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

(1) WAYNE BROWN, Plaintiff, v. (1) CITY OF TULSA; and (2) CHARLES W. JORDAN, individually and in his official capacity as Chief of Police, Tulsa Police Department; Defendants.	Case No. 19-cv-00538-JFH-CDL Hon. John F. Heil, III

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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On September 4, 2019, Defendants terminated Plaintiff's employment as a police officer with the City of Tulsa Police Department ("TPD") because of the content and viewpoint of certain social media posts allegedly posted by Plaintiff *several years prior to when he was hired as a police officer* by the City of Tulsa ("City"). In a moment of candor, the witness designated by the City to testify pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure as to the facts Defendants relied upon to justify Plaintiff's firing (*i.e.*, facts demonstrating disruption to the TPD sufficient to warrant firing Plaintiff for engaging in free speech) admitted that "***[t]here was none***." Plaintiff is entitled to summary judgment on the issue of liability.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On October 24, 2018, Plaintiff was selected for the Tulsa Police Academy. (Brown Decl. ¶ 2 at Ex. 1; Perkins Dep. at 13:3-7 at Ex. A).[1]

2. On January 22, 2019, Plaintiff commenced his employment with the TPD. (Brown Decl. ¶ 4 at Ex. 1; Perkins Dep. at 13:17-20 at Ex. B).

3. Prior to and during his time at the police academy, Plaintiff was subject to background investigations to ensure that he was qualified to become a uniformed police officer, which he was. (Brown Decl. ¶ 46 at Ex. 1; Perkins Dep. at 13:21-25 to 15:1-12; 19:4-12 at Ex. A; Jordan Dep. at 12:11-25 to 13:1-22 at Ex. B).

4. The police academy is twenty-eight weeks long, and it is rigorous. (Brown Decl. ¶ 6 at Ex. 1; Jordan Dep. at 13:23-25 to 14:1-9 at Ex. B).

[1] The Perkins, Jordan, Dalgleish, and Carlisle depositions are attached to the Muise Declaration (Exhibit 2) as Exhibits A through D, respectively. Exhibit E of the Muise Declaration contains the numbered deposition exhibits (1 through 16) referenced in this brief and in the declaration of Plaintiff (Exhibit 1).

5. Plaintiff successfully completed the police academy on August 2, 2019. (Brown Decl. ¶ 7 at Ex. 1; Perkins Dep. at 19:4-7 at Ex. A; Jordan Dep. at 14:10-12 at Ex. B).

6. At no time while he was attending the police academy did Plaintiff ever discriminate against anyone on account of his or her race, religion, or other protected class nor did he engage in any conduct that exhibited an unlawful or otherwise discriminatory bias against any race, religion, or other protected class. (Brown Decl. ¶¶ 8, 46 at Ex. 1; Perkins Dep. at 19:8-12 at Ex. A; Jordan Dep. at 15:4-14 at Ex. B; Dalgleish Dep. at 21:13-25 to 22:1, 88:11-15 at Ex. C).

7. At no time while he was attending the police academy did Plaintiff engage in any conduct unbecoming an officer or police employee. (Brown Decl. ¶¶ 9, 46 at Ex. 1; Jordan Dep. at 15:4-14 at Ex. B; Dalgleish at 88:11-15 at Ex. C).

8. On August 6, 2019, Plaintiff began field training. His shift assignment was Tuesday through Friday, 1400 to 2400 (2 p.m. to midnight). (Brown Decl. ¶¶ 10, 11 at Ex. 1; Perkins Dep. at 19:19-25 at Ex. A).

9. At no time during his field training did Plaintiff ever discriminate against anyone on account of his or her race, religion, or other protected class nor did he engage in any conduct that exhibited an unlawful or otherwise discriminatory bias against any race, religion, or other protected class. (Brown Decl. ¶¶ 12, 46 at Ex. 1; Jordan Dep. at 16:4-16 at Ex. B; Dalgleish at 88:11-15 at Ex. C).

10. At no time during his field training did Plaintiff take any action that was inconsistent with his Oath of Office and Value Oath nor did he engage in any conduct unbecoming an officer or police employee. (Brown Decl. ¶¶ 13, 14, 46 at Ex. 1; Jordan Dep. at 16:4-16 at Ex. B; Dalgleish at 88:11-15 at Ex. C).

11. During his time at the academy and during his field training, Plaintiff's performance as a candidate and his performance as a police officer demonstrated that he was qualified to serve as a uniformed police officer with the TPD. (Brown Decl. ¶¶ 15, 46 at Ex. 1; *see also* Jordan Dep. at 16:4-16 at Ex. B; Dalgleish at 88:11-15 at Ex. C).

12. On September 4, 2019, Defendants terminated Plaintiff's employment as a TPD officer based on the content and viewpoint of social media posts that were allegedly posted on his Facebook page ("Duke Brown") several years prior to his hiring by the TPD. (Brown Decl. ¶¶ 16, 53-59 at Ex. 1; Perkins Dep. at 20:7-15; 30:11-16 at Ex. A; Jordan Dep. at 16:17-23 at Ex. B).

13. Marq Lewis, a local political and anti-police activist, initiated a public effort to fire Plaintiff based on Plaintiff's old Facebook postings. (Brown Decl. ¶¶ 17, 18, 20, 21, 22, 39, 40, 54-57 at Ex. 1; Perkins Dep. at 25:14-20; 27:4-9 at Ex. A; Dalgleish Dep. at 37:19-22, 67:2-12 at Ex. C; Carlisle Dep. at 15:23-25 to 16:1-10, 21:23-25 to 22:1-6, 18-25 to 23:1-9, 56:13-17 at Ex. D; Pl.'s Dep. Ex. 4, 7, 15 at Ex. E, *see also* Jordan Dep. at 28:10-12 at Ex. B).

