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-JED-FHM

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT CHARLES W. JORDAN'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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INTRODUCTION

This civil rights action brought under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and Oklahoma state law, challenges Defendants' termination of Plaintiff Wayne Brown on account of the content and viewpoint of his "protected expression," which was made as a private citizen prior to his employment with Defendant City of Tulsa ("City").

On or about September 4, 2019, Defendants, acting under color of state law, 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 made by Plaintiff *several years prior to* the City hiring him as a police officer.

"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). Indeed, 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.

Defendant Jordan, the Chief of Police who directed Plaintiff's firing, argues that he should escape all liability on the basis of qualified immunity. He is mistaken. The Court should deny his motion (Doc. No. 14).

STATEMENT OF FACTS

I. Objections to Defendant Jordan's Statement of "Facts."

For purposes of resolving Defendant Jordan's motion, the facts are those set forth in Plaintiff's First Amended Complaint ("FAC"). Defendant Jordan seeks to introduce facts in support of his motion by making factual statements and drawing inferences from those facts that are not found in the FAC. The Court must reject his efforts. Accordingly, Plaintiff objects to the following "facts" set forth in Defendant Jordan's motion:

- That Plaintiff "posted or shared to his Facebook timeline numerous posts, pictures, and comments which contained racist, anti-Islam, pro-violence, and other offensive content."[1] (Jordan Mot. at 1, 2).
- That when Plaintiff updated his Facebook profile picture, it "made clear that the content contained on his Facebook page belonged to a member of the Tulsa Police Department." (Jordan Mot. at 2).
- That "[d]espite the fact that Plaintiff made changes to his Facebook profile and updated his picture, he did not take any steps to remove the previously posted offensive content from his page or make any effort to set his content to 'private' so that it was not publicly available."[2] (Jordan Mot. at 2).

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[1] The reasonable inference drawn from the fact that the Facebook posts at issue remained on the social media platform for *many years*—a platform which maintains strict community standards prohibiting offensive content, *see* https://www.facebook.com/communitystandards/introduction—is that the posts do not contain "racist, anti-Islam, pro-violence, and other offensive content." (*See* FAC ¶¶ 81, 83). Nonetheless, no reasonable juror in Oklahoma would consider these posts offensive nor would the juror conclude that Plaintiff's sharing of these posts years prior to being hired as a police officer disqualifies him from currently serving on the TPD, particularly when there is no evidence that Plaintiff has ever engaged in any racists or discriminatory behavior. (*See* FAC ¶¶ 21-31, 79-83).

[2] Plaintiff's abrupt firing without any reasonable warning or opportunity to explain or discuss the posts at issue precluded him from taking any measures that would have pleased his employer.

- That "Mr. Lewis' Facebook post received hundreds of comments and shares. As a result, Tulsa Police Chief Chuck Jordan received calls[3] from members of the public expressing concern that Plaintiff's publicly accessible profile on Facebook included offensive content that was unbecoming of an officer at TPD."[4] (Jordan Mot. at 3).
- "After being made aware of Plaintiff's posts, Chief Jordan and his staff reviewed the posts and determined they included content that was highly offensive, not in line with the views of the department, and detrimental to the work the department has been doing to build trust and relationships with certain parts of the community. The Chief further concluded that the fact that Plaintiff had continued to publish the content on his Facebook page even after becoming a member of TPD was violative of the policies and procedures that are expected to be followed by Tulsa Police Officers." (Jordan Mot. at 4-5).

II. Relevant Facts for Purposes of Deciding Defendant Jordan's Motion.

On October 24, 2018, Plaintiff was selected for the Tulsa Police Academy. It was Plaintiff's life-long dream to become a uniformed police officer. (FAC ¶¶ 17, 18).

(FAC ¶¶ 50-52, 54-56, 65).

[3] There was only one complaint, and it came from a well-known, anti-police activist. (FAC ¶¶ 34, 35).

