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-FHM

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

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INTRODUCTION

Defendants' response to Plaintiff's motion for partial summary judgment confirms that this court should grant Plaintiff's motion and enter judgment in his favor as to liability as a matter of law. Indeed, there is no dispute of the *material* facts, and Defendants cannot create one by attempting to recast their own sworn testimony in a false light or by simply asserting that certain facts are not true without providing any evidence to support the assertion. Indeed, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (internal citations omitted); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (stating that there is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party").

The following summary highlights the material facts and Defendants' inability to demonstrate *through sufficient evidence* that these facts are actually in dispute.

SUMMARY OF UNDISPUTED MATERIAL FACTS

- As a result of Defendant Webster's order, the Islamic Society of Tulsa's "Law Enforcement Appreciation Day" (hereinafter "Islamic Event") was <u>*mandatory*</u> for Plaintiff (and the entire police department, except for first shift) as of February 17, 2011.[1] (Fields Decl. at ¶ 26

[1] Defendants "den[y] all allegations, express or implied, that Plaintiff was required to attend" the Islamic Event. (Defs.' Opp'n at 3). This assertion is false, as the undisputed evidence shows. During the February 21, 2011, meeting, *which was recorded*, Defendant Webster stated, "Are you prepared to designate two officers and a supervisor <u>*or yourself*</u> to attend this event?" Plaintiff responded, "No." Defendant Webster then stated, "If ordered?" Plaintiff responded, "No, Chief, I am not." (Pl.'s Mem. at ¶ 39; Fields Decl. at ¶ 40 [Doc. 42-2]). On March 10, 2011, Defendants sent Plaintiff a confirming email, stating, "You are hereby notified that Chief Chuck Jordan has requested IA to conduct an administrative investigation <u>*in regards to your refusal to attend*</u> and refusal to assign officers from your shift, <u>*who shared your religious beliefs*</u>,

[Doc. 42-2]; Jordan Dep. at 48, 50, 51 [Doc. 42-24]; Harris Dep. at 48 [Doc. 42-27]).

- Plaintiff objected to the mandatory order *on the basis of his sincerely held religious beliefs*. (Fields Decl. at ¶¶ 30-31 [Doc. 42-2], Dep. Ex. 10 [Doc. 42-11] [emphasis added]).

- Plaintiff *clearly and unequivocally* conveyed his religious objection to Defendants. (Fields Decl. at ¶¶ 30-31 [Doc. 42-2], Dep. Ex. 10 [Doc. 42-11]).

- Defendants *understood* that Plaintiff's objection to the mandatory order was *based upon his sincerely held religious beliefs*. (Jordan Dep. at 54-55 [Doc. 42-24]; Fields Decl. at ¶¶ 30, 31 [Doc. 42-2], Dep. Ex. 10 [Doc. 42-11]).

- Defendants (and Major Harris) *admit* that they ("absolutely") *do **not** question the sincerity of Plaintiff's religious beliefs, which served as the basis for his religious objection to the order*. (Jordan Dep. at 74-75 [Doc. 42-24] [testifying that he "absolutely" believed Plaintiff's religious objection was sincere]; Harris Dep. at 17-18, 73 [Doc. 42-27] [testifying that she had no reason to doubt the sincerity of Plaintiff's religious objection to the order]; Webster Dep. at 20 [Doc. 42-25] [acknowledging Plaintiff's right to invoke a religious objection to his order and not questioning the sincerity of Plaintiff's religious objection]).

- Defendants understood that Plaintiff would have *no objection* to the order if attendance at the Islamic Event was *voluntary* (*i.e.*, Defendants understood that they could have simply accommodated, and thus made an exemption for, Plaintiff's religious beliefs by making the event

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to attend the 'Law Enforcement Appreciation Day' on March 4, 2011, at the Tulsa Peace Academy." (Pl.'s Mem. at ¶ 44; *see* Defs.' Opp'n at 5 [admitting this fact]; Fields Decl. at ¶ 46 [Doc. 42-2], Dep. Ex. 16 [Doc. 42-15][emphasis added]). And Plaintiff's "Sworn-Employee Performance Evaluation" 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*." (Pl.'s Mem. at ¶ 54; *see* Defs.' Opp'n at 8 [not disputing *this* fact]; Fields Decl. at ¶ 54 [Doc. 42-2], Decl. Ex. 1A [Doc. 42-3][emphasis added]).

voluntary).[2] (Pl.'s Mem. at ¶ 37; Defs.' Opp'n at 5 [admitting this fact]).

- *Never* has an "appreciation" event sponsored by a religious organization or held at a place of worship been mandatory for the officers, until the Islamic Event. (Fields Decl. at ¶ 13 [Doc. 42-2]; Jordan Dep. at 40-41 [Doc. 42-24]; Wells Decl. at ¶¶ 1-13 [Doc. 50-4]).