14. The City, through TPD Sergeant Shane Tuell, a public relations officer, released, the following public statement regarding the firing of Plaintiff: "Early yesterday morning the police department was notified of some questionable media posts by one of our officers. The Chief [Defendant Jordan] immediately ordered internal affairs to open an investigation and ***within one hour and 15 minutes of receiving the complaint, the officer was terminated***." (Brown Decl. ¶ 19, 51 at Ex. 1; Jordan Dep. at 34:14-25 to 35:1-10, 21-24 to 36:1-8 at Ex. B; Carlisle Dep. at 50:20-25 at Ex. D).

15. The internal affairs investigation (IA Report) revealed four citizen complaints about the social media posts and three citizen complaints about the firing of Plaintiff out of a City population of approximately 400,000 people. (Jordan Dep. at 41:16-25 to 42:1-11, 44:12-18 at

Ex. B, Pl.'s Dep. Ex. 2 [IA Report] at Ex. E; Dalgleish Dep. at 58::23-25 to 62:1 at Ex. C; Carlisle Dep. at 20:7-11, 21:23-25 to 22:1-6, 40:21-24, 45:8-19, 53:7-25 to 55:1-8, 79:15-25 to 81:1-14, 88:23-25 to 89:1-25 at Ex. D).

16. Defendant Jordan, the TPD Chief of Police at the time, had the authority to make policy on behalf of the City. (Jordan Dep. at 10:5-9, Ex. B; Dalgleish Dep. at 16:8-23 at Ex. C).

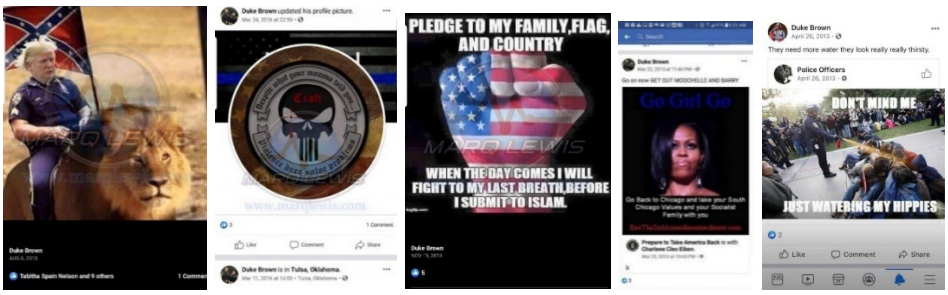
17. As the TPD Chief of Police, Defendant Jordan had the authority to hire or fire police officers on behalf of the City. (Jordan Dep. at 10:10-13, Ex. B; Dalgleish Dep. at 16:8-23 at Ex. C).

18. Defendant Jordan, on behalf of the City, fired Plaintiff for the Facebook posts made years prior to Plaintiff's hiring by the TPD. (Jordan Dep. at 11:5-9 at Ex. B; Dalgleish Dep. at 16:8-23 at Ex. C; *see also* Brown Decl. ¶¶ 16, 23-29, 56, 57 at Ex. 1).

19. Defendant Jordan never gave Plaintiff an opportunity to sit down with him and explain why he was being fired. (Brown Decl. ¶¶ 34, 36, 46, 49 at Ex. 1; Jordan Dep. at 11:14-16, 25:10-14 at Ex. B; *see also id*. at 65:15-20; Carlisle Dep. at 7:1-25 to 8:1-5 at Ex. D).

20. The "objectionable" social media posts allegedly found on Plaintiff's Facebook page that were brought to the attention of the TPD are described as follows and appear in the images below: (1) a post of the yet-to-be-president Donald Trump that was posted on or about August 6, *2015*; (2) a post containing a skull image created by the famous American sniper and war hero Chris Kyle superimposed over the American flag with a thin blue line that was posted on or about March 24, *2016*; (3) a post consisting of an image making the point that Americans will not surrender or submit to Islam that was posted on November 15, *2015*; (4) an image of Michelle Obama with a message urging her to take her "South Chicago Values" and "Socialist Family" back to Chicago that was posted by "Prepare to Take America Back" and shared by Plaintiff on March

22, *2013*; (5) an image posted by "Police Officers" ("watering my hippies") that was shared by Plaintiff on April 26, *2013*; (6) an image of "Texas Muslim Day" posted by "Stop Islamization of the world" and shared by Plaintiff on March 25, *2013*; (7) an image posted in September *2014*, that shows support for Officer Wilson who was publicly vilified by anti-police activists as a racist for shooting a black man; (8) an image posted by "The Inmates of the Asylum" and shared by Plaintiff on March 19, *2013* (the post contains the skull image on the cover);[2] (9) an image of the City Mayor, Defendant Jordan, and Plaintiff at the academy graduation ceremony (this image was posted by Marq Lewis on his Facebook page, but it was *not* posted by Plaintiff on his page), and (10) an image of Plaintiff and a fellow TPD officer ("TPD Officer Post") that Plaintiff posted on August 15, 2019 to his Facebook page:



[2] The quote is attributable to Darynda Jones, a New York Times bestselling author of the *Charley Davidson* series of paranormal romantic thrillers. The specific quote is from Jones' *Fourth Grave Beneath My Feet* and a simple Google search reveals that this quote is commonly used, particularly by those who have an interest in murder mysteries. (*See* https://www.azquotes.com/author/19321-Darynda_Jones#google_vignette; https://darynda.com/books/fourth-grave-beneath-my-feet).

(Brown Decl. ¶¶ 54-59 at Ex. 1; Perkins Dep. at 27:11-25 to 28:1-3 at Ex. A; Jordan Dep. at 16:17-25 to 19:1-12 at Ex. B; Carlisle Dep. at 26:3-12 at Ex. D, Pl.'s Dep. Ex. 3 at Ex. E).

