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' MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT

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Defendants Illinois State Police ("ISP"), Jonathon E. Monken and Patrick E. Keen, ("Defendants"), by and through their attorney, LISA MADIGAN, Illinois Attorney General, hereby submit the following Memorandum in support of their Motion for Summary Judgment:

BACKGROUND

This case presents the question of whether ISP may be compelled to retain a volunteer with demonstrable ties to an organization that funded terrorism. Plaintiff Kifah Mustapha brings this lawsuit under Title VII of the Civil Rights Act and Section 1983, alleging violations of equal protection and the First Amendment, and seeking reinstatement to his unpaid chaplain position. For the reasons stated herein, Defendants are entitled to summary judgment in their favor.

ISP operates a volunteer-based, interfaith chaplain program to support employees confronted with trauma. (DSF ¶¶29-30, 70). In April 2008, Plaintiff applied for an unpaid ISP chaplain position. (*Id.* ¶¶20, 30). ISP Sergeant Nick Hasan, a member of Plaintiff's congregation, recommended him. (*Id.* ¶24). [redacted] (*Id.* ¶23). Plaintiff submitted background check authorization forms as required by ISP's chaplain policy. (*Id.* ¶¶21, 23). [redacted] (*Id.* ¶26). On December 1, 2009, Defendant Keen, then Deputy Director of ISP's Division of Administration, sent Plaintiff a letter affirming his selection as a chaplain. (*Id.* ¶¶5, 27). In December 2009, Plaintiff and six other new chaplains completed an orientation, for which they paid their own expenses. (*Id.* ¶32). The chaplains were given ISP identification cards mistakenly identifying them as contract employees. (*Id.* ¶33). This error was later corrected, and new cards were issued. (*Id.* ¶34).

On January 6, 2010, ISP First Deputy Director Luis Tigera received a disturbing email from a retired ISP officer attaching an article by Steven Emerson of IPT News. (*Id.* ¶¶35-36).

The article criticized ISP for selecting Plaintiff, highlighting that he had ties to several extremist groups and was listed as an "unindicted co-conspirator" in the criminal trial of the Holy Land Foundation for Relief and Development ("HLF"). (*Id.* ¶35). In 2001, the federal government froze HLF's operations, and the Treasury Department's office of Foreign Assets Control declared HLF a Specially Designated Terrorist. (*Id.* ¶¶13-14). Ultimately, a jury convicted HLF along with several individuals, finding that HLF funneled funds to terrorist groups, including Hamas. (*Id.* ¶15). Defendants were previously unaware of Plaintiff's association with HLF, [redacted] (*Id.* ¶¶20, 36). In light of the serious allegations in the article, it was swiftly sent to ISP's highest ranks, including Defendants Keen and Monken. (*Id.* ¶37).

ISP immediately inquired as to whether background checks had been completed for the 2009 chaplain class, an inquiry further complicated by the fact that the chaplain coordinator had retired. (*Id.* ¶¶38-39). Eventually it was determined that preliminary background checks were initiated but were never refreshed and finalized prior to the orientation as they should have been. (*Id.* ¶40). ISP officials decided Category A was appropriate based on chaplains' access to confidential information. (*Id.* ¶41). A "Category A" includes credit, criminal, traffic, and VITAL histories, neighborhood canvassing, reference checks, and candidate interviews. (*Id.* ¶42).

All seven chaplains were informed that additional forms needed to be completed for a further background check, and they should refrain from identifying themselves as ISP chaplains in the interim. (*Id.* ¶44). When ISP received Plaintiff's completed forms, [redacted] (*Id.* ¶45). [redacted] was responsible for fundraising. (*Id.* ¶¶11-12). Plaintiff claims he believed HLF was a humanitarian organization intended to benefit Palestinians. (*Id.* ¶18). Upon receipt of the paperwork, the Division of Internal Investigations ("DII") commenced Category A background

checks on all seven chaplains. (*Id.* ¶46). The investigators assigned to Plaintiff's file contacted dozens of individuals seeking information. (*Id.* ¶47). The FBI provided [redacted] as well as documents and DVDs seized from Plaintiff's HLF office in 2001. (*Id.* ¶¶47, 49). ISP officials were also advised by FBI Special Agent in Charge, Robert Grant, that if Plaintiff applied for the FBI's chaplain program, he would not pass the background check. (*Id.* ¶48). [redacted] (*Id.* ¶59). Ultimately, DII submitted a report recommending that Plaintiff should not be permitted to pass the background check. (*Id.* ¶¶60, 62).

