IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SILVIA COTRISS,

Plaintiff,

v.

CITY OF ROSWELL; JAMES RUSSELL GRANT, Roswell Chief of Police, Individually and in his Official Capacity; and KATHERINE GAINES LOVE, Roswell City Administrator, Individually and in her Official Capacity,

Defendants.

CIVIL ACTION FILE

NO. 1:16-CV-4589-MHC

ORDER

This case comes before the Court on Defendants City of Roswell, James Russell Grant, and Katherine Gaines Love's Motion to Dismiss for Failure to State a Claim [Doc. 15] ("Defs.' Mot.").

I. BACKGROUND

Plaintiff Silvia Cotriss alleges that she was employed with the Roswell Police Department ("RPD") for twenty years until her termination in July 2016, at which time she was a Sergeant in the Uniform Patrol Division. Compl. [Doc. 1]

¶¶ 8, 14. She was terminated after a citizen sent an e-mail to Defendant James Russell Grant, the Roswell Chief of Police, complaining that a Confederate flag was displayed on a flagpole at a private residence while a marked RPD vehicle was parked in the driveway of that residence. Id. ¶¶ 9, 14. Specifically, the citizen's e-mail stated:

> Chief Grant,
>
> I was in attendance at eagles nest church this past Sunday and actually sat two rows behind you as we discussed race relations and fostering empathy, understanding, and open lines of communication. I do appreciate your participation and willingness to keep that line of communication open. I am however disheartened when this Monday morning I am taking my daughter and son to their pre-school to see a home on west Wiley bridge road flying a confederate flag with a Roswell Police department explorer parked in the driveway. It is very difficult to explain to my daughter that we should trust our police, but in the same sentiment if I were to ever be pulled over or some situation where my family needs the police to protect and serve. My first thought/fear is that it may be the officer proudly flying his/her confederate flag. I fully support our individual rights of free speech and how we express our beliefs as long as there is no harm done to anyone. In light of current race, police, and human relations this officer is representative of the police force tasked to protect and serve.
>
> I hope this email finds you well and this officer will be apart [sic] of your cultural sensitivity and bias removal in the near future.

July 11, 2016, e-mail, attached as Ex. A to Defs.' Mot. [Doc. 15-1].

Plaintiff admits that she resides at the residence referenced in the citizen's e-mail. Compl. ¶ 10. She alleges that a smaller version of a Confederate flag with a

motorcycle had been displayed from April 2015 until three-to-four weeks prior to the citizen's e-mail complaint, at which time the motorcycle Confederate flag was removed and replaced by a full Confederate flag. Id. ¶ 11. Plaintiff also alleges that, although her RPD vehicle was parked in her driveway at least between March and May 2016, it was returned to the police department for replacement radios and would not have been parked in the driveway at the time the e-mail complaint was sent. Id. ¶ 10.[1]

Plaintiff alleges that flying the flag was "a way to honor her Southern heritage and her late husband." Id. ¶ 13. She further alleges that, following the citizen's e-mail complaint, the police conducted an internal investigation and concluded that she was in violation of RPD and City of Roswell (the "City") policies that (1) require officers on and off duty to "conduct themselves as to merit the confidence and respect of the public and fellow officers;" (2) forbid officers on and off duty from "engaging in conduct which adversely affects the efficiency of the RPD and has a tendency to destroy public respect for the employee or RPD or destroys confidence in the operation of the City service;" and (3) forbid City

[1] In any event, Plaintiff does not deny that her police department vehicle was parked in her driveway during the time that a Confederate flag of some form was flying on a pole at her residence.

employees from "conduct on or off duty that reflects unfavorably on the City as an employer." Id. ¶ 14. Based on these alleged violations, she was terminated on July 14, 2016. Id.