[4] It is improper for this Court to consider the screenshot of Lewis' Facebook post that the City attached to its motion as Exhibit A. (*See* Jordan Mot. at 2, n.3 [incorporating Exhibit A]). Lewis' Facebook page is not a "document," nor is his Facebook page central to Plaintiff's claims. *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002) ("In addition to the complaint, the district court may consider *documents* referred to in the complaint if the documents are *central* to the plaintiff's *claim* and the parties do not dispute the documents' authenticity.") (emphasis added). Moreover, contrary to Defendant Jordan's assertion, 300 "shares" is indicative of nothing: you don't have to be from Tulsa to "share" the post—just a "follower" who apparently agrees with Lewis' anti-police agenda—and Tulsa has a population of over 400,000. *See* https://www.census.gov/quickfacts/fact/table/tulsacityoklahoma,tulsacountyoklahoma/PST045218) (last visited Feb. 10, 2020).

On January 22, 2019, Plaintiff commenced his employment with the TPD. Prior to and during his time at the police academy, Plaintiff was subject to close scrutiny and background investigations to ensure that he had the character, demeanor, and temperament to become a uniformed police officer, which he does. (FAC ¶¶ 19, 20).

At no time has Plaintiff ever discriminated against anyone on account of his or her race, religion, or other protected class. At no time has Plaintiff engaged in any conduct that exhibited an unlawful or otherwise discriminatory bias against any race, religion, or other protected class. (FAC ¶ 21).

The police academy is twenty-eight weeks long. It is rigorous, and it is designed, in large part, to test the character of the candidates. Plaintiff successfully completed the police academy on August 2, 2019. 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. At no time while he was attending the police academy did Plaintiff engage in any conduct unbecoming an officer or police employee. (FAC ¶¶ 22-25).

On August 6, 2019, Plaintiff began field training. His shift assignment was Tuesday through Friday, 1400 to 2400 (2 p.m. to midnight). 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. At no time during his field training did Plaintiff take any action that was inconsistent with his Oath of Office and Value Oath. At no time during his field training did Plaintiff engage in any conduct unbecoming an officer or police employee. (FAC ¶¶ 26-30).

During his time at the academy and during his field training, Plaintiff's performance as a candidate and his performance as a police officer were exemplary. Plaintiff's actions demonstrated that he was well qualified to serve as a uniformed police officer with the TPD. (FAC ¶ 31).

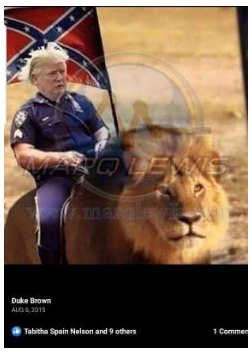
On September 4, 2019, Defendants terminated Plaintiff's employment as an officer with the TPD based on the content and viewpoint of social media posts allegedly posted by Plaintiff on his Facebook page ("Duke Brown") several years prior to his hiring by the TPD. Defendants terminated Plaintiff's employment at the urging of Marq Lewis, a local, radical, left-wing, political activist and agitator who has disdain for white police officers and hatred for President Donald Trump, considering both to be racists. (FAC ¶¶ 32, 33).

Marq Lewis, and/or those working in association with him, including the Council on American-Islamic Relations-Oklahoma ("CAIR-OK"), made a complaint about Plaintiff's old Facebook posts to Defendants, who fired Plaintiff shortly thereafter as a result. "Within one hour and fifteen minutes of receiving *the complaint* the officer was terminated," TPD Sergeant Shane Tuell told reporters, referring to the firing of Plaintiff. (FAC ¶¶ 34, 35) (emphasis added).

In his Facebook post, Marq Lewis complains about *three* "very offensive social media images" that he and/or those associated with him searched out on Plaintiff's Facebook page.[5] (FAC ¶ 38). However, during Plaintiff's appeal of the denial of unemployment benefits as a result of his termination, Deputy Chief Eric Dalgliesh of the TPD testified for the City and stated that Plaintiff was terminated for posting *two* images on his Facebook page: the Trump Post and the Blue Lives Matter Post, appearing below:

[5] It is common knowledge that in order to find a Facebook post that is 3 or 4 years old, the person looking would have to dig deeply and engage in an exhaustive search to find it.