Subsequently, a group of ISP officials, including Defendants Monken and Keen, watched a video seized from Plaintiff's office depicting a performance filmed during a convention for the Islamic Association for Palestine. (*Id.* ¶¶50-51). In the video, Plaintiff and others chanted lyrics including "O Hamas, teach us the rifle" and "O Hamas, raise the banner of jihad." (*Id.* ¶¶51-52). The performance includes a child holding a machine gun, which is later passed around while the group dances, as well as a man wearing a mask traditionally associated with Hamas. (*Id.* ¶¶53-56). [redacted] (*Id.* ¶57).

In June 2010, the unanimous consensus was that Plaintiff should not be retained as a chaplain. (*Id.* ¶63). Defendants Monken and Keen indicated that three primary factors motivated their decision. (*Id.* ¶66). The first factor was Plaintiff's identification as an unindicted co-conspirator. (*Id.* ¶67). Second, ISP officials were profoundly disturbed by Plaintiff's appearance in the video, which raised questions as to Plaintiff's ability to effectively serve as a chaplain for individuals of all faiths, as well as real concerns that Plaintiff in fact did support Hamas. (*Id.* ¶68). Third, ISP considered privileged information along with the FBI memo and statement that

Plaintiff would not pass a background check to be an FBI chaplain. (*Id.* ¶69).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers and interrogatories, together with affidavits, show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-324 (1986). Federal Rule of Civil Procedure 56(c) requires the non-moving party to demonstrate the existence of a genuine issue for trial. *Id.* at 324.

ARGUMENT

A. Summary Judgment Should Be Granted in Favor of Defendant ISP.

a. Plaintiff was not an "employee" under Title VII.

Title VII's reach is limited. Its coverage does not extend to independent contractors, employees of small employers, unpaid volunteers or those constituting an employer (i.e., an owner). 42 U.S.C. § 2000e(b), (f); *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1243 (11th Cir. 1998) ("We can assume that Congress also meant to limit the pool of potential plaintiffs under Title VII…"). Plaintiff is precluded from Title VII coverage because ISP chaplains serve as unpaid volunteers.

The Seventh Circuit has not yet addressed when a volunteer may qualify as an employee under Title VII, but the majority of federal courts confronted with this question (and the EEOC) have held significant remuneration for the volunteer services as essential to the inquiry. *See O'Connor v. Davis*, 126 F.3d 112, 115-16 (2d Cir. 1997); *Jacob-Mua v. Veneman*, 289 F.3d 517, 521 (8th Cir. 2002), *abrogated on other grounds*, *Torgerson v City of Rochester*, 643 F.3d 1031 (8th Cir. 2011); *Llampallas*, 163 F.3d at 1243 ("[O]nly individuals who receive compensation from an employer can be deemed 'employees' under the statute."); EEOC Compliance Manual, EEOCCM s 2-III at § A-1-c (noting that for the benefits associated with a volunteer to qualify as

an employee, they must constitute "significant remuneration" rather than merely "inconsequential incidents of an otherwise gratuitous relationship."). Under the remuneration test, there must first be significant remuneration in exchange for services. *O'Connor*, 126 F.3d at 115-16. Only if such financial benefit exists is the individual deemed "hired," and an inquiry into whether the individual was acting as an employee or independent contractor is necessary. *Id*.

Here, the facts do not establish remuneration – the position is unpaid. (DSF ¶30.) Although other benefits can meet the requisite threshold, they must be more than *incidental* to the volunteer work – the benefits must amount to independent consideration for services. *See Love v. Cmty. Nutrition Network*, No. 09-cv- 4937, 2010 WL 5185089, at *8 n.7 (N.D. Ill. Dec. 16, 2010) (noting that employee, formerly an unpaid volunteer, would not qualify as an employee under Title VII for period as a volunteer because she did not receive "appreciable consideration" in exchange for services); *Dionne Jones-Walsh v. Town of Cicero*, No. 04-cv-06029, 2005 WL 2293671, at *4 (N.D. Ill. Sept. 14, 2005) ("Workers who do not receive any form of compensation are not protected by Title VII."); *Vickery v. Minooka Volunteer Fire Dept.*, 990 F.Supp. 995, 998-999 (N.D. Ill. 1997) (holding volunteer firefighters are not "employees" to count toward the requisite 15 employees to determine an employer under Title VII); *Holder v. Town of Bristol*, 09-cv-32 PPS, 2009 WL 3004552, at *3 (N.D. Ind. Sept. 17, 2009); *Henderson v. YMCA*, No. 05-cv-3179, 2005 WL 3115461, at *1 (C.D. Ill. Nov. 18, 2005) ("Where no financial benefit is obtained by the purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist."); *Moran v. Harris County*, No. H-07-582, 2007 WL 2534824, at *1 (S.D. Tex. Aug. 31, 2007); *Tawes v. Frankford Volunteer Fire Co.*, No. A-03-842-KAJ, 2005 WL 83784, *4 (D. Del. Jan. 13, 2005) (finding volunteer firefighter was not an employee under ADA and noting compensation was "of

paramount importance to such an inquiry."); *Scott v. City of Minco*, 393 F.Supp.2d 1180, 1190 (W.D. Okl. 2005) (volunteer firefighters were not "employees" toward employer's requisite 15 employees under Title VII). Without direct financial benefit, there is no employment under Title VII, a statute designed to protect an individual's livelihood. *Tawes*, 2005 WL 83784, at *5.