On December 14, 2016, Plaintiff filed this action, alleging a violation of her First Amendment right to free speech under 42 U.S.C. § 1983 against the City of Roswell, Grant, and Katherine Gaines Love (Roswell City Administrator) in their official and individual capacities. See Compl. ¶¶ 5, 16-19; Pl.'s Br. in Opp'n to Defs.' Mot. [Doc. 16] ("Pl.'s Resp.") at 2.[2]

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Under Federal Rule of Civil Procedure 12(b)(6), a claim will be dismissed for failure to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant

[2] Although the Complaint appears to allege two separate claims, Plaintiff clarified that she intends to state only one. Pl.'s Resp. at 2.

> is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation omitted). Thus, a claim will survive a motion to dismiss only if the factual allegations in the pleading are "enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555.

At the motion to dismiss stage, the court accepts all well-pleaded facts in the plaintiff's complaint as true, as well as all reasonable inferences drawn from those facts. McGinley v. Houston, 361 F.3d 1328, 1330 (11th Cir. 2004); Lotierzo v. Woman's World Med. Ctr., Inc., 278 F.3d 1180, 1182 (11th Cir. 2002). Not only must the court accept the well-pleaded allegations as true, but these allegations must also be construed in the light most favorable to the pleader. Powell v. Thomas, 643 F.3d 1300, 1302 (11th Cir. 2011). However, the court need not accept legal conclusions, nor must it accept as true legal conclusions couched as factual allegations. Iqbal, 556 U.S. at 678. Thus, evaluation of a motion to dismiss requires the court to assume the veracity of well-pleaded factual allegations and "determine whether they plausibly give rise to an entitlement to relief." Id. at 679.

As a general rule, courts in the Eleventh Circuit do not consider anything beyond the face of the complaint and documents attached thereto when analyzing a

motion to dismiss. Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1284 (11th Cir. 2007). However, there is an exception to this general rule "in cases in which a plaintiff refers to a document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss." Id.; see also Day v. Taylor, 400 F.3d 1272, 1276 (11th Cir. 2005) ("Our prior decisions also make clear that a document need not be physically attached to a pleading to be incorporated by reference into it; if a document's contents are alleged in a complaint and no party questions its contents, we may consider such a document provided [if it is central to the plaintiff's claim].").

In this case, Plaintiff's Complaint references the e-mail at issue and Defendants have attached a copy of the e-mail to their Motion to Dismiss. See Compl. ¶ 9; July 11, 2016, e-mail. Defendants' action against Plaintiff resulted from the e-mail and it is central to Plaintiff's claims. The parties do not contest the authenticity of the e-mail. Accordingly, in ruling on the present Motion to Dismiss, the Court will consider the e-mail attached to Defendants' Motion to Dismiss.

III. DISCUSSION

"It is well established that section 1983 itself creates no substantive rights; it merely provides a remedy for deprivations of federal rights established elsewhere." Wideman v. Shallowford Cmty. Hosp., Inc., 826 F.2d 1030, 1032 (11th Cir. 1987) (citing City of Okla. City v. Tuttle, 471 U.S. 808, 816 (1985)). To sustain a cause of action based on section 1983, a litigant must establish two elements: (1) that she suffered a deprivation of a right, privilege or immunity protected by the U.S. Constitution or federal law, and (2) that the act or omission causing the deprivation was committed by a person acting under color of state law. Arrington v. Cobb Cty., 139 F.3d 865, 872 (11th Cir. 1998); Emory v. Peeler, 756 F.2d 1547, 1554 (11th Cir. 1985); Dollar v. Haralson Cty., 704 F.2d 1540, 1542-43 (11th Cir. 1983). "[S]ection 1983 imposes liability only 'for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.'" Wideman, 826 F.2d at 1032 (quoting Baker v. McCollan, 443 U.S. 137, 146 (1979)). Accordingly, "[i]n any § 1983 action, a court must determine 'whether the Plaintiff has been deprived of a right secured by the Constitution and laws of the United States.'" Glenn v. Brumby, 663 F.3d 1312, 1315 (11th Cir. 2011) (quoting Baker, 443 U.S. at 140); see also 42 U.S.C. § 1983. "Absent the

existence of an underlying constitutional right, no section 1983 claim will lie." Wideman, 826 F.2d at 1032.