21. The TPD Officer Post is the only image of those listed by Marq Lewis that Plaintiff posted ***while he was employed by the TPD***. (Brown Decl. ¶ 55(f) at Ex. 1; Carlisle Dep. at 26:3-12 at Ex. D, Pl.'s Dep. Ex. 3 at Ex. E).

22. The TPD Officer Post does not violate the Social Media Policy; in fact, Defendant Jordan maintained a Facebook page that pictured him and identified him as an officer with the TPD. (Jordan Dep. at 20:21-25 to 21:1-8; 38:2-23 at Ex. B, Pl's Dep. Ex. 10 [Jordan Facebook Page] at Ex. E; *see also* Dalgleish Dep. at 24:10-16 at Ex. C).

23. Defendant Jordan did not find any offense with the "I Support Darren Wilson" post (Jordan Dep. at 19:13-25 to 20:1-20 at Ex. B, Pl's Dep. Ex. 3 [Darren Wilson Post, p.10/10] at Ex. E; *see also* Carlisle Dep. at 43:8-25 to 44:1-18 at Ex. D), even though the Officer Wilson shooting was a catalyst for the Black Lives Matter/"Hands Up, Don't Shoot" movements, and this shooting is considered by a large segment of the public to be an example of rampant racism amongst police officers (*see id.; see also* https://afas.wustl.edu/racism-reform-rebellion-ferguson-uprising-rise-black-lives-matter, last visited June 5, 2025).

24. The social media posts that served as Defendants' basis for firing Plaintiff were posted or shared on Plaintiff's Facebook page three to six years prior to the start of his employment with the TPD in 2019. (Brown Decl. ¶¶ 53-59 at Ex. 1; Pl.'s Dep. Ex. 3 [Facebook Posts] at Ex. E; Perkins Dep. at 20:7-15 at Ex. A; Jordan Dep. at 18:13-20 at Ex. B; Dalgleish Dep. at 15:12-19, 65:24-25 to 66:1-5 at Ex. C; Carlisle Dep. at 49:1-5 at Ex. D).[3]

[3] Defendant Jordan testified as follows:

> Q: Is it your understanding, when you fired Wayne Brown, these posts were made years prior to him being hired as a police officer?

25. The Interoffice Correspondence set forth the basis for Plaintiff's firing as follows:

> Department personnel should be mindful that their speech, when using social media, is public and becomes part of the worldwide electronic domain. Therefore, adherence to the department's code of conduct is required in the personal use of social media. In particular, ***department personnel*** are prohibited from ***posting***[4] speech containing obscene or sexually explicit language, images, acts, and statements or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, religion, or protected class of individuals.

(Brown Decl. ¶¶ 27-29 at Ex. 1; Jordan Dep. at 16:24-25 to 17:1-8 at Ex. B; Carlisle Dep. at 23:14-25 to 24:1-25 to 25:1-14 at Ex. D; Pl.'s Dep. Ex. 5 [Interoffice Correspondence] at Ex. E).

26. At no time did Plaintiff "post[] speech containing obscene or sexually explicit language, images, acts, and statements or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, religion, or protected class of individuals" ***while he was*** "department personnel." (Brown Decl. ¶¶ 16, 46 at Ex. 1; Jordan Dep. at 18:13-20 at Ex. B; Dalgleish Dep. at 65:24-25 to 66:1-5 at Ex. C).

27. The Social Media Policy expressly prohibits "*posting*" (the present participle of post—*i.e.*, the action takes place in the moment and not in the past) while a member of the "department" (*i.e.*, the policy expressly applies to "posting" *while* working for the TPD). (*See*

A: That's correct.
Q: So it'd be correct to say that these posts were not made when he was actually a member of the department?
A: Those posts, no.
(Jordan Dep. at 18:13-20 at Ex. B).
Deputy Chief Eric Dalgleish, a Rule 30(b)(6) witness for the City testified as follows:
Q: Do you have any evidence that Mr. Brown was aware of the social media policy when he made any posts between 2013 and 2016?
A: No, not during that time period.
Q: And that's the time period that the posts in question were made, correct?
A: Correct.
(Dalgleish Dep. at 65:24-25 to 66:1-5).

[4] The policy does not state "***have posted***" prior to becoming "department personnel." It is worded so as to apply once the person is hired (becomes "department personnel"), and it prohibits such "posting" at that time and while a member of the department. (*See infra* ¶ 27).

Perkins Dep. at 31:10-24 at Ex. A; Jordan Dep. at 49:14-25 to 50:1-8, 51:6-17, 52:25 to 53:1-14, 22-25 to 54:1 at Ex. B; Dalgleish Dep. at 57:1-25 to 58:1-13, 65:24-25 to 66:1-5 at Ex. C; Carlisle Dep. at 50:5-9 at Ex. D;[5] *see also* Brown Decl. ¶ 46 at Ex. 1).

28. City policy states as follows:

> 402. Prohibition Against Suspension, Removal or Demotion
>
> No person in the classified service shall be suspended, removed or demoted because of race, creed, color, *religious or political beliefs or affiliations*, except when such person advocates or belongs to an organization which advocates the overthrow of the government by force or violence (CSCA).

(Brown Decl. ¶ 30 at Ex. 1; Carlisle 71:11-25 to 72:1-21 at Ex. D; Pl.'s Dep. Ex. 16 at Ex. E).

29. Plaintiff does not advocate or belong to an organization which advocates the overthrow of the government by force or violence. (Brown Decl. ¶ 31 at Ex. 1).

30. As a result of his termination, Plaintiff sought unemployment benefits, and his request was denied by the Oklahoma Employment Security Commission, which concluded that Plaintiff was not entitled to unemployment benefits because he was discharged for misconduct connected to his work. Plaintiff appealed. (Brown Decl. ¶ 62 at Ex. 1).