No plausible employment relationship existed between Plaintiff and ISP. At most, Plaintiff indicates if he were injured or killed while providing chaplain services, he may be eligible for workers compensation or death benefits. Line-of-duty benefits have been held insufficient to pass the remuneration test because they are *incidental* and are not guaranteed. *See Holder*, 2009 WL 3004552, at *5; *Tawes*, 2005 WL 83784, at *5; *Scott*, 393 F.Supp.2d at 1190 ("The line-of-duty benefits, although not completely irrelevant, are of no benefit to the [volunteer] unless injured or killed on the job."). Moreover, statutory benefits can be rescinded by the legislature, are not automatic, and do not necessarily come from ISP. Here, the absence of independent compensation is affirmed by Plaintiff's failure to ascertain monetary damages redressible under Title VII, such as lost wages and benefits. DSF ¶75; *Llampallas*, 163 F.3d at 1243 (the remedial scheme under Title VII "could not make a non-employee plaintiff whole.").

Alternatively, at the very least, Plaintiff is excluded from Title VII as an independent contractor. A chaplain has no set schedule. (DSF ¶29.) Plaintiff shouldered his expenses associated with the orientation. (*Id*. ¶32.) [redacted] (*Id.* ¶10.) Even the mistaken ID provided to Plaintiff indicated that they were *contract* employees. (*Id*. ¶33.) *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-324 (1992) (describing factors to differentiate an employee from an independent contractor).

The evidence is clear that the chaplain position is an unpaid volunteer position in which Plaintiff hoped to participate in addition to his obligations as an Imam. He sought no financial gain from the position, and his livelihood was not dependent on it. Accordingly, Plaintiff was not an "employee" and is precluded from bringing suit under Title VII.

b. Alternatively, Plaintiff has presented no evidence of discrimination.

i. Plaintiff has no direct evidence of discrimination.

Generally, "direct evidence" proves unlawful discrimination without need for inference or presumption. *Good v. Univ. of Chicago Med. Ctr.*, 673 F.3d 670, 675 (7th Cir. 2012) (citations omitted). Direct evidence may take two forms: 1) an admission by the employer that the action was based on a prohibited animus; or 2) a "convincing mosaic" of circumstantial evidence pointing directly to a prohibited motive. *Id.* at 674; *Burton v. USF Logistics*, No. 03-cv-5303, 2005 WL 711576, at *3 (N.D. Ill. Mar. 28, 2005). The direct method sets a "high threshold" and requires "evidence leading directly to the conclusion that an employer was illegally motivated[.]" *Good*, 673 F.3d at 676. Plaintiff's race, religion and national origin [redacted] (DSF ¶¶23, 26.) The evidence is void of blatant animus, so Plaintiff must proceed under the indirect method.

ii. Plaintiff's claim also fails under the indirect method of proof.

To survive summary judgment under the indirect method, Plaintiff must establish a *prima facie* case by showing: 1) he is in a protected class; 2) he met ISP's legitimate expectations; 3) he was subjected to an adverse employment action; and 4) ISP treated similarly situated employees outside of the protected class more favorably. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If Plaintiff establishes this, the burden shifts to Defendants to offer a legitimate, nondiscriminatory reason for the decision, which the Plaintiff can attack as pretext for discrimination. *Id.* at 802, 804. For purposes of this motion, if this Court determines that Plaintiff

is a Title VII employee, Defendants will concede that Plaintiff can meet the first and third elements of a *prima facie* case. However, Defendants are entitled to summary judgment because: 1) Plaintiff did not meet ISP's legitimate expectations; and 2) Plaintiff cannot point to any similarly situated employee treated more favorably. Even if Plaintiff could make a *prima facie* case, his claim fails because he cannot show Defendants' legitimate reason is pretextual.