The sole claim Plaintiff has asserted against Defendants is based upon the alleged deprivation of Plaintiff's First Amendment rights. Compl. ¶¶ 16-25. Defendants contend that this claim should be dismissed because (1) Plaintiff has failed to demonstrate that her speech was about a matter of public concern, and (2) even if Plaintiff's speech was about a matter of public concern, her interest in making such speech is outweighed by Defendants' interest in providing efficient services. Defs.' Mot. at 5-20. Further, Defendants contend that, even if Plaintiff has stated a claim under § 1983, Grant and Love are entitled to qualified immunity from suit in their individual capacities because the alleged speech right was not clearly established when Plaintiff was terminated. Id. at 21-25.

A public employer may not terminate a public employee in retaliation for speech protected by the First Amendment. Alves v. Bd. of Regents, 804 F.3d 1149, 1159 (11th Cir. 2015) (citing Bryson v. City of Waycross, 888 F.2d 1562, 1565 (11th Cir. 1989)). Although a citizen "must accept certain limitations on her freedom" upon entering government service, id. (quoting Garcetti v. Ceballos, 547 U.S. 410, 418 (2006)) (internal punctuation omitted), she does not "relinquish the First Amendment rights she would otherwise enjoy as a citizen to comment on

matters of public interest." Id. (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)) (internal punctuation omitted). The goal is to "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568.

The Supreme Court employs a four-part test, based on Pickering and its progeny, to determine whether a public employee states a claim for retaliation in violation of the First Amendment. Cook v. Gwinnett Cty. Sch. Dist., 414 F.3d 1313, 1318 (11th Cir. 2005). The employee must first show that she spoke "as a citizen on a matter of public concern." Garcetti, 547 U.S. at 418. If she does so, the Court then weighs her First Amendment interest against the interest of the governmental employer "in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. Both of these first two steps are questions of law. Cook, 414 F.3d at 1318. If the employee's interest outweigh the government's interest, a fact-finder must determine whether the employee's speech played a substantial part in the government's decision to discharge the employee and whether the government would have reached the same decision absent the protected speech. Id.

Defendants' Motion to Dismiss concerns only the first two steps of the analysis: (1) whether the speech at issue relates to a matter of public concern, and (2) whether RPD's interest in restricting that speech outweighed Plaintiff's First Amendment interest.

A. Whether Plaintiff's Speech Involved a Matter of Public Concern

The government as employer has a stronger interest in regulating the speech of its employees than in regulating the speech of the citizenry in general. Connick v. Myers, 461 U.S. 138, 140 (1983). Nevertheless, "[a] public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." Id. (citing Pickering). The First Amendment protects government employee speech if the employee speaks "as a citizen upon matters of public concern." Id. at 147. However, if the employee speaks "as an employee upon matters only of personal interest," the speech is not constitutionally protected. Id. Therefore, the Court must decide (1) if Plaintiff spoke as a citizen, and (2) whether her speech was a matter of public concern. Boyce v. Andrew, 510 F.3d 1333, 1342 (11th Cir. 2007) (citing Connick and Pickering).

For the first inquiry, the Court must examine "whether a government employee's speech relates to his or her job as opposed to an issue of public concern." Id. at 1343. "The 'controlling factor' is whether the expressions are

made as an employee fulfilling his responsibility to his employer." Springer v. City of Atlanta, No. 1:05-CV-0713-GET, 2006 WL 2246188, at *3 (N.D. Ga. Aug. 4, 2006) (citing Garcetti, 547 U.S. at 421). Here, Plaintiff had the Confederate flag raised at her personal residence, and there is no evidence currently before the Court that she took any other action at her place of employment in conjunction with that activity. There is no indication (and Defendants do not contend) that Plaintiff spoke pursuant to her official duties in any manner. The Court finds that the facts as set forth in Plaintiff's Complaint, which must be accepted as true upon consideration of Defendants' Motion to Dismiss, show that Plaintiff spoke as a citizen.

