IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KIFAH MUSTAPHA,	)	
	)	
Plaintiff,	)	**No. 10 C 5473**
	)	
v.	)	
	)	**The Honorable Ronald A. Guzman**
JONATHON E. MONKEN, et al.	)	
Defendants.	)	

DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT

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Defendants Illinois State Police ("ISP"), Jonathon E. Monken and Patrick E. Keen, (collectively, "Defendants"), by their attorney, LISA MADIGAN, Illinois Attorney General, hereby submit the following reply in further support of their motion for summary judgment:

INTRODUCTION

Plaintiff has gone to such great lengths to create the illusion of an issue of fact, that in response to Defendants' Rule 56.1 Statement of Fact ¶58, [redacted][1] Once peeling away the distractions and many immaterial facts cited by Plaintiff, this case is transparent. Plaintiff was not discriminated against: he failed a background check and as a result, his offer was rescinded. As for the First Amendment, individuals undoubtedly have a right to express their views, no matter how offensive to others. But this right is viewed through a more restricted lens when an individual seeks a public position – particularly law enforcement, where public integrity is paramount. Plaintiff can make excuses as to why it is acceptable that he appears on a video cheering a gun-toting child while praising jihad. But ISP will not tolerate this type of conduct among its own. No issue of material fact exists and Defendants request summary judgment on all counts.

PLAINTIFF'S NON-COMPLIANCE WITH LOCAL RULE 56.1

Local Rule 56.1 provides that in responding to a moving party's statement of uncontested material facts, the party must file a concise response to each numbered paragraph, including, in the case of disagreement, specific references to the supporting materials relied upon. L.R. 56.1(b)(3).[2] If the non-moving party fails to identify refuting evidence in the record, the fact is deemed admitted. *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003); *Malec v. Sanford*, 191 F.R.D. 581, 584 (N.D. Ill. 2000). Purely argumentative denials are forbidden. *Malec*, 191 F.R.D.

[1] Plaintiff urges this Court to grant summary judgment in his favor in response to Defendants' motion, calling into

[2] Citations to the record are as follows: Defendants Statement of Facts (DSF ¶_); Plaintiff's Statement of Additional facts and Defendants' response therein (PSF ¶_); Defendants' Memorandum in Support of Their Motion for Summary Judgment (Def. Memo p._); Plaintiff's Response Brief (Pl.'s Resp. p. _.).

at 584. A district court is not required to "wade through improper denials and legal argument in search of a genuinely disputed fact." *Smith*, 321 F.3d at 683 (quotations omitted).

In contrast, many of Plaintiff's responses are argumentative denials and improper legal argument. For example, Plaintiff's denials of DSF ¶¶20, 39, 40, 41, 49, 55, 56, 57, 59, 63, 66, 67, 68, 69, 70, 72, 74, and 76 are improper because the additional evidence cited does ***not*** controvert the stated fact. In over half of these instances, Plaintiff does not claim he is disputing the fact, but rather disputes the "characterization" or "mischaracterization" of the fact(s). *See* DSF ¶¶49, 55, 56, 57, 59, 66, 67, 68, 69, 70, 76. In another, he claims to dispute the "inference" that can be drawn from the fact. (DSF ¶20). Plaintiff even disputes ***direct quotes*** from ***his*** deposition. (DSF ¶¶55, 57). And Plaintiff improperly disputes facts from Defendants' affidavits because they were not mentioned at depositions, (DSF ¶¶39, 70), or "contradict" deposition testimony, (DSF ¶68) though Plaintiff does not explain how they are contradictory. Notwithstanding Plaintiff's impermissible arguments, Plaintiff does not cite controverting evidence and these responses serve no purpose other than to attempt to create a factual dispute where none exists. In other responses, Plaintiff adds facts and/or rephrases the fact without disputing them. *See* DSF ¶¶10, 19, 21, 26, 37, 44, 62. A Rule 56.1 response to a movant's facts is not the proper forum to add or amend facts to the record. As Plaintiff neither disputes nor controverts DSF ¶¶10, 19, 21, 26, 37, 44, and 62, they are admitted. Because these responses do not comply with L.R. 56.1, all of the aforementioned facts should be deemed admitted, and any extraneous arguments or additional facts disregarded by this Court. *See Smith v. Lamz*, 321 F.3d at 683; *Malec*, 191 F.R.D. at 584.