- The Trump Post is an image of the yet-to-be-president Donald Trump. This image was posted on or about *August 6, 2015*:[6]



- The Blue Lives Matter post contains an image created by the famous American sniper and decorated war hero Chris Kyle superimposed over the American flag with a thin blue line—the flag image is associated with the "blue lives matter" movement. This image was posted on or about *March 24, 2016*.

(FAC ¶¶ 90, 72).[7]

Plaintiff was informed of his termination on September 4, 2019, by TPD Captain Thom Bell, TPD Captain Luke Sherman, and two officers from TPD Internal Affairs. At approximately

[6] Contrary to the opinion of those who oppose President Trump—people like Marq Lewis—a person is not a racist because he supports our duly elected President. (FAC ¶ 78).

[7] While none of the Facebook posts that Mr. Lewis complained about in his post can serve as a basis for firing Plaintiff, Plaintiff focuses here on the two posts that the City's representative claimed were the basis for Plaintiff's termination. (FAC ¶ 90). As noted, this admission was made during the hearing on Plaintiff's appeal of the denial of unemployment benefits. (FAC ¶¶ 89, 90).

2:05 p.m., Plaintiff was told by Captain Bell to come in the meeting room where Captain Sherman and the Internal Affairs officers were waiting. (FAC ¶¶ 39, 40).

Upon Plaintiff's entry into the room, the door was closed behind him by Captain Sherman, and Plaintiff was instructed to remove his gun belt by Captain Bell. Plaintiff removed his gun belt as ordered and handed it to the Internal Affairs officer to his immediate left, who then laid it on the table. (FAC ¶¶ 41, 42).

Plaintiff was told to sit down. He complied. He was then handed an Interoffice Correspondence from Defendant Jordan dated September 4, 2019, the subject of which is "Personnel Order #19-257 Termination," and told to read it. Plaintiff read the correspondence, which stated that his employment with the TPD was "hereby terminated effective immediately" because the TPD "was made aware of social media postings made by [Plaintiff] that violate Department Rules & Regulations and Policies and Procedures." (FAC ¶¶ 43, 44, Ex. A).

Accordingly, the basis for Plaintiff's termination was the following TPD policy: Policy and Procedure 31-324 (Social Media and Networking) Procedures C.6., which states,

> 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 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.

(FAC ¶ 45) ("Social Media Policy"). However, the Personnel Policies and Procedures for the City state 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).

(FAC ¶ 46) (emphasis added). Plaintiff does not advocate or belong to an organization which advocates the overthrow of the government by force or violence. (FAC ¶ 47).

During this meeting on September 4, 2019, and consistent with the Interoffice Correspondence, Plaintiff was told that his employment was being terminated because he violated the Social Media Policy. Plaintiff was informed that he posted offending social media posts on his private Facebook page, and that these posts were sent by a complaining citizen to either the mayor's office or Defendant Jordan's office, he was unclear which. (FAC ¶¶ 48, 49).

Plaintiff asked if they (those responsible for the decision to fire him, including Defendant Jordan) were going to give him a chance to explain "his side of it," and he was told by Captain Bell and the Internal Affairs officer to his immediate left that they were not there to listen to anything Plaintiff had to say and that he needed to sign the termination paper. Plaintiff stated that this was not right and that he had done nothing wrong. (FAC ¶¶ 50, 51).

Plaintiff asked if there was any way that he could talk to Defendant Jordan about this decision to terminate his employment. The officers would not say whether Plaintiff would be given a chance to discuss the matter with Defendant Jordan. All they would say was that they would pass the message to him (Defendant Jordan), but they were not going to discuss anything further about this with Plaintiff. (FAC ¶¶ 51, 52).

Plaintiff was then told to strip off his vest and relinquish all of his credentials that were issued to him by the TPD. Plaintiff complied. Plaintiff continued to try and talk with the officers about the matter, but they refused to speak with him. Plaintiff told them that the posts were three to six years old and that this decision to terminate his employment was complete "BS" and they knew it. (FAC ¶¶ 53, 54).