1. Plaintiff's failure to successfully pass the background check meant he could not meet ISP's legitimate expectations.

ISP's policy mandates applicants pass a background check, (DSF ¶21), and termination for failing a background check does not on its face support a discrimination claim. *Davis v. Jewish Vocational Serv.*, No. 07-cv-4735, 2010 WL 1172537, at *5 (N.D. Ill. Mar. 17, 2010) (granting summary judgment where plaintiff failed background check, as there was no evidence it was tied to prohibited animus). Once Plaintiff failed the 2010 background check, he no longer met ISP's expectations, and its previous perception that Plaintiff was qualified was mooted. *Johal v. Little Lady Foods, Inc*., 434 F.3d 943, 946 (7th Cir. 2006) (stating that what matters for discriminatory discharges is whether the employee was meeting expectations at the time of discharge). The 2009 background check error led everyone to believe Plaintiff met expectations, but this does not make ISP's findings via a thorough background check less legitimate. Plaintiff failed the background and cannot establish the second prong of his *prima facie* case.

2. There is no evidence that anyone outside of the protected classes alleged here were treated more favorably.

Following discovery of the background check error, it is undisputed that "Category A" background checks commenced on all seven chaplains. (DSF ¶43.) An employee can only be similarly situated if the comparator has "engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Fane v. Lock Reynolds, LLP*, 480 F.3d 534, 540 (7th Cir. 2007) (citations omitted). Here,

an individual cannot be similarly situated unless his background check yielded information of a similar derogatory nature to Plaintiff. *Davis*, 2010 WL 1172537, at *5 (granting Title VII summary judgment for defendant where plaintiff did not identify anyone similarly situated, specifically no one with "any sort of criminal record, let alone a misdemeanor record similar to his."). The other six chaplains passed their background checks [redacted] (DSF ¶71.) It is also undisputed that no other chaplain's background check revealed ties to a terrorist organization, potential participation in organized crime, or potential funding of terrorist groups or activities. (*Id*. ¶¶71, 73.) Indeed, Plaintiff has not pointed to any similarly situated comparator who was treated more favorably. (*Id*. ¶74.) Accordingly, Plaintiff cannot establish the fourth element of his *prima facie* case.

3. Regardless, Plaintiff cannot establish pretext.

The undisputed evidence shows ISP did not retain Plaintiff because he failed the background check, (DSF ¶¶63-64, 72): a legitimate, nondiscriminatory reason. *Sendra v. Potter*, 833 F.Supp.2d 846, 854 (N.D. Ill. 2011) (holding that never passing a background check was a legitimate, nondiscriminatory business reason not to hire applicant); *Parker v. CGI Tech. & Solutions, Inc*., No. 11-0288-KD-N, 2012 WL 3610784, at *2 (S.D. Ala. Aug. 21, 2012) (holding failure to pass a background check because of discrepancies in employment history as a legitimate nondiscriminatory reason for termination); *Ramos v. Equiserve*, 146 Fed. Appx. 565, at *4 (3d Cir. 2005) (granting summary judgment for defendant where employee was terminated based on arrest record discovered in background check). The burden is on Plaintiff to overcome this legitimate proffered reason provided and establish that it is nothing more than pretext for unlawful discrimination. *Nawroot v. CPC Int'l*, 277 F.3d 896, 905-906 (7th Cir. 2002).

Pretext is a lie to cover up discrimination. *Birch v. Illinois Bone & Joint Inst., Ltd*., No. 04-cv-7285, 2006 WL 2795040, at *7 (N.D. Ill. Sept. 28, 2006) (*quoting Wolf v. Buss (Am.),*

Inc., 77 F.3d 914, 919 (7th Cir. 1996)). To establish pretext, Plaintiff must identify inconsistencies making it plausible for a jury to find ISP's reasoning "unworthy of credence." *Fane*, 480 F.3d at 541. Pretext may be shown with evidence that the proffered reason is factually baseless, was not the actual motivation for discharge or did not warrant discharge. *Nawroot*, 277 F.3d. at 906. Plaintiff cannot establish pretext. First, it is undisputed that he failed the background check. Second, the evidence affirms the background check and the information discovered therein led to ISP's decision. *Id*. at 907 (noting that to rebut an employer's proffered reason, more than a self-serving interpretation is necessary, there must be a demonstration that the basis for the decision was not "honestly held."); *Fane*, 480 F.3d at 541 ("If [defendant] honestly believed the reasons it gave, [plaintiff] loses even if the reasons are foolish, trivial or baseless."). Third, there was a sufficient basis to determine he failed the background check.