Plaintiff's statement of additional facts also fails to comply with Local Rule 56.1. Under L.R. 56.1(b)(3)(B), the nonmovant's statement of additional facts is subject to identical standards as a movant's statement of facts. L.R. 56.1(b)(3)(B). A short, numbered paragraph should

contain only one or two allegations. *Malec*, 191 F.R.D. at 583. "[I]t is inappropriate to confuse the issues by alleging multiple facts in a single paragraph in hopes of one's opponent missing one." *Id.* Absent prior leave of Court, the non-movant may not file more than 40 separately-numbered statements of additional facts. L.R. 56.1(b)(3)(C). Further, each fact must include citations to a particular page or paragraph number, as opposed to citing an entire document or document group. *Smith*, 321 F.3d at 683; *Malec*, 191 F.R.D. at 583. Non-complying facts are "nullities" and may be stricken. *See Malec*, 191 F.R.D. at 583. Many of Plaintiff's additional facts are compound, containing far more than one or two allegations, far exceeding forty in total. *See* PSF ¶¶80, 84, 89, 97, 101, 106, 107, 108, 109, 110, 113, 117, 118. All of these facts should be stricken for their noncompliance. *See Smith*, 321 F.3d at 683; *Malec*, 191 F.R.D. at 583.

ARGUMENT

A. ISP Is Entitled to Summary Judgment on Plaintiff's Title VII Claim.

a. Volunteer Chaplains Are Not "Employees" Under Title VII.

i. This Court should adopt the "Remuneration Test," as most courts have.

In their motion, Defendants applied the remuneration test derived from *O'Connor v. Davis* to determine whether a volunteer qualifies as an employee under Title VII. 126 F.3d 112, 115-116 (2d Cir. 1997). Under this test, the court must first determine if the individual was ever "hired." *Id*. Only if this threshold is met, should the court delve into whether the plaintiff can establish common law agency. *Id*. Defendants' brief discusses why the chaplain position cannot pass this threshold. See Def. Memo pp. 4-7. Plaintiff seemingly concedes this, arguing instead that this Court should reject the remuneration test and apply the agency inquiry in a vacuum.

When faced with the question of whether remuneration should be an antecedent to the agency analysis when evaluating whether a volunteer is an employee under Title VII, majority of federal courts have found that it is. See cases cited in Def. Memo pp. 4-6; see also *Brown v. City of North Chicago*, No. 04-cv1288, 2006 WL 1840802, *6, n.2 (N.D. Ill. June 28, 2006); *Evans v.*

Washington Ctr. For Internships and Academic Seminars,587 F.Supp.2d 148, 151 (D.D.C. 2008) ("it has consistently been held under Title VII that an unpaid intern is not an employee"); *Juino v. Livingston Parish Fire Dept. No. 5*, No. 11-466, 2012 WL 527972, *4 (M.D. La. Feb. 14, 2012). Indeed, any other conclusion turns Title VII on its head. To adopt Plaintiff's interpretation would mean a lawyer at a 5 person law firm is precluded from Title VII coverage, but a volunteer chaplain holding a full-time, paid position as an imam is not. Neither is covered, because Title VII didn't set out to stop every form of discrimination. It protects specific employees at a defined group of employers – nothing more, nothing less.

Instead, Plaintiff relies on two outliers: *Bryson v. Middlefield Volunteer Fire Dept., Inc.* and *Volling v. Antioch Rescue Squad*. Significantly, *Bryson* did not hold the volunteers in that case were employees under Title VII, but merely held remuneration is not an "antecedent inquiry." 656 F.3d 348, 353 (6th Cir. 2011). To date, *Bryson* has only been cited outside of the Sixth Circuit twice on this issue. In the first instance, *Bryson* was expressly rejected. *Juino*, 2012 WL 527972 at *4 ("The Court agrees with [Defendant] that the *O'Connor* approach is likely the better inquiry[.]"). The second was *Volling*, which has not been cited by a single court since its issuance. To be clear, *Volling* is the **single** case cited by Plaintiff in which volunteers were held as employees under Title VII – and it did so in the limited context of a Rule 12 motion. *Volling*, No. 11-cv-4920, 2012 WL 6021553, at *10 (N.D. Ill. Dec. 4, 2012) ("The question is whether the plaintiffs have alleged facts sufficient to make a plausible claim that they meet the requirements for Title VII protection, and [] the Court concludes that they have."). *Volling* is also factually distinguishable. The plaintiffs in *Volling* pled that they had assigned shifts, mandatory uniforms and a supervisory hierarchy which the court found amounted to "a well-defined chain of command and close supervision[,]" all of which the undisputed facts show are not present