Earlier that day (at or about 11:11 a.m.) and prior to Plaintiff arriving at work, a friend forwarded to Plaintiff a copy of Marq Lewis' Facebook post which referred to a number of old social media postings allegedly made by Plaintiff. In the post forwarded by Plaintiff's friend, Marq Lewis falsely claims, *inter alia*, that "Officer Brown has biases towards people who practice Islam and Black Americans." (FAC ¶ 55).

Plaintiff did not have any indication that old posts appearing on his Facebook page were an issue until seeing the message sent to him by his friend. Upon seeing Marq Lewis' post, Plaintiff wasn't sure what the forwarded message was all about or why Marq Lewis would be trolling his Facebook page for old posts. However, upon being confronted by Captain Bell and the other officers, Plaintiff understood that something was brewing behind the scenes and that his Facebook posts referenced by Marq Lewis were the posts that served as the basis for his firing. (FAC ¶ 56).

Plaintiff asked the officers to please not make him do a "shame walk" in front of everyone as he left, and they agreed that they would make sure the hallways were clear so he could leave. The officers told Plaintiff that he had to remove his shirt and that he was not allowed to leave with it. Plaintiff was completely devastated at this point. He signed the Interoffice Correspondence as directed, even though he did not want to. He was given a copy for his records. (FAC ¶¶ 57, 58).

Plaintiff told the officers that his patrol rifle was in the police car. The rifle was retrieved by one of the Internal Affairs officers. The officers cleaned out the police car and brought Plaintiff the items that he had purchased that were in the vehicle. Plaintiff was then led out of the meeting room and out the back door. (FAC ¶¶ 59, 60).

Captain Bell instructed Plaintiff to bring whatever he had at his house to the division the next day so they did not have to come get it and embarrass Plaintiff any further. Plaintiff departed

the Riverside Division totally dejected, embarrassed, and humiliated. He headed home realizing that his dream of being a police officer was over. (FAC ¶ 61).

Plaintiff was understandably angered by the way this all transpired. He had successfully completed background checks, interviews, and other inspections of his character. He completed twenty-eight rigorous weeks of training at the police academy and nearly a month of field training as a police officer. He had committed himself to being the best police officer possible. Not once during this arduous process did anyone suspect Plaintiff of harboring any bias toward anyone, because he doesn't. Not once during this arduous process did anyone complain to him about posts made three to six years ago on his Facebook page. Indeed, Defendant Jordan didn't have the courage to confront Plaintiff personally or to allow Plaintiff an opportunity to discuss the matter with him. Instead, ***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***. (FAC ¶ 62) (emphasis added).

The next day, September 5, 2019, around 1:00 p.m., Plaintiff returned to the Riverside Division to return the rest of the TPD property he had in his possession. Plaintiff met with Captain Bell, and he told the officer that his Bluetooth headphones were still in the police car and that he needed to retrieve them. Captain Bell directed Plaintiff to drive his personal vehicle around the back of the building to the parking lot, which he did. There, Captain Bell gave Plaintiff his headphones after retrieving them from the police vehicle. (FAC ¶ 63).

After giving him his headphones, Captain Bell told Plaintiff, "On a personal note *I didn't want to do this* (referring to Plaintiff's termination) and *I think its BS*, but understand I have a job to do as well and best of luck to you in the future," or words to that effect. Captain Bell also told

Plaintiff that *he was a good officer and they (the TPD) needed people like him*. Plaintiff responded by saying, "Thank you," and he shook Captain Bell's hand. Plaintiff then departed the division and headed home for good. (FAC ¶ 64) (emphasis added).

Plaintiff was never given an opportunity to discuss the matter with Defendant Jordan. (FAC ¶ 65).

Shortly after Plaintiff's firing, news reports began circulating and social media erupted, condemning Plaintiff and vilifying him as a racist and an Islamophobe.[8] For example, on September 6, 2019, CAIR-OK issued a press release titled, "CAIR-OK Applauds Termination of Tulsa Police Officer for Islamophobic Social Media Posts." CAIR-OK is an affiliate of CAIR-National. CAIR-National was an unindicted co-conspirator/joint-venturer in one of the largest terrorism financing trials prosecuted by the U.S. Government. Persons who oppose or are critical of CAIR's nefarious, Islamists agenda are labeled by CAIR as "Islamophobes" in an effort to marginalize and ultimately silence their speech.[9] (FAC ¶¶ 66, 67).