31. The Appeal Tribunal reversed the Commission's determination, concluding that Plaintiff was qualified for benefits and ruling, in relevant part, that "it cannot be found that [Plaintiff's] conduct [*i.e.*, posting the social media posts at issue], years before being hired, is connected to the work in this matter. It would seem illogical to find the [Plaintiff's] conduct violated a policy before he was even aware of the policy. . . . Benefits are allowed." (Brown Decl. ¶ 64 at Ex. 1; Pl.'s Dep. Ex. 6 at Ex. E).

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[5] Q: I'm asking you very explicitly, show me in the policy where it says, "Items posted prior to being a department personnel that remain posted violate the policy."
A. It does not specifically state that.
(Carlisle Dep. at 50:5-9 at Ex. D).

32. Deputy Chief Dalgleish testified on behalf of the City during the hearing before the Appeal Tribunal. (Brown Decl. ¶ 63 at Ex. 1; Dalgleish Dep. at 19:23-25 to 20:1-3 at Ex. C).

33. There is no evidence that Plaintiff was aware of the Social Media Policy when he made any posts between the years 2013 and 2016, and that was the time period that the posts at issue were made. (Dalgleish Dep. at 65:24 to 25 to 66:1-5 at Ex. C).

34. The firing of Plaintiff caused a TPD Officer to send an email to the chain of command stating, in relevant part,

> By firing [Plaintiff], the department invited activists who despise us to dig through and distort information about officers with a goal of getting the disciplined or terminated . . . . [T]reating an officer unjustly, and in a different manner than other officers in the past have been treated, does not satisfy those in whose eyes our department looks poorly. Appeasing them merely emboldens them for their next attack on the officers of TPD. . . We are an officer short now, and the community will have one less person putting himself in between them and the evil we fight against. One less officer on patrol and many more who decide they would rather hide out behind the church than patrol, because the department might not have their back if they get a complaint stopping a car. This will be considered a victory for the activists while the community suffers a great loss. . . I feel compelled to say something on behalf of this officer and let you know how this affects the officers of the department. I hope you will reexamine this hasty decision and remember the officers who are impacted by the now emboldened activists.

(Dalgleish Dep. at 68:14-25 to 71:1-6 at Ex. C; Pl.'s Dep. Ex. 8 at Ex. E).

35. But for members of the public bringing the social media posts at issue to the attention of the TPD, there was nothing that would have caused Defendants to fire Plaintiff. (Perkins Dep. at 38:10-17 at Ex. A).

36. Other TPD officers have posted, *while employed with TPD*, objectionable social media posts considered racists or attacking TPD policies and practices related to the LGBTQ community or criticizing the Chief of Police, and there was never any disruption to the TPD

sufficient to terminate the employment of these officers.[6] (Perkins Dep. at 42:15-25 to 47:1-23 at Ex. A; Dalgleish at 93:22-25 to 94:1-17, 107:13-25, 113:1-9 at Ex. C; Carlisle Dep. at 58:3-25 to 65:1-12, 74:13-25 to 78:1-9 at Ex. D; Pl.'s Dep. Ex. 13 at Ex. E).

37. Accordingly, there is no history at the TPD for Defendants to rely upon where the posting on social media of racists or controversial images or messages[7] would cause sufficient disruption to fire the offending TPD officer. (Perkins Dep. at 42:15-25 to 47:1-23 at Ex. A; Jordan Dep. at 56:14-19 [admitting the situation was "novel"] at Ex. B; Pl.'s Dep. Ex. 13 at Ex. E).

38. The Social Media Policy does not prohibit postings on the subjects of politics, race, or religion. (Jordan Dep. at 40:13-25 to 41:1-15 at Ex. B; Dalgleish Dep. at 38:1-17, 77:8-25 to 78:1-3 at Ex. C).

39. The Social Media Policy provides no objective standards for deciding which speech is permissible and which is not. Rather, it is based on subjective opinion. (Perkins Dep. at 33:4-25 to 38:1-9 at Ex. A; Dalgleish Dep. at 26:17-22, 75:15-19, 76:17-19 ["I love Islam" post is not a problem] at Ex. C; Carlisle Dep. at 31:25 to 32:1-13, 43:25 to 441-18, 68:15-19 at Ex. D).

40. TPD officers have posted racist and anti-LGBTQ social media posts *while they were departmental personnel* but they were not terminated for doing so. In other words, there is no factual predicate for Defendants to claim that Plaintiff's social media posts (made 3 to 6 years prior to his hiring) would result in sufficient disruption to the TPD to warrant firing him. (Perkins

[6] For example, one officer objected to the election of President Obama, referring to him as the "brown clown." (Carlisle Dep. at 38:6-11 [admitting it's a racist post] at Ex. D). Another officer criticized the City and its policy and practice of supporting LGBTQ events. (*See supra*.; Pl.'s Dep. Ex. 13 at Ex. E).

[7] There is nothing in the policy that requires the removal of old social media posts. Moreover, it is practically impossible to completely remove anything from the Internet that was previously posted as there are programs that can retrieve such information. (*See, e.g.,* https://www.socialappshq.com/facebook/how-to-use-wayback-machine-to-find-page/).

Dep. at 42:15-25 to 47:1-23; *see also id*. 68:1-11 at Ex. A; Jordan Dep. at 37:8-23 [expressing concern about "what the community was going to think," but admitting no disruption in the performance of duties] at Ex. B; Carlisle Dep. at 58:3-25 to 65:1-12, 74:13-25 to 78:1-9 at Ex. D; Pl.'s Dep. Ex. 13 at Ex. E).