DII's recommendation regarding Plaintiff's background check [redacted] (DSF ¶62.) The ultimate decision makers had three main concerns upon review of the background file. (DSF ¶66.) First, Plaintiff was named as an unindicted co-conspirator in the HLF Trial. (*Id*. ¶67.) Second, ISP was severely disturbed by the video, which was at best, violently suggestive and intolerant. (*Id*. ¶67.) The video raised doubt as to Plaintiff's ability to effectively serve as an *interfaith* chaplain, as well real concerns that he supported Hamas. (*Id*. ¶68.) Third, certain information was provided by the FBI that affected the final decision. (*Id*. ¶69.) While one is privileged, the others are also significant: 1) the FBI indicated that Plaintiff would not pass a background check to be an FBI chaplain; and [redacted] (*Id*. ¶¶49, 69.) It is not the job of the courts to "sit as a super-personnel department that reexamines" every business decision and the propriety therein. *Nawroot*, 277

F.3d at 906. The evidence confirms that these reasons were honestly held and a sound basis for a law enforcement agency to terminate Plaintiff's appointment.

Nothing in the record rebuts ISP's proffered reason–when an individual's ties to terrorist activity cannot be refuted in a background check, they cannot be a member of law enforcement, nor does the record indicate the actual reason for termination was Plaintiff's status in a protected class. Accordingly, Defendants are entitled to summary judgment on Plaintiff's Title VII claim.

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

Plaintiff's equal protection claim is subject to the same *prima facie* requirements and burden-shifting analysis as his Title VII claim. *Salas v. Wi. Dept. of Corr.*, 493 F.3d 913, 926 (7th Cir. 2007) (citations omitted). The only difference is that the Title VII claim is against ISP, while the equal protection claim is against individual officials. *Id.* Defendants Monken and Keen incorporate by reference ISP's Title VII analysis above, *supra* at 7-11.

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

Implicit in the First Amendment freedoms of speech, assembly, and petition is the freedom to associate for the purpose of expressing ideas. Government action may impermissibly burden First Amendment freedoms when public employment is denied or benefits withheld on account of an individual's offensive speech or association with a disfavored group. *See, e.g.*, *Waters v. Churchill*, 511 U.S. 661, 672 (1994). To establish a *prima facie* case for a First Amendment violation, Plaintiff must show that: 1) his conduct was constitutionally protected; and 2) the protected conduct was a motivating factor in his termination. *Zerante v. DeLuca*, 555 F.3d 582, 585 (7th Cir. 2009). If so, the defendant then has the burden of showing "by a preponderance of the evidence that it would have reached the same decision…even in the

absence of the protected conduct." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). "If the defendant carries that burden, the plaintiff must then demonstrate that the defendant's proffered reasons for the decision were pretextual and that…[the expression] was the real reason for the decision." *Zellner v. Herrick*, 639 F.3d 371, 379 (7th Cir. 2011).

Defendants Keen and Monken declined to retain Plaintiff, in part, due to: 1) his role in the video; and 2) his fundraising activities for HLF. (DSF ¶¶67-69). Regardless, Plaintiff's claim fails because his interest in this expression is outweighed by ISP's interests in disaffiliating itself from violent, discriminatory expression and organizations, running an effective chaplain program, and preserving the confidentiality of sensitive information. Further, Defendants would have reached the same decision without consideration of Plaintiff's expression based on recommendations and information originating with the FBI. *See Mt. Healthy*, 429 U.S. at 287.

a. Standards governing limitations on government volunteers' speech.

Courts analyze government volunteer's speech claims using the analogous context of public employees alleging First Amendment retaliation. *Mosely v. Bd. of Educ. of City of Chicago*, 434 F.3d 527, 533 (7th Cir. 2006) (citations omitted). Although public employees do not relinquish all First Amendment protections by virtue of their employment, they may be subject to restraints on speech that would be unconstitutional if applied to the general public. *Milwaukee Deputy Sheriff's Ass'n v. Clarke*, 574 F.3d 370, 376 (7th Cir. 2009) (citations omitted). In order to operate effectively, "the government must be given some latitude to proscribe employee expression that is particularly damaging to its mission[,]" even if the expression occurs off-duty. *Lalowski v. City of Des Plaines*, No. 08 C 3780, 2012 WL 5182764, at *5 (N.D. Ill. Oct. 18, 2012) (holding that termination of police officer who used abusive language at an abortion protest did not violate the First Amendment) (*citing San Diego v. Roe*,

543 U.S. 77, 80 (2004) (same for officer who sold homemade sex videos on the internet)). In fact, "where the government is employing someone for the very purpose of effectively achieving its goals," restrictions on expression "may well be appropriate." *Waters*, 511 U.S. at 675.