Next, in making the public concern determination, the Court examines "'the content, form, and context' of the speech, 'as revealed by the whole record.'" Carter v. City of Melbourne, 731 F.3d 1161, 1168 (11th Cir. 2013) (quoting Connick, 461 U.S. at 147-48). A public employee's speech involves a matter of public concern if it can "be fairly considered as relating to any matter of political, social, or other concern to the community." Cook, 414 F.3d at 1319 (quoting Connick, 461 U.S. at 146). Public concern "is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." City of San Diego v. Roe, 543

U.S. 77, 83-84 (2004). Here, Plaintiff alleges that the flying of the Confederate flag was intended "to honor her Southern heritage and her late husband" and that, when Defendants asked her why she displayed the Confederate flag, she explained that the flag was "a part of her heritage." Compl. ¶ 13. She further alleges that her "speech is a matter of public concern in that it relates to matters of political, social, or other concern to the community" and that a "Confederate flag can communicate an array of messages, among them various political and historic points of view. Indeed, the Confederate flag has been a state sponsored symbol of Georgia heritage and generally accepted symbol of Georgia heritage." Id. ¶ 17.

The Court cannot conclude as a matter of law that Plaintiff's display of the Confederate flag was strictly for personal reasons, as opposed to being intended to convey a message. Her stated desire to honor her deceased husband certainly appears personal; without more, it would be difficult for the Court to find that Plaintiff's speech was on a matter of public concern. However, Plaintiff also alleges that the flying of the Confederate flag was intended to honor her "Southern heritage." Based upon those cases which have discussed whether the display of a Confederate flag by a public employee addresses a matter of public concern, the Court finds that Plaintiff's professed reason that the flag connoted a symbol of

heritage does suffice to state a claim that her speech concerned a matter of public interest.

In Duke v. Hamil, 997 F. Supp. 2d 1291 (N.D. Ga. 2014), a deputy chief of police was demoted following his posting of an image of the Confederate flag on Facebook accompanied by the phrase, "It's time for the second revolution." Id. at 1293. Another judge in this district found "that Plaintiff's speech can be fairly considered to relate to matters of political concern to the community because a Confederate flag can communicate an array of messages, among them various political or historical points of view." Id. at 1300.

In Erickson v. City of Topeka, 209 F. Supp. 2d 1131 (D. Kan. 2002), a similar result was reached by another district court in analyzing whether a city employee's license plate, containing a Confederate flag and the words "HERITAGE NOT HATE," constituted protected speech:

> [P]laintiff is not required to show that the meaning of the flag tag or the words expressed thereon were a subject of raging debate in this locale before his speech may be found to be of public concern. . . . [T]he court cannot reasonably find that plaintiff's speech dealt with only personal disputes and grievances with no relevance to the public interests.

Id. at 1140. (internal punctuation and citation omitted). Yet another district court has held that a police officer's display of the Confederate flag at his residence and on his private MySpace page constituted protected speech. Greer v. City of

Warren, No. 1:10-CV-01065, 2012 WL 1014658, at *7 (W.D. Ark. Mar. 23, 2012) ("In Texas v. Johnson, [491 U.S. 397 (1989)], the Supreme Court recognized the communicative nature of conduct relating to flags. In this case, Plaintiff stated his display of the Confederate Flag was related to his interest in history and heritage. Because Plaintiff's display of that flag reflects such an interest in history and heritage, this Court finds that display clearly touches on a matter of public concern such that it is protected speech under the First Amendment.") (internal punctuation and record citations omitted). See also Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 262 (4th Cir. 2003), vacated on other grounds by Dixon v. Coburg Dairy, Inc., 369 F.3d 811 (4th Cir. 2005) (en banc) (finding that "[t]he act of displaying a Confederate flag is plainly within the purview of the First Amendment."); Carpenter v. City of Tampa, No. 8:03-cv-451, 2005 WL 1463206, at *3 (M.D. Fla. June 21, 2005) (finding that the display of a Confederate flag "constituted a matter of public concern and was clearly protected by the First Amendment.").