here. *Id*. at *9; (DSF ¶¶29-30, 32-34); see also Def. Memo. p.6. Thus, even in the absence of the remuneration test, *Volling* does not support that Plaintiff was anything more than an independent contractor. Plaintiff, as an ISP chaplain, was not an employee under Title VII, and for this reason alone, Defendants are entitled to summary judgment on his Title VII claim.

b. **Alternatively, Plaintiff Does Not Present Sufficient Evidence of Unlawful Discrimination Under Title VII to Survive Summary Judgment**.

Relying primarily on the direct method, Plaintiff cites five pieces of purported "circumstantial evidence" which he concludes create a "convincing mosaic" of discrimination: (1) Defendants were aware he was the best candidate of any imam; (2) Defendants tarnished him as a supporter of terrorism upon hearing the allegations that he was a "radical fundraiser;" (3) during the Category A Background, [redacted] (4) [redacted] and (5) [redacted]. Direct evidence requires evidence "point[ing] directly" to a discriminatory reason. *Hasan v. Foley & Lardner LLP*, 552 F.3d 520, 527 (7th Cir. 2009) (quotations omitted). It is undoubtedly, a "high threshold" necessitating evidence *directly leading* to the conclusion of illegal discrimination. *Good v. Univ. of Chicago Med. Ctr*., 673 F.3d 670, 676 (7th Cir. 2012). In contrast, Plaintiff's "mosaic" is replete with conclusory statements, not evidence.

Plaintiff's first piece of evidence refutes a discriminatory motive – [redacted]. (DSF ¶¶23,26). Also, nothing in the undisputed facts establishes Defendants thought Plaintiff was the "best" candidate. Further, [redacted] (DSF ¶62). Plaintiff's

second point is also not discriminatory. Defendants did not "tarnish" Plaintiff – they reported what they had learned and began investigating. (DSF ¶38; PSF ¶¶93, 112). As to his third point, while Plaintiff may disapprove of ISP [redacted]. (DSF ¶¶47-50, 61). Indeed, ISP's decision was mainly based in the FBI provided information: the video, the memo [redacted] and the FBI's indication that he would not pass a background check to be an FBI chaplain, which also refutes Plaintiff's fourth point. (DSF ¶¶67-69). Finally, Plaintiff's suggestion that his personal references trump the FBI is frankly, absurd.

Moreover, Plaintiff's reliance on *Hasan* is misguided. In *Hasan*, there were a number of facts which circumstantially supported the claim of discrimination: the plaintiff's termination came on the heels of the September 11 attacks when a Muslim attorney's hours were reduced in the context of partners making anti-Muslim comments; a refusal to give the plaintiff more work; and the proffered reason for termination changed when contradicted by performance reviews. *Id*. at 529. In contrast, here, "the sum of many nothings is nothing." *Millbrook v. IBP, Inc*., 280 F.3d 1169, n.4 (7th Cir. 2002) (citations omitted). Taken together, no reasonable jury could find that Plaintiff's evidence points directly to unlawful discrimination based on Mr. Mustapha's status as an Arab Muslim, and Defendants are entitled to summary judgment under the direct method.