- *Never* has an "appreciation" event been mandatory that included an invitation: (1) to tour a religious sanctuary, such as a mosque; (2) to observe a religious service; or (3) to receive presentations on religious beliefs, until the Islamic Event. (Fields Decl. at ¶ 13 [Doc. 42-2]; Jordan Dep. at 40-41 [Doc. 42-24] [acknowledging that no similar event was ever mandatory in his thirty-plus years on the police department]; Wells Decl. at ¶¶ 1-13 [Doc. 50-4]).

- The Islamic Event was advertised as including: (1) mosque tours; (2) observing a religious service; (3) meeting Muslim leaders; and (4) receiving presentations on religious beliefs. (Pl.'s Mem. at ¶ 23; *see* Defs.' Opp'n at 5 [admitting this fact]).

- Plaintiff is prohibited from proselytizing his faith while in uniform. (Pl.'s Mem. at ¶ 19; *see* Defs.' Opp'n at 5 [admitting this fact]).

- Making the Islamic Event mandatory placed Plaintiff in a moral dilemma that violated his religious beliefs.[3] (Fields Decl. at ¶¶ 15-21 [Doc. 42-2]; Fields Dep. at 60-63, 66-70 [Doc. 42-28]).

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[2] Defendants make the preposterous claim that "Plaintiff was aware [that] attendance at the Appreciation Day was always voluntary, *unless* there were insufficient officers willing to attend." (Defs.' Opp'n at 3). This claim must be dismissed for what it is: a *post hac* rationalization that is *contrary* to the facts and asserted merely as a litigation position to avoid liability. All Plaintiff asked of Defendants *from the very beginning* was to make the event voluntary. Had they done so or had they provided Plaintiff with a religious exemption, similar to how they would have provided an exemption for a medical reason, we would not be before this court today.

[3] It is improper as a matter of law for Defendants to question the scriptural basis for Plaintiff's religious beliefs and thus question the basis for his religious objection to the mandatory order. *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation.").

- 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 [Doc. 42-2]; Fields Dep. at 60-63, 66-70 [Doc. 42-28]; *see also* n.3, *supra*).

- Because Plaintiff objected to the mandatory order, he was punished. (Fields Decl. at ¶ 50 [Doc. 42-2], Dep. Exs. 17, 18 [Docs. 42-16, 17]).

- Plaintiff's punishment included: (1) an immediate, temporary transfer; (2) an Internal Affairs (IA) investigation; (3) suspension without pay for 80 hours/10 days; (4) making the temporary transfer permanent; (4) prohibiting Plaintiff from being "considered for future promotions" for one year; (5) assigning Plaintiff to the "graveyard" shift; and (6) threatening Plaintiff with the possibility of "more severe disciplinary action, including dismissal." (Fields Decl. at ¶ 50 [Doc. 42-2], Dep. Exs. 17, 18 [Docs. 42-16, 17]).

- Defendants' punishment altered the terms of Plaintiff's employment. (Fields Decl. at ¶ 56 [Doc. 42-2], Dep. Ex. 23 [Doc. 42-18]).

- Defendants punished Plaintiff for refusing to attend the Islamic Event based on the fact that his religious beliefs are contrary to Islam. (*See* Jordan Arbitration Test. at 351 [Doc. 50-3] ["*I can't have a police department where everybody refuses to give – to interact with Muslims because they say it's their religious reasons*."]).[4]

[4] Defendants' attempt to recast Plaintiff's religious objection as an objection based on discrimination toward Muslims (*see* Defs.' Opp'n at 4 ["The City of Tulsa has compelling reason to believe that Plaintiff's conduct was in fact motivated by anti-Islamic sentiment."]) is offensive and without factual support, (*see* Siddiqui Dep. at 82-83, 85-86 at Ex. 14). Nonetheless, this claim demonstrates quite convincingly the subjective, case-by-case assessment that Defendants employed to determine whether to grant Plaintiff an exemption in this case. Despite testifying that they did not question the sincerity of Plaintiff's religious beliefs, Defendants now further confirm that they disregarded Plaintiff's beliefs because they believe these beliefs are "anti-Islamic" and not worthy of consideration. Such discrimination, however, is prohibited by the Free Exercise Clause. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (striking down law under the Free Exercise Clause that discriminated against a certain

- On February 22, 2011, the *day after* Plaintiff was temporarily transferred and notified that he was the subject of an IA investigation for objecting to the mandatory order, Major Harris made attendance at the Islamic Event voluntary for Plaintiff's former shift. (Harris Dep. at 77, 94 [Doc. 42-27]).