In response to a media inquiry, Sgt. Shane Tuell, TPD's Public Information Officer, wrote: "Early yesterday morning the police department was notified of some questionable social media posts by one of our officers. The Chief [Defendant Jordan] immediately ordered internal affairs

[8] Defendant Jordan's firing of Plaintiff essentially justified the false accusations made against Plaintiff, thereby fueling the media response. In short, Defendant Jordan sided with a well-known, anti-police activist and betrayed a good police officer. (*See* FAC ¶ 62).

[9] As set forth in the FAC: "It is false to equate the rejection of sharia-supremacism—a principle that guided and motivated the terrorists to kill innocent Americans on 9/11, as just one example—with bias against Islam in general. Because someone rejects Nazism, for example, does not mean that the person is biased against all Germans (and national origin is a protected class). Our nation's fight against ISIS, Al Qaeda, and the Taliban is, at its core, a fight against sharia-supremacism—a reason why it was so important to destroy the caliphate that ISIS claimed it was creating. Islamists overseas have mercilessly persecuted and murdered Christians. Many Chaldean Christians, as just one example, have fled Iraq because of this persecution." (FAC ¶¶ 75-77).

to open an investigation, and within one hour and 15 minutes of receiving the complaint the officer was terminated." (FAC ¶ 68).

The social media posts that served as Defendants' basis for terminating Plaintiff were posts that were posted or shared on Plaintiff's Facebook page three to six years prior to the start of his employment with the TPD. (FAC ¶ 74).

Each of the offending Facebook posts constitutes speech made by Plaintiff as a private citizen commenting on matters of public concern. Each of the subjects represented in the offending Facebook posts constitutes public issue speech. None of the offending speech contains obscene or sexually explicit language, images, or acts, and none of the offending speech ridicules, maligns, disparages or otherwise expresses bias against any race, religion, or protected class of individuals. Each of the offending Facebook posts conveys a personal political or religious viewpoint. None of the offending Facebook posts provide a scintilla of evidence that Plaintiff would unlawfully discriminate against anyone while he was serving as a police officer with the TPD. Indeed, Plaintiff has demonstrated through his actions that he possesses the ability, character, motivation, and skill to be an exceptional police officer. (FAC ¶¶ 79-83).

Defendants terminated Plaintiff's employment because a local political activist and his followers disagree with Plaintiff's political and religious views. (FAC ¶ 84).

Defendants' termination of Plaintiff caused Plaintiff public humiliation, embarrassment, anger, and stress. At times, Plaintiff would avoid going out in public, particularly with family and friends, because of this humiliation and embarrassment and his desire not to subject his family and friends to similar humiliation, harassment, or embarrassment on his account. (FAC ¶ 85).

Defendants' termination of Plaintiff has *undermined the trust and confidence that the TPD police officers have in their leadership. Plaintiff's firing demonstrates to the rank and file of the*

TPD that their leadership, in particular Defendant Jordan, will "throw them under the bus" to promote political correctness and to appease political activists like Marq Lewis and CAIR-OK. Defendants' termination of Plaintiff erodes the esprit de corps of the TPD. Defendants' termination of Plaintiff's employment did not advance any legitimate government interest and, in fact, was contrary to the government's legitimate interests *by undermining the confidence and trust that TPD officers have in their leadership*. (FAC ¶¶ 86, 87) (emphasis added).

In sum, Defendants' termination of Plaintiff is contrary to any legitimate government interest in that *it has impaired discipline by superiors and harmony among coworkers, it has had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, and it has thus impeded the performance of other officers and interfered with the regular operation of the TPD*. (FAC ¶ 88) (emphasis added).

As a result of his termination, Plaintiff sought unemployment benefits. His request was denied by the Oklahoma Employment Security Commission, which concluded that Plaintiff was not entitled to unemployment benefits under Section 2-406 of the Oklahoma Employment Security Act because he was discharged for misconduct connected to his work. Plaintiff appealed. The issue confronted by the Appeal Tribunal was whether Plaintiff "was discharged for a reason amounting to misconduct connected with the work." The Appeal Tribunal reversed the Commission's determination, concluding that Plaintiff was qualified for benefits. The Appeal Tribunal ruled, in relevant part, that "it cannot be found that [Plaintiff's] conduct [the posting of the two images 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." (FAC ¶¶ 89-91).