The cases relied on by Defendants are inapposite. See, e.g., Tindle v. Caudell, 56 F.3d 966, 969 (8th Cir. 1995) (holding that the wearing of a costume consisting of blackface, bib overalls, and a black, curly wig did not constitute speech on a matter of public interest where the plaintiff "does not suggest that he wore his costume to express a message."); Lawrenz v. James, 852 F. Supp. 986,

992 (M.D. Fla. 1994), aff'd, 46 F.3d 70 (11th Cir. 1995) ("Plaintiff's beliefs relating to the swastika and the strength or power of white people are purely matters of personal interest, not matters of public concern."). Based on the facts as pleaded, at this stage of the litigation, the Court finds that Plaintiff intended the Confederate flag to convey a message of heritage which touches on a matter of public concern.

B. Whether Plaintiff's Interest Is Outweighed by Defendants' Interest in Providing Efficient Services

Next, Pickering requires the Court to balance her First Amendment interests against the City's interest "in promoting the efficiency of the public services it performs. . . ." 391 U.S. at 568. Defendants argue that Plaintiff's right to this speech is outweighed by RPD's interest in providing efficient and effective law enforcement. Defs.' Mot. at 11-20.

In assessing whether Defendants' interest in promoting efficient government services outweighs Plaintiff's interest in protected freedom of speech, the Court considers "(1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." Martinez v. City of Opa-Locka, 971 F.2d 708, 712 (11th Cir. 1992) (quoting Bryson v. City of Waycross, 888 F.2d 1562, 1567 (11th Cir. 1989)) (emphasis in original) (citations omitted).

The Eleventh Circuit has recognized that an organization like a police department has special concerns and "a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers." Hanson v. Soldenwagner, 19 F.3d 573, 577 (11th Cir. 1994) (citation omitted).

"However, at the motion to dismiss stage, the Court may consider only Plaintiff's facts as alleged in the Complaint to determine the parties' interests" pertaining to the Pickering analysis. Cochran v. City of Atlanta, 150 F. Supp. 3d 1305, 1314 (N.D. Ga. 2015). Plaintiff has alleged that her "speech was made at her private residence and did not in any way impair or reflect on the City or the RPD" and "did not impede the City or RPD's ability to perform its duties efficiently." Compl. ¶ 21. She also has alleged that, because she was not parking her official vehicle at her residence at the time of the e-mail, her "speech had no effect on the internal operation of the City or RPD." Id. ¶ 22.

Based solely on the facts as pleaded and taking these facts in the light most favorable to Plaintiff, as is required on a motion to dismiss, the Court cannot find

at this stage of the litigation that Defendants' interest outweighs Plaintiff's First Amendment freedom of speech interest.[3] Defendants' motion to dismiss the City of Roswell and the individual defendants in their official capacities is **DENIED**.[4]

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[3] This case is distinguishable from Duke, which granted the defendants' motion to dismiss a plaintiff's claim finding that the defendants' interest outweighed the plaintiff's interest in speaking. 997 F. Supp. 2d at 1303. There, the plaintiff was Deputy Chief of Police (and second in command of the department) and, along with displaying a Confederate flag on his Facebook page, "[a]ppear[ed] to advocate revolution during a presidential election[,]" thus sending "a partisan, if not prejudicial, message to many in the CSU Police Department and the community it serves." Id. at 1301-03. Unlike Duke, there currently is no evidence before this Court that Plaintiff undertook specific action to advocate by use of an offensive message in combination with the display of the Confederate flag.