- Major Harris was not punished in any way for making attendance at the Islamic Event voluntary on February 22, 2011. (Jordan Dep. at 66-67 [Doc. 50-2]; Jordan Arbitration Test. at 352-53 [Doc. 50-3]).

- Defendant Webster made the Islamic Event voluntary for the entire police department on February 24, 2011—just *three days* after punishing Plaintiff for objecting on religious grounds. (Fields Decl. at ¶ 55 [Doc. 42-2], Dep. Ex. 13 [Doc. 42-14]; Harris Dep. at 93-94 [Doc. 42-27]).

- The mission of the City police department was fulfilled by making the Islamic Event voluntary. (Webster Dep. at 108-09 [Doc. 42-25]; Jordan Dep. at 59-60 [Doc. 50-2]).

- Defendants have in place a policy and practice whereby exemptions to such mandatory orders are permitted on a subjective, "case-by-case" basis. (Jordan Dep. at 77 [Doc. 42-24]; *see also* Fields Decl. at ¶ 33 [Doc. 42-2]; Webster Dep. at 108-09 [Doc. 42-25] [testifying that the department accommodates officers' religious beliefs and objections "when possible . . . so long as we could do so consistent with fulfilling the mission of the police department"]).

- Defendants admit in their opposition that, pursuant to the "policy and practice of the TPD," an officer could be exempted from attending the Islamic Event "for medical reasons and to allow officers to take the day off." (Defs.' Opp'n at 11).

- The Islamic Event was held on a Friday, which is a holy day for Islam. (Fields Decl. at ¶ 12 [Doc. 42-2]; Siddiqui Dep. at 75-76 [Doc. 42-26]).

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disfavored religious belief and practice).

- Friday was *purposefully* chosen for the Islamic Event so that the officers could have "the option to stay for the prayer." (Siddiqui Dep. at 75-76 [Doc. 42-26]).

- The Islamic Event promoted the religion of Islam. (Burrell Decl. at ¶ 3 [Doc. 42-29]; Ballenger Decl. at ¶¶ 4-8 [Doc. 42-30]; Siddiqui Dep. at 45-53 [Doc. 42-26]).

ARGUMENT

I. The *Sherbert* Standard Applies Because the Mandatory Order Was Not Neutral or Generally Applicable.

Defendants claim that *Sherbert v. Verner*, 374 U.S. 398 (1963) "has no applicability here." (Defs.' Opp'n at 11-12). They are wrong. As then Circuit Judge Alito, writing for the court in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999), observed, "The *Smith* Court . . . did not overrule its prior free exercise decisions, but rather distinguished them." *Id.* at 363 (Alito, J.) (citing *Smith*, 494 U.S. at 881-84).

In short, when a challenged rule is not a "neutral rule of general applicability" and it burdens the right to free exercise of religion, it will be upheld only if it survives strict scrutiny. This is the extant and controlling law in this circuit. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) ("[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.") (internal quotations and citation omitted); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (holding that a law that burdens a religious belief or practice that is not neutral or generally applicable must "undergo the most rigorous scrutiny").[5]

[5] Defendants argue for the application of a *Pickering*-type balancing test that is used for *speech* cases in the employment context. (*See* Defs.' Opp'n at 12-13). Defendants' argument is misplaced. *Shrum v. City of Coweta*, 449 F.3d 1132 (10th Cir. 2006) (applying traditional free exercise analysis to a claim advanced by a police officer in an employment context); *see also*

Defendants contradict their prior legal assertion by then subsequently arguing that the order at issue does not trigger "rigorous scrutiny" because it was a "neutral rule of general applicability." (Defs.' Opp'n at 13-14). Defendants are wrong as a matter of fact and law.

As noted previously, when the imposition of an order that burdens the free exercise of religion is discriminatorily applied, it must survive strict scrutiny. Here, Plaintiff was singled out and punished for raising a *religious* objection to the mandatory order, yet if he sought an exemption from the order based on a medical reason or because he wanted to go on vacation that would have been permitted, as Defendants acknowledge.[6] *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 538 ("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.") Further, never before, and certainly not in the past thirty years, has an "appreciation" event that was sponsored by a religious organization and held at a religious venue been mandatory for the officers to attend. And that is particularly the case when the event involved an invitation: (1) to tour the religious sanctuary; (2) to observe a worship service; and (3) to receive presentations on religious beliefs. And because Plaintiff, a Christian, raised a religious objection to the mandatory order based on the fact that the Islamic Event was contrary to his Christian beliefs, he was severely punished. (*See* Jordan Arbitration Test. at 351 [Doc. 50-3] [testifying that he can't have a police department where officers refuse to interact with Muslims for "religious reasons"]). And to further demonstrate that Plaintiff was singled out for discriminatory treatment based on his *religious objection*, the very day following his punitive transfer and receipt of notice of the

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Fraternal Order of Police Newark Lodge No. 12, 170 F.3d at 359 (same).