As to the indirect method, Defendants are entitled to summary judgment because 1) Plaintiff did not meet ISP's legitimate expectations 2) Plaintiff cannot point to anyone similarly situated who was treated more favorably; and 3) Plaintiff cannot establish pretext. Plaintiff does not address Defendants' contention that by failing the background check (which it is undisputed was required (DSF ¶21)), Plaintiff no longer met ISP's expectations which in itself defeats Plaintiff under the indirect method. Instead, Plaintiff begins by conceding there are no similarly

situated individuals and to find one would be "nearly impossible." [3] If no one is similarly situated, it is Plaintiff's burden to prove his case under the direct method –not the Court's burden to alter its analysis to cater to Plaintiff. *Hasan*, 552 F.3d at 530. Nonetheless, Plaintiff suggests he was treated less favorably because (1) none of the other applicants had their membership in political organizations scrutinized; and (2) three Jewish chaplains [redacted] First, Plaintiff's discrimination claim does not hinge on his association with any organization. To the extent Plaintiff asserts his associations were subject to heightened scrutiny because of his race or religion, this claim is disingenuous. HLF was Plaintiff's former employer, and Category A background checks include an inquiry into former employers. (DSF ¶42). Not only did the other 2010 candidates undergo and successfully pass background checks, but no such criminal or terrorist affiliations were uncovered. (DSF ¶¶43,46,71,73). This is inapposite to the sole case cited by Plaintiff, *Chaney v. Plainfield Healthcare Ctr.*, where the comparator engaged in misconduct which did not result in a proper investigation. 612 F.3d 908, 916 (7th Cir. 2010). Plaintiff has not pointed to derogatory information uncovered in the 2010 background checks which was either 1) insufficiently investigated or 2) insufficiently refuted and the candidate selected anyway.

Second, for the first time in his Response, Plaintiff indicates three Jewish chaplains [redacted] (DSF ¶41, 43; PSF ¶118); *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002) (factor considered in similarly situated analysis is

[3] Plaintiff's reliance on *NAACP v. Alabama*, 357 U.S. 449 (1958) is a red herring. First, *Alabama* concerned an inquiry into an association's full membership list in the course of state regulation, not a lawsuit alleging disparate treatment. Second, potential associations with terrorist or criminal organizations were not uncovered in the other 2010 background checks. (DSF ¶¶71,73).

whether they were subject to the same standards). In fact, the document Plaintiff cites indicates [redacted] *Id.* (PSF ¶118). It is undisputed that the 2009 class, including the six non-Muslim/non-Arab applicants, underwent the same background check. (DSF ¶46). Plaintiff has not and cannot provide evidence raising an issue of fact as to whether a similarly situated non-Arab Muslim was treated more favorably.

Finally, Plaintiff provides not an iota of evidence to meet his burden of showing pretext. Plaintiff failed the background check [redacted] (DSF ¶62) Pretext is a lie to cover up discrimination. *Birch v. Il. Bone & Joint Inst., Ltd.*, No. 04-cv-7285, 2006 WL 2795040, at *7 (N.D. Ill. Sept. 28, 2006). There was no cover up – just a law enforcement agency denying a candidate who failed a background check [redacted]. Defendants' legitimate, non-discriminatory reason remains unrebutted. Plaintiff points to no evidence supporting his theory that but for his status as a Muslim Arab, he would have been retained. Accordingly, Defendants are entitled to summary judgment under Title VII.

B. Defendants Monken and Keen Are Entitled to Summary Judgment on Plaintiff's Section 1983 Equal Protection Claim.

The parties agree that the *prima facie* requirements of Title VII apply to the equal protection claim. Defendants Monken and Keen incorporate by reference ISP's Title VII analysis, *supra* at pp. 5-8.

C. Defendants Monken and Keen Are Entitled to Summary Judgment on Plaintiff's First Amendment Claim.

This case is different than most because Defendants admit that some of Plaintiff's expression motivated his termination. At the end of the day, this Court need not resolve whether or not Plaintiff's activities as a part of HLF included any intent to further its illegal aims. This

Court need only review whether under *Pickering*, ISP's sincerely held interests as a law enforcement agency outweighed Plaintiff's interests as a matter of law.

a. Defendants Have Not Disputed That Plaintiff's Expression Constituted Speech on A Matter of Public Concern.