[4] Defendants reference the national discussion concerning the arrests and shootings of African American suspects by police officers and attacks against police officers to support their contention that they have an interest that outweighs Plaintiff's First Amendment rights. Defs.' Mot. at 15-16. There is no doubt that display of the Confederate flag raises strong feelings among individuals. "It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, that flag is identified with racial separation." United States v. Blanding, 250 F.3d 858, 861 (4th Cir. 2001). It may be that once the factual record in this case is developed, Defendants will be able to marshal evidence to support their contention that their interest in promoting efficiency in government services outweighs Plaintiff's First Amendment interest. However, at this stage of the litigation, there are no facts that compel the Court to find that Defendants' interest outweighs Plaintiff's First Amendment rights.

C. Whether Defendants Grant and Love Are Entitled to Qualified Immunity from Individual Liability

Defendants also contend that, even if Plaintiff has stated a claim under § 1983, Grant and Love are entitled to qualified immunity from suit in their individual capacities because the alleged speech right was not clearly established when Plaintiff was terminated. Defs.' Mot. at 21-25. This Court agrees.

"Qualified immunity offers complete protection for individual public officials performing discretionary functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Sherrod v. Johnson, 667 F.3d 1359, 1363 (11th Cir. 2012) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). To claim qualified immunity, a defendant must first show he was performing a discretionary function. Barnes v. Zaccari, 669 F.3d 1295, 1303 (11th Cir. 2012). There is no dispute that Grant and Love were acting in the scope of their discretionary authority in this case. See Compl. ¶ 20; Defs.' Mot. at 22.

"Once discretionary authority is established, the burden then shifts to the plaintiff to show that qualified immunity should not apply." Edwards v. Shanley, 666 F.3d 1289, 1294 (11th Cir. 2012) (quoting Lewis v. City of W. Palm Beach, Fla., 561 F.3d 1288, 1291 (11th Cir. 2009)). A plaintiff demonstrates that qualified immunity does not apply by showing: "(1) the defendant violated a constitutional

right, and (2) the right was clearly established at the time of the alleged violation." Holloman ex rel. Holloman v. Harland, 572 F.3d 1252, 1254 (11th Cir. 2004). A constitutional right is clearly established "only if its contours are 'sufficiently clear that a reasonable official would understand what he is doing violates that right.'" Vaughan v. Cox, 343 F.3d 1323, 1332 (11th Cir. 2003) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "When we consider whether the law clearly established the relevant conduct as a constitutional violation at the time that [the government official] engaged in the challenged acts, we look for 'fair warning' to officers that the conduct at issue violated a constitutional right." Jones v. Fransen, 857 F.3d 843, 851 (11th Cir. 2017) (citing Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2011) (en banc)). There are three methods to show that the government official had fair warning:

> First, the plaintiffs may show that a materially similar case has already been decided. Second, the plaintiffs can point to a broader, clearly established principle that should control the novel facts of the situation. Finally, the conduct involved in the case may so obviously violate the constitution that prior case law is unnecessary. Under controlling law, the plaintiffs must carry their burden by looking to the law as interpreted at the time by the United States Supreme Court, the Eleventh Circuit, or the [relevant State Supreme Court].

Terrell v. Smith, 668 F.3d 1244, 1255-56 (11th Cir. 2012) (citations, quotation marks, and alterations omitted). The second and third methods, known as "obvious clarity" cases, exist when "case law is not needed" to demonstrate the unlawfulness

of the conduct or where the existing case law is so obvious that "every reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." Vinyard v. Wilson, 311 F.3d 1340, 1350-51 (11th Cir. 2002). Such cases are rare. See, e.g., Santamorena v. Georgia Military College, 147 F.3d 1337, 1340 n.6 (11th Cir. 1998) (noting that "these exceptional cases rarely arise").

Here, the Court does not find (and the parties have not argued) that Plaintiff's termination is so egregious to violate the First Amendment on its face, and there are no "broad principles" in case law that would clearly establish that every reasonable official in the individual Defendants' positions would know that their conduct would have violated Plaintiff's First Amendment rights. Therefore, this is not one of the rare "obvious clarity" cases. Remaining is the question of whether materially similar case law has been decided.