In evaluating a First Amendment retaliation claim, a court must determine whether the employee expressed himself as a citizen upon matters of public concern or as an employee upon matters of only personal interest. *Connick v. Myers*, 461 U.S. 138, 147 (1983); *Milwaukee Deputy Sheriff's Ass'n*, 574 F.3d at 377 (*citing Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006)); *see also Messman v. Helmke*, 133 F.3d 1042, 1045 (7th Cir. 1998) (applying public employee speech test to freedom of association claim). To determine this question of law, a court must consider "the content, form, and context of a given statement." *Connick*, 461 U.S. at 147-48. Even then, the speech is not entitled to First Amendment protection if the government "can prove that the interest of the employee as a citizen in commenting on the matter is outweighed by the interest of the government employer in promoting effective and efficient public service." *Chaklos v. Stevens*, 560 F.3d 705, 714 (7th Cir. 2009) (*citing Pickering*, 391 U.S. at 574). This inquiry requires consideration of seven related factors:

> (1) whether the speech would create problems in maintaining discipline or harmony among co-workers;
> (2) whether the employment relationship is one in which personal loyalty and confidence are necessary;
> (3) whether the speech impeded the employee's ability to perform her responsibilities;
> (4) the time, place, and manner of the speech;
> (5) the context within which the underlying dispute arose;
> (6) whether the matter was one on which debate was vital to informed decision-making…
> (7) whether the speaker should be regarded as a member of the general public.

Chaklos, 560 F.3d at 714-15 (citations omitted). The employers' "reasonable predictions of disruption" are "given substantial weight," even when the speech addresses a matter of public concern. *Waters*, 511 U.S. at 673. No proof of actual disruption is required. *Connick*, 461 U.S. at

152. In conducting the *Pickering* balancing test, a court is required to accept the government's "fact-finding efforts, made after a reasonable inquiry and supported by evidence obtained in that investigation." *Weicherding v. Riegel*, 160 F.3d 1139, 1144 (7th Cir. 1998) (holding government's interest in preventing prison sergeant's association with Ku Klux Klan outweighed employee's interest in expressive association); *see also Waters*, 511 U.S. at 677 (holding that courts should "look to the facts as the employer reasonably found them to be.").

b. Plaintiff's expression lacks First Amendment protection because ISP's interests significantly outweigh Plaintiff's interests.

As an initial matter, it cannot be fairly disputed that Defendants conducted extensive inquiry into Plaintiff's expression before reaching factual conclusions and their ultimate decision to not retain Plaintiff. *See Weicherding*, 160 F.3d at 1144; (DSF ¶¶42, 47). As such, Defendants' factual findings must be accepted by the Court. *See id.* Proceeding to the First Amendment analysis, for purposes of this motion only, Defendants will assume that the public concern prong is satisfied, as Plaintiff claims that at least some of his expression touched on humanitarian concerns. *See Connick*, 461 U.S. at 147. But under this set of facts, the governments' interests far outweigh Plaintiff's interest in his expression. *See Pickering*, 391 U.S. at 574.

First, Defendants reasonably believed that condoning Plaintiff's expression would jeopardize the integrity of ISP. (DSF ¶70). Police agents are expected to embody the loyalty and professionalism appropriate to the paramilitary organization they represent. *See Piscottano v. Murphy*, 511 F.3d 247, 277-78 (7th Cir. 2007) (government interest outweighed prison guard's association with Outlaws gang); *Kokkinis v. Ivkovich*, 185 F.3d 840, 845 (7th Cir. 1999) (same for police officer's interest in masked television appearance accusing chief of sexism); *Jefferson v. Ambroz*, 90 F.3d 1291, 1297 (7th Cir. 1996) (same for parole officer's interest in criticizing police by impersonating Black Gangster Disciples member). As such, courts have repeatedly

held that deference to the government's judgment regarding the disruptive nature of its agents' speech is especially important in law enforcement. *Kokkinis*, 185 F.3d at 845; *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995) (government interests outweighed those of police officer punished for wearing black-face). Here, Defendants reasonably determined that Plaintiff's expression would damage ISP due to its anti-Jewish and un-American content and manner.

A police agency's interest in restricting agents' speech peaks when issues of discrimination and bias arise. The Second Circuit squarely addressed this in *Pappas v. Giuliani*:

> The effectiveness of a…police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias…If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection…And the department's ability to recruit and train personnel from that community will be damaged.

290 F.3d 143, 146-47 (2d Cir. 2002) (government interests outweighed those of police officer terminated for anonymously disseminating anti-Jewish literature). If the police were to ignore prejudice by its agents, it could be viewed as condoning, or even worse, endorsing a discriminatory viewpoint. Unsurprisingly, First Amendment retaliation cases involving prejudice and racism overwhelmingly recognize that the government's interests override the speakers'. *See Locurto v. Giuliani*, 447 F.3d 159, 183 (2d Cir. 2006) (government interest outweighed police officer's interest in "Black to the Future" float and parody of lynching); *Pappas*, 290 F.3d at 146-47 (anti-Jewish literature); *Weicherding*, 160 F.3d at 1144 (KKK affiliation); *Tindle*, 56 F.3d at 971 (black-face costume). It is plain that an agent of the state police has no protected right to "publicly ridicul[e] those he is commissioned to protect and serve[.]" *Locurto*, 447 F.3d at 183.