ARGUMENT

I. Qualified Immunity Standard.

To begin, qualified immunity does not protect a defendant against claims for declaratory and injunctive relief, it does not apply to claims against a municipality, nor does it apply to claims against a defendant in his official capacity.[10] *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct [or] in an action against a municipality"); *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993) ("[T]here is no qualified immunity to shield the defendants from claims [for declaratory and injunctive relief]"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) (same); *Hall v. Tollett*, 128 F.3d 418, 430 (6th Cir. 1997) ("Qualified immunity . . . does not shield [the defendant] from the claims brought against him in his official capacity."). Consequently, Defendant Jordan cannot use qualified immunity to thwart Plaintiff's request for declaratory and injunctive relief. In his FAC, Plaintiff is seeking, *inter alia*, the following:

> [A] declaration that the termination of Plaintiff's employment as a police officer with the TPD was unlawful; an injunction enjoining the enforcement of Defendants' unconstitutional acts, policies, practices, procedures, and/or customs that were the moving force behind the violation of Plaintiff's rights as set forth in this First Amended Complaint; an injunction expunging all paperwork or references

[10] At this stage of the litigation, per the Interoffice Correspondence, Plaintiff was fired based on a TPD social media policy, which may or may not be a City policy. (*See* FAC ¶¶ 44, 45, Ex. A). However, as alleged in the FAC, Defendant Jordan, in his official capacity as Chief of Police, is a decisionmaker for the City (which is why Plaintiff sued both the City and Defendant Jordan in his official capacity—Defendant Jordan would be the person against whom declaratory and injunctive relief would be appropriate). (*See* FAC ¶¶ 14-16). Plaintiff contends that the TPD policy at issue should be considered a City policy, thus making the City liable under *Monell v. New York Department of Social Services*, 436 U.S. 658, 694-95 (1978). If the City concedes the municipal liability issue, then Plaintiff would agree that there is no need to also name Defendant Jordan in his official capacity. But the City has not conceded this issue. Also, Plaintiff named Defendant Jordan to make it clear that the City would be liable for his actions on a theory of *respondeat superior* for the *Burk* claim. *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.").

> from Plaintiff's personnel file related to the incident giving rise to Defendants' violation of his rights as set forth in this First Amended Complaint and prohibiting the use of any such paperwork or references in any future employment matter . . . .

(FAC ¶ 6 & Prayer for Relief).

Further, the defense of qualified immunity does not shield Defendant Jordan's violation of Plaintiff's clearly established rights.[11] In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court stated the applicable standard as follows: government officials are protected from personal liability and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

The Court employs a two-part test to analyze a qualified immunity defense. "In resolving a motion to dismiss based on qualified immunity, a court must consider whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and *whether the right at issue* was clearly established at the time of defendant's alleged misconduct." *Leverington v. City of Colo. Springs*, 643 F.3d 719, 732 (10th Cir. 2011) (quotations and ellipses omitted) (emphasis added); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001) (mandating a two-step sequence for resolving qualified immunity claims); *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (stating that courts have discretion to "decid[e] which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand").

Whether a right is "clearly established" is an objective test: "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a

[11] Similar to how Defendant Jordan incorporates the arguments set forth in the City's motion to dismiss in support of his motion (Jordan Mot. at 6, 7, 12, 15), to avoid further repetition, Plaintiff hereby incorporates for purposes of this response the arguments set forth in his response in opposition to the City's motion.

reasonable officer that his conduct was unlawful in the situation he confronted." *Stearns v. Clarkson*, 615 F.3d 1278, 1282 (10th Cir. 2010) (quotation omitted).

"The law is clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the *right* must be as plaintiff maintains." *Harman v. Pollock*, 586 F.3d 1254, 1261 (10th Cir. 2009) (internal quotations omitted) (emphasis added). The Tenth Circuit has explained that "clearly established" means "'[t]he *contours of the right* must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'" *Id*. (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added). Indeed, the Supreme Court noted in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."