Plaintiff expends four pages describing why his expression is protected speech. Even if it is, that is not determinative: ISP can legitimately rescind his appointment based on speech, regardless of whether it would normally be protected by the First Amendment. Defendants only argue that the speech is not protected under *Pickering*, and Plaintiff's reliance on cases outside of the employment context ignores the distinction at the heart of *Pickering*: a public employee's speech must be balanced against the interests of the state. 391 U.S. 563, 568 (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

In addressing why Plaintiff believes his speech is protected, he devotes pages to explaining when Hamas began targeting civilians [redacted] when Hamas was designated a terrorist organization in comparison to when the video was made, and whether publication of the unindicted co-conspirator list at HLF's trial was proper. At times, Plaintiff seemingly justifies Hamas' violent evolution. All of this is irrelevant and Defendants will not indulge in a point-by-point response to an argument of no assistance to the Court. Defendants are not prosecuting Hamas. Their only position in this case is that Plaintiff's association (and questionable role) with HLF and participation in the video *lawfully* contributed to ISP's decision that he was not a suitable candidate. Nevertheless, some clarification is needed.

First, Plaintiff is incorrect that Defendants' decision was motivated by disagreement with the content of the speech, rather the content raised serious concerns regarding Plaintiff's objective suitability. (DSF ¶¶68,70). Defendants were under no [redacted]

[redacted] (DSF ¶¶48, 49, 61, 69). That is the point of a background check – to gather information from multiple sources and assess whether someone's credibility sufficiently checks out. [redacted] Similarly, Defendants did not violate the First Amendment simply because [redacted] was met with skepticism. Based on the information provided, [redacted] (DSF ¶¶11, 12, 14, 17, 20, 47-49). Thus, Plaintiff's contention that Defendants' concerns were limited to his actual speech is incorrect. Second, it is irrelevant that Hamas was designated a terrorist organization after the video was made. At the time ISP saw the video, the *designation had occurred*. (DSF ¶¶16,50). Additionally, common sense indicates that the violence which led to the 1995 designation would have occurred in the immediately preceding years, such as 1994, when the video in which Plaintiff sang "O'Hamas, raise the banner of jihad" and "teach us the rifle" was made. (DSF ¶¶50-52). Finally, Plaintiff did not just associate with HLF, he fundraised for them, distinguishing his cases discussing blanket prohibitions on association.[4] (DSF ¶12).

b. Applying *Pickering*, ISP's Interests Far Outweigh Those of Plaintiff.

Whether speech is protected under the First Amendment is a question of law for the Court to determine. *Kokkinis v. Ivkovich*, 185 F.3d 840, 843 (7th Cir. 1999). For purposes of this motion, Defendants do not contend Plaintiff's expressive associations do not address a matter of public concern. Rather, Defendants contend that Plaintiff's interest in this expression, whether or not a matter of public concern, is outweighed by Defendants' interests under the *Pickering* balancing test, rendering it unprotected in the public employment context. As an initial matter,

[4] Plaintiff relies on two pre-*Pickering* cases for the notion that Defendants had to be aware that Plaintiff had knowledge of his association's illegal aims. See *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Keyishian v. Bd. of Regents of the University of the State of New York*, 385 U.S. 589 (1967). These cases are inapposite. Not only do they not address *Pickering*, but they dealt with acts of legislation which cast broad prohibitions on associations such as the Communist party, not a personnel decision addressing one employee's conduct.

this Court should accept the factual findings of the ISP and conclusions made in 2010 after the Category A background check. *Weicherding v. Riegel,* 160 F.3d 1139, 1143 (7th Cir. 1998) ("[*D*]e *novo* review of employment decisions by courts would hamper the efficiency of government decisionmaking[.]") (citations omitted). Plaintiff half disputes this by arguing Defendants must "act reasonably" in ascertaining these facts, but then points to no fact with which he takes exception. Plaintiff's disagreement with the weight Defendants assigned to certain sources, such as the FBI, doesn't make Defendants' findings any less reasonable.

Here, the appropriate inquiry under *Pickering* is whether Plaintiff's interests are outweighed by ISP's interests in promoting effective public service. *Chaklos v. Stevens,* 560 F.3d 705, 714 (7th Cir. 2009). No proof of actual disruption is required, and employers' "predictions of disruption" are given much deference. *Waters v. Churchill,* 511 U.S. 661, 673 (1994). Indeed, "[d]eference to the employer's judgment regarding the disruptive nature of an employee's speech is especially important in the context of law enforcement." *Kokkinis,* 185 F.3d at 845. Defendants cite three reasons why ISP's interests are favored and Plaintiff's expression would be disruptive to ISP: (1) Retaining Plaintiff would jeopardize ISP's integrity; (2) Plaintiff's expression impaired his ability to serve as an interfaith chaplain; and (3) Plaintiff's expression raises questions as to whether he can be entrusted with confidential information. Plaintiff concedes that these interests are recognized under *Pickering,* arguing only that there is a factual dispute as to whether these concerns were sincerely held. The record is clear that they were.