41. Defendants have no evidence/factual basis for concluding that Plaintiff's Facebook posts caused or would cause any disruption to the City or TPD sufficient to warrant Plaintiff's firing, and past experience confirms this point. (Carlisle Dep. at 57:22-25 to 58:1, 90:1-5, 25 to 91:1-4, at Ex. D [admitting that there is no "hard evidence" that Plaintiff's post would cause disruption sufficient to warrant firing him]; *see also* Dalgleish Dep. at 28:24-25 to 29:1-4, 14-20 ["Q: What were you unable to do on September 4, 2019, because these phone calls and complaints came in about the Facebook posts? A: I'm unaware of anything particularly."]; 82:24-25 to 83:1-5, 85:24-25 to 86:1-4 at Ex. C).[8]

42. On September 27, 2019, Plaintiff, through counsel, hand-delivered his Notice of Tort Claim to the City clerk. (Wood Decl. ¶ 2, Ex. A [Cover Ltr. with Notice] at Ex. 3).

43. The City failed to act on Plaintiff's request within 90 days, thereby denying Plaintiff's tort claim for wrongful termination. (Wood Decl. ¶ 3 at Ex. 3).

44. On October 1, 2019, Plaintiff was hired by the Rogers County Sheriff Office, and he continues to work there as a deputy sheriff. (Brown Decl. ¶ 65 at Ex. 1).

45. At no time while working as a law enforcement officer with the Rogers County Sheriffs Office has Plaintiff ever engaged in (or been accused of engaging in) any action that was

[8] City officials felt "embarrassed" by the public disclosure of the social media posts. (Perkins Dep. at 24: 4-24 to 25:1-7; 27:11-15 to 28:1-23 at Ex. A; Pl.'s Dep. Ex. 12 at Ex. E). As noted, Plaintiff did not post the picture with him, the mayor, and Defendant Jordan that is referenced by Perkins in his deposition. (Brown Decl. ¶ 57 at Ex. 1).

considered discriminatory against anyone on account of his or her race, religion, or other protected class nor did he engage in (or been accused of engaging in) any conduct that exhibited an unlawful or otherwise discriminatory bias against any race, religion, or other protected class. (Brown Decl. ¶ 66 at Ex. 1; *see also* Jordan Dep. at 57:17-25 to 58:1-8 at Ex. B).

SUMMARY JUDGMENT STANDARD

"Summary 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 and citation omitted). Accordingly, "[t]he 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).

Plaintiff, the movant for summary judgment, has an initial burden of showing "the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. A genuine issue of material fact exists if a reasonable juror could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). To survive Plaintiff's motion, Defendants must "come forward with *specific facts* showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (citation and quotation marks omitted) (emphasis added). To demonstrate a genuine issue, Defendants must present sufficient evidence upon which a jury could reasonably find in their favor; a "scintilla of evidence" is insufficient. *Liberty Lobby*, 477 U.S. at 252.

ARGUMENT

"It is well settled that 'a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'" *Garcetti v.*

Ceballos, 547 U.S. 410, 413 (2006) (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (same). Moreover, Oklahoma law recognizes an actionable common-law tort for an at-will employee's discharge in contravention of a clear mandate of public policy that is found in Oklahoma's constitutional, statutory, or decisional law or in a federal constitutional provision, such as the First Amendment, that prescribes a norm of conduct for Oklahoma (a *Burk* claim). Under the Oklahoma Constitution, "Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Okla. Const. Art. II, § 22.

The policy implications associated with permitting the government to terminate a public employee for speech he made *several years prior to his hiring* are grave. Permitting such actions threatens to chill the free speech rights of anyone who has an interest in pursuing public employment in the future. *Brown v. City of Tulsa*, 124 F.4th 1251, 1266 (10th Cir. 2025) ("[W]e do not take lightly our responsibility to ensure that citizens are not deprived of fundamental rights by virtue of working for the government.") (internal quotations, punctuation, and citation omitted). The Court should grant this motion.

I. Defendants Violated Plaintiff's Right to Freedom of Speech.

A. Plaintiff's Speech Is Protected Expression.

Pursuant to clearly established law, Defendants may not fire Plaintiff on a basis that infringes his constitutionally protected interest in freedom of speech. *Rankin*, 483 U.S. at 383 ("[A] State may not discharge an employee on a basis that infringes that employee's

constitutionally protected interest in freedom of speech."). Plaintiff's speech addressed political and social issues and thus involved a matter of public concern. *See Considine v. Bd. of Cnty. Comm'rs*, 910 F.2d 695, 699 (10th Cir. 1990) (defining speech on a matter of public concern as "speech fairly considered as relating to any matter of political, social, or other concern to the community") (quoting *Connick*, 461 U.S. at 146). Under controlling Tenth Circuit precedent, Plaintiff's social media posts, which are a form of expression that *did not occur at work nor are they about work*, are best considered "protected expression" for this Court's analysis. As stated by the Tenth Circuit, "We hold that the public concern prong of the *Pickering/Connick* test cannot be applied to a case of nonverbal expression that does not occur at work or is not about work. The alternative test should be whether the speech involved is 'protected expression.'"[9] *Flanagan v. Munger*, 890 F.2d 1557, 1564-65 (10th Cir. 1989) ("Applying the above test to this case, it is clear that plaintiffs' speech is protected expression. Sexually explicit films and the distribution of sexually explicit films have consistently been upheld as protected under the first amendment, whether under the free speech or free press clauses."); *see also id.* at 1564 (finding that the public-concern test "implies that the test is not intended to apply to areas in which the employee does not speak at work or about work," because the test "is intended to weed out speech by an employee speaking as an employee upon matters only of personal interest"). Accordingly, the Supreme Court "has recognized that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (internal quotations and citations omitted). And the First Amendment protects expression made in social media forums:

[9] All of the social media posts at issue involve the sharing of previously created images/posts, much like *Flanagan* involved the distribution of previously created videos.

