the event was advertised as promoting and it in fact did promote

[8] From an Establishment Clause perspective, it does not matter that the event was voluntary for everyone but Plaintiff. The fact that the government endorsed and approved of this event, as well as participated in it, is sufficient to violate the Establishment Clause, as noted above. Indeed, the test is whether the government's actions are "sufficiently likely to be perceived" as approving or endorsing a particular religion. Certainly, by ordering Plaintiff to attend and then punishing him when he refused based on his Christian religious beliefs, it is sufficiently likely that Defendants' actions would be perceived as violating the Establishment Clause.

Islam. Indeed, a photograph of police officers sitting at a table with members of the mosque was posted on the Islamic Society's website and below the photograph was a caption, "Discover Islam Classes for Non-Muslims," implying that the officers were there taking classes on Islam. In sum, a reasonable observer would conclude that Defendants' actions conveyed the impermissible message of approval of Islam and disapproval of Plaintiff's Christian beliefs.

V. Defendants' Actions Violated the Equal Protection Clause.

The Equal Protection Clause prohibits a state from denying to "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This clause embodies the principle that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When a classification targets a suspect class *or infringes a fundamental right*, such as the free exercise of religion, the court applies strict scrutiny. *See Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002); *see also Secsys, LLC v. Vigil*, 666 F.3d 678, 687 (10th Cir. 2012) ("Laws selectively burdening fundamental rights are also 'carefully scrutinized.'") (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972)). "To survive strict scrutiny, the government must show that its classification is narrowly tailored to achieve a compelling government interest." *KT&G Corp. v. Att'y Gen. of Okla.*, 535 F.3d 1114, 1137 (10th Cir. 2008).

Here, Plaintiff was discriminated against and punished for invoking his fundamental right to the free exercise of religion in violation of the First Amendment and the equal protection guarantee of the Fourteenth Amendment.

CONCLUSION

Plaintiff respectfully requests that the court grant his motion and enter judgment in his favor on all claims as to liability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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