Here, Plaintiff's expressive activities espoused a distinctly anti-Jewish viewpoint. In the

video, Plaintiff chanted about Hamas, jihad, and raising the rifle, while a little boy danced with an automatic weapon. (DSF ¶¶51-57). A reasonable person would see this as a call for violence and "would know that Hamas was gunning for Israelis[.]" *Boim v. HLF*, 549 F.3d 685, 694 (7th Cir. 2008). Even though Plaintiff denies that he endorsed the terrorist organization Hamas, Defendants were entirely reasonable to believe otherwise based on the form and content of the video and [redacted] (DSF ¶¶49, 58). Certainly Defendants were reasonable to believe that condoning Plaintiff's expression would prove deeply offensive to Jews and diminish ISP's integrity in the Jewish community.

There is also a distinct unpatriotic element to Plaintiff's expression that cannot be ignored. Americans have expended countless resources, and thousands have given their lives fighting terrorism in a war sure to define a generation. The expression in the video is conveyed in a manner that is militant and certainly not peaceful. At best, its message could be reasonably interpreted to advocate violence and vigilantism, highly inconsistent with ISP's mission of maintaining order and legal compliance. More likely, the video and Plaintiff's fundraising activities for the HLF could lead the public to believe that ISP looked the other way when confronted with evidence that Plaintiff aided and abetted, or at least cheered for, terrorism. The expression could be viewed as an affront to U.S. veterans and Jews alike, both of whom may be deterred from cooperating with or seeking employment with ISP. Certainly it was reasonable for Defendants to believe that ISP's public integrity would be jeopardized if it retained Plaintiff under the circumstances. Indeed, within weeks of Plaintiff's orientation, a flurry of media attention erupted, criticizing ISP for selecting Plaintiff in light of his ties to terrorism. (DSF ¶35). It was only a matter of time until other law enforcement organizations learned of the incident, which could threaten their willingness to maintain information-sharing agreements with ISP. (*Id.*

¶9). Defendants had no obligation to wait for further criticism and erosion of trust before ISP discontinued its affiliation with Plaintiff upon failure of the background check.

Second, Plaintiff's expression impaired his ability to effectively serve as an interfaith chaplain. *See Chaklos*, 560 F.3d at 714-15; (DSF ¶70). Especially in diverse Chicagoland, a chaplain would be called to assist individuals from a multitude of faiths. *Id*. It was reasonable for Defendants to determine that many citizens, including Jews and veterans, would be uncomfortable accepting solace from Plaintiff if they knew about his connection to HLF or learned of the video. ISP cannot conduct an effective chaplain program if it is preoccupied with whether a particular chaplain may cause added distress to those already confronted with tragedy.

Third, Plaintiff's expression raises a question as to whether he can be entrusted with confidential information he may encounter as a chaplain. *See Chaklos*, 560 F.3d at 714-15; (DSF ¶70). As demonstrated by ISP's background check of Plaintiff, privileged information pertaining to national security can surface in the course of routine police work. ISP also operates a Statewide Terrorism and Intelligence Center and is a member of the FBI's Joint Terrorism Task Force. (DSF ¶¶7-8). As ISP has a strong interest in protecting highly confidential information, it is essential that a chaplain maintain the secrecy of information just as a police officer would.

Background checks necessarily require an exercise of discretion. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1978). The Supreme Court has acknowledged that "[p]redictive judgment of this kind must be made by those with the necessary expertise" in protecting secret information. *Id.* at 529. Background checks and security clearances are an "inexact science" and are "only an attempt to predict [one's] possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, [one] might compromise sensitive information." *Id.* at 528-29 (citations omitted). In affirming DII's recommendation that Plaintiff

be denied, (DSF ¶62), Defendants were reasonable to err on the side of caution to ensure protection of confidential information. Although Plaintiff was not convicted of funding Hamas, failing a background check certainly does not require proof beyond a reasonable doubt. The fact remained that Plaintiff's expression closely tied him to a terrorist organization for which it is a crime to lend support. Under these circumstances, Defendants' were reasonable in determining Plaintiff had potential to compromise confidential information.