[6] (*See* Defs.' Opp'n at 11 ["The City admits that the policy and practice of the TPD is to excuse an officer for medical reasons and to allow officers to take the day off. . . ."]).

IA investigation, the Islamic Event was made voluntary for his shift and three days later it was made voluntary for the entire police department. Consequently, there is no reasonable dispute that Plaintiff was punished because he objected to the mandatory order based on his Christian religious beliefs. *See also Shrum*, 449 F.3d at 1144 (stating that it is *not* necessary that the "discrimination" be "motivated by overt religious hostility or prejudice" to be actionable under the Free Exercise Clause, rather "the animating ideal of the constitutional provision is to protect the 'free exercise of religion' from unwarranted governmental inhibition *whatever its source*") (emphasis added).

Finally, there is no factual dispute that Defendants have in place a policy and practice whereby exemptions to such mandatory orders are permitted on a subjective, "case-by-case" basis.[7] (Jordan Dep. at 77 [Doc. 42-24]). Indeed, Defendants admit that they would have no objection to exempting an officer from the Islamic Event for a medical reason, such as an allergy to the food, or because he wanted to go on vacation. However, when Plaintiff sought a religious exemption, he was severely punished. Consequently, when the government has a rule that permits exemptions for non-religious reasons, it "may not refuse to extend [an exemption] to cases of religious hardship without compelling reason." *Axson-Flynn*, 356 F.3d at 1294-95

[7] *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006), and *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694 (10th Cir. 1994), are not helpful to Defendants (*see* Defs.' Opp'n at 14-15) because both of these cases involved circumstances in which there was "no authority or discretion" on the part of government officials to grant exemptions beyond the very limited, objective exemptions provided by the respective statute and policy at issue. Here, Defendants have very broad, indeed plenary, discretion to grant exemptions from the mandatory order on a subjective, "case-by-case" basis for any number of reasons, but yet refused to grant an exemption to Plaintiff for religious reasons. Consequently, this is a case in which Defendants "made a 'value judgment in favor of secular motivations, but not religious motivations.'" *Grace United Methodist Church*, 451 F.3d at 654 (quoting *Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d at 654). (*See* Jordan Arbitration Test. at 351 [Doc. 50-3] ["I can't have a police department where everybody refuses to give – to interact with Muslims because they say it's their religious reasons."]).

(describing the "'individualized exemption' exception" of *Sherbert* as an "exception[] to the *Smith* rule"); *see also Fraternal Order of Police Newark Lodge No. 12*, 170 F.3d at 366-67 (striking down a police department's policy regarding the prohibition on the wearing of beards under the Free Exercise Clause because the department made exceptions for secular reasons, but refused to exempt officers whose religious beliefs prohibited shaving).

Finally, there can be no reasonable dispute that the mandatory order was not narrowly tailored to promote a compelling government interest. This conclusion is evidenced by the simple fact that Defendants admittedly achieved their objectives by making the event voluntary.

II. Defendants Impermissibly Burdened Plaintiff's Religious Beliefs.

Defendants claim, by way of footnote, that "the most compelling reason for denying Plaintiff's claim is that he was not constitutionally burdened in the exercise of his religion." (Defs.' Opp'n at 15, n.4). Once again, Defendants are mistaken. "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding *religious beliefs* as such." *See McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (emphasis added). 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.*, 508 U.S. at 523 (emphasis added); *see also id*. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

Consequently, when government conduct burdens a person's *religious beliefs*, the Free Exercise Clause is triggered. *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981) ("[B]eliefs rooted in religion are protected by the Free Exercise Clause. . . ."). And because the "[c]ourts are not arbiters of scriptural interpretation," 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). Here, the record is undisputed that Plaintiff acted "for religious reasons" and was severely punished as a result. (*See, e.g.,* Jordan Arbitration Test. at 351 [Doc. 50-3] [testifying that he can't have a police department where officers refuse to interact with Muslims for "religious reasons"]). And the U.S. Supreme 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. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988). Consequently, there can be *no* reasonable dispute that punitively transferring Plaintiff, subjecting him to an IA investigation, and suspending him without pay for two weeks placed an impermissible burden on Plaintiff's free exercise of religion in violation of the First Amendment. *See Thomas*, 450 U.S. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

CONCLUSION

Plaintiff respectfully requests that the court grant his motion for partial summary judgment 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 September 18, 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.

AMERICAN FREEDOM LAW CENTER

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