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular. . . . In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought."

Packingham v. N.C., 582 U.S. 98, 104 (2017) (citations omitted). In sum, there can be no serious dispute that the speech at issue is protected by the First Amendment—either as speech addressing a "matter of public concern" or as "protected expression."

Additionally, it is without dispute that Plaintiff's protected expression was made *years prior* to his hiring by the City as a police officer and thus well before he was a public employee and subject to any social media policy. Additionally, Plaintiff's speech at issue does not address any policy or employee of the TPD (which is obvious, as the messages were posted years before he ever applied to or was hired by the TPD). Consequently, the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), is not a good fit. Nonetheless, consistent with *Flanagan*, we now turn to the balancing portion of the *Pickering* test.[10] *Flanagan*, 890 F.2d at 1565 ("Since this speech is off the job and not related to the internal functioning of the department and is clearly protected expression under the first amendment, we then proceed to the balancing portion of the *Pickering* test.").

[10] The Tenth Circuit applies a five-step approach for analyzing claims where a public employee has been disciplined/terminated based on his speech. These steps include the following: (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct. *Helget v. City of Hays*, 844 F.3d 1216, 1221 (10th Cir. 2017). The only issue for this Court to decide is step (3), and the undisputed *evidence* (not unsupported, speculative claims) requires a finding in Plaintiff's favor as a matter of law.

B. The Balance Favors Protecting Plaintiff's Speech.

"Under *Pickering*, [a court] must balance plaintiffs' interest in engaging in [] protected expression against the state's interest as an employer in 'promoting the efficiency of the public services it performs through its employees.'" *Flanagan*, 890 F.2d at 1565 (quoting *Pickering*, 391 U.S. at 568). When balancing these interests, the court must consider "the content, context, manner, time, and place of the employee's expression." *Id*. (citing *Connick*, 461 U.S. at 152-53). "[T]he balance must tip in favor of protection [of free speech rights] unless the employer shows that some restriction is ***necessary*** to prevent the disruption of official functions or to insure effective performance by the employee." *Id*. (internal quotation marks omitted) (emphasis added). "While it is framed as a 'balancing test,' [the *Pickering* test] actually places a substantial threshold burden on the employer before balancing is even considered." *Trant v. Okla.*, 426 F. App'x 653, 661 (10th Cir. 2011). Thus, "the *employer* bears the burden of justifying its regulation of the employee's speech." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1207 (10th Cir. 2007). This "burden" "is a true burden of *demonstration*, ***not a mere matter of hypothetical articulation***." *Trant*, 426 F. App'x at 661. Consequently, an "employer ***cannot rely on purely speculative allegations that certain statements caused or will cause disruption***." *Id*. (quoting *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1304 (10th Cir. 2009)); *see also Brown*, 124 F.4th at 1268 ("The government bears the burden of proving—*with evidence*—both its specific interest in taking the adverse employment action against the plaintiff and that it acted based on that interest, rather than for another reason."). Here, there is admittedly *no evidence* of disruption, just rank speculation. Indeed, the only experience Defendants have with violations of the Social Media Policy (by officers who posted objectionable content while employed by the City, including content challenging TPD policies and practices related to the LGBTQ community) demonstrates

that Defendants' speculative claims of disruption are baseless. The Court should grant this motion. *See* Fed. R. Civ. P. 56 (a) ("[t]he court *shall* grant summary judgment . . . .") (emphasis added).

The analysis in *Flanagan* further compels this Court to grant Plaintiff's motion. In *Flanagan*, police officers were given official reprimands for operating while off-duty a video rental store that contained sexually explicit films. *Flanagan,* 890 F.2d at 1561. The court held that the plaintiffs' interest in their free speech rights outweighed the "attenuated" interest of defendants in avoiding "negative public feelings about the distribution of sexually explicit films [that] would erode the public's respect and confidence in the police department . . . [and] discourage citizens from cooperating with the department, thereby inhibiting the efficiency and effectiveness of it in the community." *Id*. at 1566. More importantly, the court held that the "reaction by offended members of the public [that] adversely impact [a police department's] *external* relationships and operations" cannot justify suppressing the free speech rights of off-duty officers, *id*. (emphasis added); rather "the only public employer interest that can outweigh a public employee's recognized speech rights is the interest in avoiding *direct* disruption, *by the speech itself*, of the public employer's *internal* operations and employment relationships," *id*. Thus, absent "***evidence*** of actual, or potential, disruption of the department's internal operations" such as "discipline problems," "disharmony," "impact on close working relationships," and "performance problems by plaintiffs," the employer police department cannot penalize an off-duty officer for exercising his first amendment rights. *Id*.

In *Flanagan*, the Tenth Circuit made an additional finding that is dispositive here:

> The department cannot justify disciplinary action against plaintiffs simply because some members of the public find plaintiffs' speech offensive and for that reason may not cooperate with law enforcement officers in the future. The Supreme Court has squarely rejected what it refers to as the "heckler's veto" as a justification for curtailing "offensive" speech in order to prevent public disorder. *See, e.g., Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

> *See also Berger v. Battaglia*, 779 F.2d [992, 1001 (4th Cir. 1985)]. The record is devoid of evidence of actual or potential ***internal*** disruption caused by plaintiffs' speech. Defendants' evidence pointed only to potential problems which might be caused by the ***public's reaction to plaintiffs' speech***. "Apprehension of disturbance is not enough to overcome the right to freedom of expression." *Battle v. Mulholland*, 439 F.2d 321, 324 (5th Cir. 1971) (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506-07 (1969)). The Supreme Court's rejection of the heckler's veto lends support to our holding that the defendants have only an attenuated interest in preventing plaintiffs' speech.