As the Tenth Circuit emphasized in *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010), "[T]he 'clearly established' prong of the qualified immunity inquiry asks whether the '[t]he contours of the *right*' the plaintiff claims the defendant violated are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id*. at 1207 (internal quotations and citations omitted).

In *Dodds*, for example, the court concluded that "Plaintiff has demonstrated at this stage in the litigation that the contours of the right he claims Defendant violated were sufficiently clear that a reasonable official in Defendant's position would know his maintenance of policies that prevent arrestees with preset bail from posting bail for no legitimate reason violates the Fourteenth

Amendment right to due process." *Id*. The court described the "clearly established" right as "Plaintiff's right to be free from unjustified detention after his bail was set." *Id*. at 1206-07.

As set forth in Plaintiff's response in opposition to the City's motion to dismiss and as argued further below, the Court should have little difficulty rejecting Defendant Jordan's qualified immunity defense.

II. Defendant Jordan Violated Plaintiff's Clearly Established Right to Free Speech.

"The law has been clearly established since 1968 that public employees may not be discharged in retaliation for speaking on matters of public concern, absent a showing that the government employer's interest in the efficiency of its operations outweighs the employee's interest in the speech." *Andersen v. McCotter*, 100 F.3d 723, 729 (10th Cir. 1996); *see also McFall v. Bednar*, 407 F.3d 1081, 1090 (10th Cir. 2005) (finding that it was clearly established that a government employee cannot be terminated for speaking out on matters of public concern); *Hulen v. Yates*, 322 F.3d 1229, 1239-40 (10th Cir. 2003) (finding it well-established that retaliation in the form of an involuntary transfer for protected speech is prohibited); *Garcetti*, 547 U.S. at 413 (quoting *Connick*, 461 U.S. at 142) ("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.'"); *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.") (citation omitted); *City of San Diego*, 543 U.S. at 80 (same).

Moreover, in the specific context of this case, the Court should conclude that established Tenth Circuit law was sufficient to put Defendant Jordan on notice that Plaintiff's speech touched on a matter of public concern or was "protected expression." *See Flanagan v. Munger*, 890 F.2d 1557, 1564-65 (10th Cir. 1989) ("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.'"); *id*. ("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"). Speech on a matter of public concern is generally defined as "speech fairly considered as relating to any matter of political, social, or other concern to the community." *Considine v. Bd. of Cnty. Comm'rs*, 910 F.2d 695, 699 (10th Cir. 1990) (quoting *Connick*, 461 U.S. at 146) (internal quotations omitted). 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 more recently, the Court affirmed that the First Amendment protects expression via social media:

> 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., 137 S. Ct. 1730, 1735-36 (2017) (citations omitted). In sum, prior to Plaintiff's firing for his speech, it was clearly established that his speech was protected by the First Amendment—either as speech addressing a "matter of public concern" or as "protected expression." We turn now to the balancing test. *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.").

"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). Indeed, "[w]hile 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)).

The analysis in *Flanagan* compels the Court to deny Defendant Jordan's motion.[12] In *Flanagan*, police officers were given official reprimands for operating while off-duty a video

[12] Defendants rely principally upon *Sabatini v. Las Vegas Metropolitan Police Department*, 369 F. Supp. 3d 1066 (D. Nev. 2019), a district court case from Nevada that is not controlling and which is factually different from the case at bar. (Jordan Mot. at 8, City Mot. at 8-13). Plaintiff

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 relevant (and dispositive) here. Per the court:

Sabatini, a corrections officer, made over two dozen posts on his Facebook page that were overtly racists and directed toward inmates, and Plaintiff Moser made an offending post that commented directly on actions of fellow police officers. *See id*. Thus, unlike the present case, the speech at issue in *Sabatini* was made while the officers were employed by the police department, and the speech related directly to the internal operations and functioning of the department. Additionally, Defendants' reliance on *Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017), a Fourth Circuit case, is also misplaced insofar as its analysis is inconsistent with *Flanagan*. (*See* Jordan Mot. at 8, City Mot. at 9-11 [relying upon *Grutzmacher*]). Because *Flanagan*, a Tenth Circuit case, demonstrates that Defendant Jordan violated clearly established rights of which a reasonable government official would have known, it would be improper to go outside of the circuit to look for any contrary cases.