In contrast to ISP's interests, Plaintiff's interest in his expression carries far less weight. The weight given to an employee's expression depends on its time, place, and manner. *See Pickering*, 391 U.S. at 574. Had Plaintiff expressed his concerns about the humanitarian needs of the Palestinian people through a peaceful speech or fundraising for a legitimate charitable organization (instead of chanting about jihad and cheering the use of weapons), he would not be viewed as a potential security threat. (DSF ¶¶52-53). The *Pickering* balance plainly favors ISP.

c. Alternatively, Plaintiff would have failed the background check even without consideration of his possible support for Hamas.

Alternatively, Defendants can demonstrate that they would not have retained Plaintiff in the absence of his expression. *See Mt. Healthy*, 429 U.S. at 287. Even if Defendants had never seen the video or learned of Plaintiff's HLF ties, the background check revealed additional matters fatal to Plaintiff's candidacy: 1) the FBI opined that Plaintiff would not pass an FBI chaplain's background check; and 2) the FBI had privileged information that prevented Plaintiff from passing a background check. (DSF ¶69). In this instance, Defendants were able to view the FBI's privileged information, but even if they had not, Defendants would have acted reasonably by relying on the FBI's word alone. Plaintiff cannot show that Defendants' reliance upon the FBI was unreasonable, and it certainly is not pretext for First Amendment retaliation.

D. Defendants Monken and Keen Have Qualified Immunity from Plaintiff's Section 1983 Equal Protection and First Amendment Claims.

Even in the event that this Court were to find that Plaintiff's claims rise to the level of a constitutional violation, Defendants are entitled to qualified immunity. Qualified immunity shields government officials from individual liability under §1983 for discretionary functions, unless their conduct violates clearly established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This standard permits ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law. *Gregorich v. Lund*, 54 F.3d 410, 414-15 (7th Cir. 1995) (citations omitted). When qualified immunity is raised, it is a plaintiff's burden to overcome it. *Id*. at 413. In the context of the *Pickering* balancing test, the Seventh Circuit has acknowledged the need for a particularly broad application of qualified immunity, as "[d]ifferences in the nature of the competing interests from case to case make it difficult for a government official to determine, in the absence of case law that is very closely analogous, whether the balance that he strikes is an appropriate accommodation of the competing individual and governmental interests." *Id.* at 414.

Defendants cannot locate cases even remotely close to the facts here, as this scenario is extremely rare, if not unprecedented. Defendants Monken and Keen have certainly never dealt with a situation in which an individual with ties to a known terrorist organization seeks a confidential government position. (DSF ¶73). Defendants cannot be at their peril simply because they "legitimately but mistakenly believed that the balancing of interests tipped" in ISP's favor. *See Gregorich*, 54 F.3d at 415. In a law enforcement agency like ISP, Defendants should act erring on the side of caution to *maintain* the security of confidential and national security information, rather than jeopardizing such information for fear of being sued.

Defendants' reliance on DII's investigation also entitles them to qualified immunity. DII

is specially charged with conducting background checks for ISP. Defendants had no reason to believe that DII's investigation of Plaintiff was unreliable. High ranking officials like Defendants Monken and Keen must be able to rely on their subordinates' work without fearing liability.

Defendants are also entitled to qualified immunity because they could have reasonably but mistakenly believed that Plaintiff's speech did not address matters of public concern. *See Connick,* 461 U.S. at 147. For example, the Supreme Court has held that providing material support to a foreign terrorist organization like Hamas never deserves protection under the First Amendment, even in the form of expression. *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2723 (2010). If Defendants legitimately believed that Plaintiff knowingly raised funds for Hamas, not only would Plaintiff's expression lack protection, but it would be a crime. Defendants also could have believed that the video did not constitute protected speech due to its content and form. The video could be reasonably viewed as an unprotected incitement to violence. Defendants could also have reasonably believed that the video depicted only personal hostilities, as it certainly did not describe humanitarian issues affecting the Palestinian people.

Finally, Defendants are entitled to qualified immunity if they simply misunderstood the cultural significance of Plaintiffs' expression. In conducting a background check for a volunteer position, Defendants could not be expected to devote substantial resources to deciphering foreign ethnomusicology. It is unreasonable to expect Defendants that would respond to the video with anything but horror. We urge the Court to view the video. ISP officials had to decide whether somebody cheering for violence while a child holds a gun is fit to be a state police chaplain. A reasonable person would decide the answer to that question is an emphatic "**no**."

CONCLUSION

Defendants respectfully request that this Court enter summary judgment in their favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the aforementioned document was filed on Thursday, March 7, 2013 through the Court's CM/ECF system. Parties of record may obtain a copy of the paper through the Court's CM/ECF system.

/s/ Marni M. Malowitz