This Court need not look past the undeniable truth that ISP's retaining of an individual with demonstrable ties to an organization funding terrorism would diminish its integrity as a quasi-military law enforcement agency. Plaintiff (incredibly) suggests ISP should have issued a statement explaining ISP was aware of his ties to terrorism, but in an effort to not offend the First

Amendment, selected him as a chaplain. In the context of *Pickering*, the Seventh Circuit has recognized law enforcement's interest in instilling public confidence, as well as an interest in maintaining effective relationships with other law enforcement agencies. *Kokkinis*, 185 F.3d at 845 (citations omitted); *Jefferson v. Ambroz*, 90 F.3d 1291, 1297 (7th Cir. 1996). Such a statement would undoubtedly rock the public's confidence, suggesting ISP condones intolerance, is "soft on terror" and perhaps worse, takes calculated safety risks at the public's expense.

Additionally, Plaintiff's only response to Defendants' binding cases is to dispute any characterization of Plaintiff's expressions as anti-American or anti-Jewish, dismissing the cases addressing racism as irrelevant. First, Plaintiff's expressions clearly foster intolerance and Defendants were reasonable in perceiving them that way. Second, Plaintiff is silent as to Defendants' cases outside the context of racism. See Def. Memo. pp. 14-15.[5] Defendants' reasonable concerns are noted in the record and Plaintiff's contentions otherwise are baseless. (DSF ¶¶67-70). Indeed, by Plaintiff's own admission, Defendant Monken testified that retaining someone who failed a background check would disrupt operations. (PSF ¶116). Plaintiff next suggests Defendants had no reasonable basis for concluding Plaintiff's retention could affect integrity because [redacted] (DSF ¶¶48, 49). [redacted] (DSF ¶49).

[5] Plaintiff then cites one Fourth Circuit case which upheld a cop's use of blackface during a musical performance as artistic expression protected under *Pickering*. *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985). Notably, even *Berger* concedes a public employee's interest in speech is no greater than a private employee and there could be instances in which external disruptions would be appropriate considerations under *Pickering*. *Id.* at 998-1001.

Second, Plaintiff disregards Defendants' concerns that Plaintiff's association with HLF and appearance in the video would impair his ability to work effectively as an interfaith chaplain. Courts recognize a police unit as a particularly close-knit community. Speech that may not disrupt an environment less dependent on order may be disruptive in this context. *Kokkinis*, 185 F.3d at 845. Despite [redacted] Defendants were within reason to believe, based on the disturbing video, that Plaintiff's services would be disruptive to an effective chaplain program in the context of law enforcement.

Lastly, Plaintiff disregards Defendants' concerns surrounding confidential information. Chaplains have access to confidential information by virtue of being in the presence of on-duty police officers, and this is why Category A background checks are now mandated. (DSF ¶41). [redacted] this accessibility to confidential material was a serious concern. (DSF ¶70). Plaintiff may want to tout his participation in the Citizen's Academy, but far more relevant is the FBI's statement that Plaintiff would not pass the background check to be an FBI chaplain.[6] (DSF ¶¶48, 69). The potential for disruption was more than speculative, it was obvious. At the very least, as supervisors of a law enforcement agency, Defendants were reasonable to err on the side of caution. Plaintiff primarily relies on *McGreal v. Ostrov*, but that case is factually inapposite – it addressed a police officer's complaints of corruption (over two years) and a disputed point was whether the complaints had been a motivating factor of the adverse action.[7] 368 F.3d 657, 680 (7th Cir. 2004). There is no

[6] Magistrate Keys has recognized the irrelevance of Plaintiff's participation in the Citizen's Academy. See Dckt. No. 75, p.6.