> 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, e.g.,* FAC ¶ 84 ["Defendants terminated Plaintiff's employment because a local political activist and his followers disagree with Plaintiff's political and religious views']; *see also* FAC ¶ 62).

As the factual record demonstrates, the balance weighs heavily in favor of protecting Plaintiff's right to freedom of speech. The record demonstrates that Defendant Jordan had no legitimate interest in punishing Plaintiff for his speech. In fact, firing Plaintiff for his speech was contrary to the TPD's interests because it undermined the confidence and trust that TPD officers have in their leadership. (FAC ¶¶ 86-88). As set forth in the FAC, 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. (FAC ¶¶ 62, 84). Defendants' termination of Plaintiff has undermined the trust and confidence that the TPD police officers have in their leadership. Plaintiff's firing demonstrates to the rank and file of the TPD that their leadership, in particular Defendant Jordan, will "throw them under the bus" to promote political correctness and to appease political activists like Marq Lewis and CAIR-OK.

Defendants' termination of Plaintiff erodes the *esprit de corps* of the TPD. And this was confirmed by Captain Bell, who told Plaintiff that he "didn't want to do this" (referring to Plaintiff's termination) and that he (Captain Bell) thought it was "BS," adding that he thought Plaintiff was a good officer and they (the TPD) needed people like him. (FAC ¶¶ 64, 86-88).

In sum, Defendant Jordan's termination of Plaintiff is contrary to any legitimate government interest in that it has impaired discipline by superiors and harmony among coworkers, it has had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, and it has thus impeded the performance of other officers and interfered with the regular operation of the TPD.[13] Defendant Jordan is not entitled to qualified immunity.

III. Defendant Jordan Violated Plaintiff's Clearly Established Right to Equal Protection.

Defendant Jordan misapprehends Plaintiff's equal protection claim. Consequently, his arguments in support of dismissing this claim are without merit. The principle of law at issue here was clearly established in 1972 and articulated by the Supreme Court as follows: "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972); *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (discriminating among speech-related activities in a forum violates the Equal Protection Clause). As noted above, social media is an exceedingly important forum for free speech. *See Packingham v. N.C.*, 137 S. Ct. at 1736 (2017) ("[S]ocial media users employ these websites to engage in a wide array of protected

[13] *Fields v. City of Tulsa*, 753 F.3d 1000, 1015 (10th Cir. 2014), does not undermine Plaintiff's position. In *Fields*, the court's primary concern was with the *internal* operations of the TPD, including the confidence and trust that TPD officers will have in their leadership. *See, e.g., id*. at 1015 ("We have long recognized that law-enforcement agencies have a 'heightened interest . . . in maintaining discipline . . . among employees.'") (internal citation omitted).

First Amendment activity on topics 'as diverse as human thought.'") (citation omitted). By punishing Plaintiff for speech that Defendant Jordan considered offensive, Defendant Jordan engaged in viewpoint discrimination. *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("Giving offense is a viewpoint."). Thus, the Equal Protection Clause prohibits government officials from permitting the use of a forum (social media) to people whose views they find acceptable,[14] but denying use to those wishing to express less favored or more controversial views by punishing them for doing so. This is precisely what Defendant Jordan has done here (*see, e.g.* FAC ¶ 84), in violation of Plaintiff's clearly established right to equal protection guaranteed by the Fourteenth Amendment. Defendant Jordan is not entitled to qualified immunity.

CONCLUSION

For the reasons set forth here and in Plaintiff's response in opposition to the City's motion to dismiss, the Court should deny Defendant Jordan's motion.

Respectfully submitted,

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[14] The City (https://www.facebook.com/cityoftulsa/) and Defendant Jordan (https://www.facebook.com/chuck.jordan1) maintain Facebook pages, as does the City's police department (https://www.facebook.com/tulsapolice/).

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2020, 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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