> As noted, to establish fair warning under this method, plaintiff may point to prior case law (from the Supreme Court of the United States, the Eleventh Circuit, or the highest court in the relevant state) that is materially similar. This method requires us to consider whether the factual scenario that the official faced is fairly distinguishable from the circumstances facing a government official in a previous case. Although existing case law does not necessarily have to be directly on point, it must be close enough to have put the statutory or constitutional question beyond debate. If reasonable people can differ on the lawfulness of a government official's actions despite existing case law, he did not have fair warning and is entitled to qualified immunity. This court has stated many times that if case law, in factual terms, has not

> staked out a bright line, qualified immunity almost always protects the defendant.

Gaines v. Wardynski, No. 16-15583, 2017 WL 4173625, at *3 (11th Cir. Sept. 21, 2017) (internal citations and punctuation omitted).[5] "It is particularly difficult to overcome the qualified immunity defense in the First Amendment context." Id. (citations omitted). Immunity is especially appropriate in cases where the employer's government agency is involved in quasi-military organizations such as law enforcement agencies because discipline is essential to such agencies, Williams v. Bd. of Regents, 629 F.3d 993, 1003 (5th Cir. 1980),[6] and because law enforcement employees are entitled to less First Amendment protection than other government employees, McMullen v. Carson, 754 F.2d 936, 938 (11th Cir. 1985).

This Court concludes that the law was not so clearly established that the Pickering balancing test would weigh in Plaintiff's favor based on the facts of this case. Plaintiff contends that Garcetti, Connick, and Johnson demonstrate that the Pickering test inevitably would have weighed in her favor and, thus, her right was

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[5] There are no controlling Supreme Court, Eleventh Circuit, or Georgia Supreme Court cases holding that the termination of a law enforcement officer for flying a Confederate flag violates the officer's First Amendment rights.

[6] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued before October 1, 1981.

clearly established at the time of her termination. However, none of the cases cited by Plaintiff involve the same or similar facts as this case. As the Eleventh Circuit has concluded:

> The Supreme Court has never established a bright-line test for determining when a public employee may be disciplined in response to that employee's speech. Instead, Pickering established a case-by-case balancing of interests test. Although "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression," an employee's interest as a citizen in commenting on matters of public concern must be balanced against the state's interest as an employer "in promoting the efficiency of the public services it performs through its employees." Because no bright-line standard exists to put the employer on notice of a constitutional violation, this circuit has recognized that a public employer is entitled to immunity from suit unless the Pickering balance "would lead to the inevitable conclusion that the discharge of the employee was unlawful." Accordingly, this court need not decide the precise result of applying the Pickering balancing test to [the plaintiff]. Instead, we need only decide whether such a result would be so evidently in favor of protecting the employee's right to speak that reasonable officials in appellees' place "would necessarily know that the termination of [the plaintiff] under these circumstances violated [the plaintiff's] constitutional rights."

Busby v. City of Orlando, 931 F.2d 764, 773-74 (11th Cir. 1991) (internal citations omitted).

Here, qualified immunity is appropriate because the outcome does not so clearly favor Plaintiff under the particular circumstances of this case that the individual Defendants were expected to know that terminating her would result in a constitutional violation. See Gaines, 2017 WL 4173625, at *7 (holding that the

defendant was entitled to qualified immunity because the case law the plaintiff relied upon "was not particularized to the facts of the case, but rather it merely set out First Amendment principles at a high level of generality . . . ."). Defendants' motion to dismiss Grant and Love in their individual capacities is **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendants City of Roswell, James Russell Grant, and Katherine Gaines Love's Motion to Dismiss for Failure to State a Claim [Doc. 15] is **GRANTED IN PART and DENIED IN PART**. Specifically, Defendants' Motion is **GRANTED** with respect to Plaintiff's claims against Grant and Love in their individual capacities, but otherwise is **DENIED**.

IT IS SO ORDERED this 26th day of September, 2017.

Mark H. Cohen

MARK H. COHEN
United States District Judge