Flanagan, 890 F.2d at 1566-67 (emphasis added); (*see also* Jordan Dep. at 37:8-23 [describing the "internal disruption" as concern about "what the community was going to think" and admitting no actual disruption in the performance of duties] at Ex. B).

As the undisputed facts demonstrate, the balance weighs in favor of protecting Plaintiff's right to freedom of speech. Indeed, the record demonstrates that Defendants had ***no evidence*** to justify firing Plaintiff because of his social media posts. This is most clearly demonstrated by the City's witness who was designated pursuant to Rule 30(b)(6) to testify as to the alleged disruption caused by Plaintiff's social media posts. (*See* Pl.'s Dep. Ex. 14 ["Facts related to Plaintiff's firing, including, but not limited to, facts related to the alleged 'internal disruption' caused by Plaintiff's social media posts and/or firing to the Tulsa Police Department."] at Ex. E). The witness testified, in relevant part, as follows:

> **Q: . . .What is the hard evidence you have that keeping Wayne Brown on the police department would have created sufficient disruption to fire him?**
> **A**. ***There was none***.

(Carlisle Dep. at 90:25 to 91:1-4 at Ex. D) (emphasis added).

In fact, firing Plaintiff for his speech was contrary to Defendants' interests because it undermined the confidence and trust that TPD officers have in their leadership. (*See, e.g.,* Officer Angel Email, Pl.'s Dep. Ex. 8). Even members of the community expressed outrage by the firing. (*See* IA Report, Pl.'s Dep. Ex. 2). As the facts show, Defendant Jordan allowed a local political

activist who was well known in the community, *particularly amongst the police officers*, as a person who harbors anti-police bias to cause Plaintiff's firing based on the content and viewpoint of Plaintiff's public issue speech made years prior to his hiring by the TPD. The evidence shows that Defendants' termination of Plaintiff undermined the trust and confidence that the TPD police officers have in their leadership, further eroding the *esprit de corps* of the TPD. This was confirmed by the email sent by Officer Angel. (Pl.'s Dep. Ex. 8).

In sum, Defendants' termination of Plaintiff violated Plaintiff's clearly established right to freedom of speech. Plaintiff is entitled to summary judgment as to liability on this claim.

C. The Social Media Policy Is Unconstitutional.

The Social Media Policy, facially and as applied, is a content- and viewpoint-based restriction on speech in violation of the First Amendment. (*See* First Am. Compl. ¶ 97 ["Defendants' Social Media Policy, facially and as applied to punish Plaintiff for his private speech, violates the Free Speech Clause of the First Amendment."]). The Social Media Policy states, in relevant part, as follows:

> [D]epartment personnel are prohibited from posting speech containing obscene or sexually explicit language, images, acts, and statements or other forms of speech *that ridicule, malign, disparage, or otherwise express bias against* any race, religion, or protected class of individuals.

By its plain language, the Social Media Policy regulates the content of speech. And in particular, it prohibits certain content that some may consider offensive. In other words, it is a viewpoint-based restriction on speech.

There is no question that social media is an exceedingly important *forum* for free speech. *Packingham*, 582 U.S. at 104 ("While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It

is cyberspace—the 'vast democratic forums of the Internet' in general, . . . and social media in particular.") (internal citation omitted).

Moreover, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *see Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Content-based laws . . . are presumptively unconstitutional."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). And "[v]iewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. Accordingly, "[t]he principle that has emerged from [Supreme Court] cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotations and citation omitted).

By punishing Plaintiff for engaging in speech in this forum because Defendants considered the speech offensive, Defendants engaged in viewpoint discrimination. As explained by the Supreme Court in *Matal v. Tam*, 582 U.S. 218, 220 (2017), "[g]iving offense is a viewpoint." Indeed, the fact that Defendant Jordan had no objection to the Darren Wilson post (one of the posts the anti-police activist found objectionable) demonstrates not only a lack of objective standards, but that the policy is undoubtedly a viewpoint-based restriction. Consequently, this policy is unconstitutional facially and as applied.

II. The City Is Liable for Plaintiff's Wrongful Discharge.

Under the Oklahoma Constitution, "Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed

to restrain or abridge the liberty of speech or of the press." Okla. Const. Art. II, § 22. This public policy is also articulated in the following City policy: "No person in the classified service shall be suspended, removed or demoted because of . . . religious or political beliefs or affiliations, except when such person advocates or belongs to an organization which advocates the overthrow of the government by force or violence." Plaintiff also has a right to freedom of speech under the First Amendment to the U.S. Constitution. As noted above, the Supreme Court "has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Claiborne Hardware Co.*, 458 U.S. at 913 (citations omitted).

A viable *Burk* (wrongful discharge) claim[11] must allege (1) an actual or constructive discharge (2) of an at-will employee (3) in significant part for a reason that violates an Oklahoma public policy goal (4) that is found in Oklahoma's constitutional, statutory, or decisional law or in a federal constitutional provision that prescribes a norm of conduct for Oklahoma and (5) no statutory remedy exists that is adequate to protect the *Oklahoma policy goal*. *Vasek v. Bd. of Cty. Comm'rs*, 186 P.3d 928, 932 (Okla. 2008).

As demonstrated by the undisputed facts: (1) Plaintiff was actually discharged from his employment; (2) For purposes of a *Burk* wrongful discharge claim, Plaintiff was an at-will employee; (3) As set forth above, the reason for Plaintiff's discharge violates an Oklahoma public policy goal (4) that is found in Oklahoma's Constitution, the First Amendment to the U.S. Constitution, and the City's policy; and (5) no statutory remedy exists that is adequate to protect the Oklahoma policy goal.

[11] *Burk v. K-Mart Corp.,*1989 OK 22, 770 P. 2d 24 (Okla. 1989).