[7] *McGreal* is not only distinguishable, but it's likely at least some of the speech in question occurred in the course of his duties. 368 F.3d 657. Its analysis has limited relevance because it pre-dates *Garcetti v. Ceballos*, 547 U.S. 410 (2006) which made clear that statements in accordance with professional duties are not protected speech. The same is true as to Plaintiff's reliance on *Gustafson v. Jones*, 290 F.3d 895 (2002). In *Gustafson*, the Seventh Circuit also found the defense of a fear of disruption waived because it was raised for the first time on appeal. *Id*. at 911.

issue of material fact as to Defendants' concerns that Plaintiff's speech posed potential for disruption, and the balancing test heavily favors Defendants.

c. Alternatively, Absent Plaintiff's Speech the Result is the Same.

Should this Court determine Plaintiff's expressions were protected, Defendants would have ultimately reached the same decision despite the expression, and Plaintiff should not be put in a better position than he would be in by virtue of engaging in protected speech. *Mt. Healthy City School Dist. Bd. v. Doyle*, 429 U.S. 274, 285-286 (1977) ("The [First Amendment] is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."). The privileged FBI information as well as the FBI's indication that Plaintiff would not pass an FBI chaplain background check was fatal to Plaintiff's candidacy. Though the January 2010 article resulted in Defendants' discovery that the background checks were never refreshed, that doesn't change what was subsequently uncovered. Accordingly, Defendants are entitled to summary judgment on Plaintiff's First Amendment claim.

D. Alternatively, Defendants Monken and Keen Have Qualified Immunity from Plaintiff's Section 1983 Claims.

Plaintiff has failed to carry his burden of overcoming Defendants' qualified immunity defense. *See Gregorich v. Lund*, 54 F.3d 410, 413 (7th Cir. 1995) (citations omitted). Plaintiff fails to address most of Defendants' arguments, and Defendants rely primarily on their motion. See Def. Memo pp. 19-20. Certainly even if this Court determined *Pickering* favors Plaintiff, it was not clearly established that expressive associations with terrorist groups or their supporters is protected under *Pickering* in the law enforcement context. Nonetheless, Defendants will briefly address Plaintiff's final point – asserting that Defendants "now claim" to have mistakenly believed Plaintiff's speech did not address matters of public concern. This misstates Defendants' argument. Defendants simply pointed out that *even if* Defendants Monken and Keen genuinely (but mistakenly) believed Plaintiff was furthering the illegal aims of his associates and therefore

was not engaging in speech on a matter of public concern, such a belief, especially considering the ties to international terrorism at play in this case, is fully protected by the doctrine of qualified immunity.

The same is true for the equal protection claim. So long as Defendants sincerely believed Plaintiff failed the background check and was not suitable, it doesn't matter if they were wrong. Background checks require discretion, and on issues where two individuals of reasonable competence could disagree, there is qualified immunity, even if the decision made was mistaken. *Ulichny v. Merton Cmty. Sch. Dist.*, 249 F.3d 686, 706 (7th Cir. 2001). The fact that the federal government chose not to indict Plaintiff doesn't mean the Constitution mandates ISP retain him when he failed the background check. *Waters*, 511 U.S. at 676 ("Government employers should be allowed to use personnel procedures" which "differ from the evidentiary rules."). Defendants were prudent and gave Plaintiff a fair chance, perhaps more than many would have considering the unprecedented allegations. It is undisputed that this was unprecedented for Defendants Monken and Keen. (DSF ¶73). Indeed, a background check spanning over nearly six months and relying on direction from the branch of the ISP charged with investigations and the FBI hardly yields a decision that could seriously be construed as "uneducated" or "hasty."

CONCLUSION

Plaintiff, as a citizen, may have a First Amendment right to express violent words and support Hamas. But such expressions may, when it comes to working with law enforcement, be disqualifying. That was ISP's decision, and it was well within constitutional bounds. Moreover, Plaintiff fails to rebut Defendants' legitimate, non-discriminatory reason for rescinding the offer. Defendants request that this Court enter summary judgment in their favor on all counts.

Respectfully submitted,

/s/ Laura M. Rawski

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the aforementioned document was filed on Thursday, April 18, 2013 through the Court's CM/ECF system. Parties of record may obtain a copy of the redacted version of the paper through the Court's CM/ECF system. The undersigned attorney further certifies that a sealed copy of the paper was sent via email on April 18, 2013 to:

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