While Plaintiff has advanced a *federal* claim under 42 U.S.C. § 1983, this federal statute, standing alone, is not sufficient to adequately protect Plaintiff's interests and the *Oklahoma* policy goals described above. To begin, § 1983 cannot be used to protect the policy goals set forth in the Oklahoma Constitution and in state law, such as the City's policy, which sets forth a policy goal consistent with the rights secured by the Oklahoma Constitution. In other words, § 1983 only protects rights granted *by federal law*, not rights or policies protected *by state law*. *See, e.g., Stanley v. Gallegos*, 852 F.3d 1210, 1211 (10th Cir. 2017) ("The federal civil-rights statute, 42 U.S.C. § 1983, authorizes suits against persons acting under color of state law *for violations of rights granted by federal law*.") (emphasis added). Second, the *Burk* claim protects at-will employees. Third, the City is only liable under § 1983 if it is found that a municipal policy was the moving force behind the constitutional violation. *See Monell v. N.Y. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978). Fourth, and related, the City may be liable under Plaintiff's *Burk* claim on a theory of *respondeat superior*. *See Speight v. Presley*, 2008 OK 99, ¶ 13, 203 P.3d 173, 176 (Okla. 2008) ("Oklahoma law recognizes the application of the doctrine of respondeat superior to the Governmental Tort Claims Act."). *Respondeat superior* liability is not available under § 1983. *Monell*, 436 U.S. at 691 ("[W]e conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."). Consequently, if there is no municipal liability under *Monell* and Defendant Jordan has qualified immunity from suit under § 1983, as he previously claimed he did (Jordan Mot. to Dismiss at 5-6 [Doc. No. 14]) and will likely claim again, then Plaintiff will have no remedy for his unlawful termination. In sum, § 1983 does not adequately protect *Oklahoma's* policy goals.

Finally, Plaintiff has complied with the notice requirements of the Governmental Tort Claims Act. On September 27, 2019, Plaintiff, through counsel, hand delivered to the City Clerk a Notice of Tort Claim, seeking recovery for his wrongful termination under state law. The City failed to act on Plaintiff's request within 90 days, thereby denying Plaintiff's claim. Accordingly, prior to filing this current action, Plaintiff complied with the tort claims notice provisions of the Oklahoma Governmental Tort Claims Act ("GTCA"), 51 O.S. § 151, *et seq*., by notifying the City of Tulsa of his intent to file state law claims in connection with the events and injuries described in the First Amended Complaint. The GTCA process has been exhausted. Thus, the claim is timely brought pursuant to 51 O.S. § 157. Plaintiff is entitled to summary judgment on his *Burk* claim.

III. The Appeal Tribunal Decision Is Persuasive, further Tipping the Balance in Favor of Protecting Plaintiff's Right to Freedom of Speech.

"The Supreme Court has clearly held that collateral estoppel principles apply in section 1983 actions." *Wilson v. Bustamante*, No. 95-2028, 1995 U.S. App. LEXIS 24713, at *4 (10th Cir. Sep. 1, 1995). Moreover, the Court has "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." *Astoria Fed. S&L Assoc. v. Solimino*, 501 U.S. 104, 107 (1991). While Oklahoma statutory law makes decisions of the Appeal Tribunal not binding or conclusive in subsequent proceedings, *see* 40 Okla. St. § 2-610.1, Oklahoma *federal* courts (including this one) have considered such decisions when ruling upon matters properly before the court. As stated in *Turner v. Phillips 66 Co.*:

> Oklahoma federal courts are split as to whether section 2-610.1 applies to federal claims. *Compare Barley v. Wal-Mart Stores E., LP*, No. 07-CV-0240-CVE-PJC, 2008 U.S. Dist. LEXIS 29552, 2008 WL 1732945, at *4 n. 6 (N.D. Okla. Apr. 10, 2008) (declining to consider evidence of OESC proceedings with respect to Title VII claim) *with Miller v. Love's Travel Stops & Country Stores*, Inc., No. CIV-06-

> 1008-D, 2008 U.S. Dist. LEXIS 127705, 2008 WL 11338078, at *1 (W.D. Okla. May 12, 2008). However, Oklahoma federal courts are unanimous that OESC decisions are not binding upon federal courts. *See Barley*, 2008 U.S. Dist. LEXIS 29552, 2008 WL 1732945, at *4 n. 6; *Miller*, 2008 U.S. Dist. LEXIS 127705, 2008 WL 11338078, at *1; *Dillman v. Winchester*, 639 F. Supp. 2d 1257, 1268 (W.D. Okla. 2009) ("OESC decisions are not binding upon this Court."). Although not binding upon the court, the court concludes that neither party will be prejudiced by the court's consideration of the decision, as Phillips 66 had the opportunity to respond to the OESC Order in its reply brief. *See Nettle v. Cent. Okla. Am. Indian Health Council, Inc.*, No. CIV-05-1288-W, 2007 WL 9711267, *4 n. 1 (W.D. Okla. Nov. 19, 2007). Thus, the court will consider the OESC decision with the recognition that it is not binding upon this court.

Turner v. Phillips 66 Co., No. 18-CV-00198-GKF-FHM, 2019 U.S. Dist. LEXIS 54139, at *20-21 (N.D. Okla. Mar. 29, 2019). Here, when reviewing Plaintiff's claims, this Court should consider the Appeal Tribunal's conclusion that "it cannot be found that [Plaintiff's] conduct [*i.e.*, posting the social media posts at issue], years before being hired, is connected to the work in this matter. It would seem illogical to find the [Plaintiff's] conduct violated a policy before he was even aware of the policy." (Pl.'s Dep. Ex. 6). This logical conclusion is certainly applicable here *a fortiori* insofar as Plaintiff was not simply unaware of the policy, he posted the comments years before he was employed by the TPD and thus had no reasonable notice that such a policy even existed.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for partial summary judgment on the issue of liability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2025, 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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