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

SILVIA COTRISS, Plaintiff, v. CITY OF ROSWELL, GEORGIA, *et al.*, Defendants.	CIVIL ACTION FILE NO. 1:16-CV-04589-WMR

ORDER

This is a First Amendment civil rights case before the Court on Defendants' Motion for Summary Judgment [Doc. 69] and Plaintiff's Motion for Summary Judgment [Doc. 73].

I. Background

"In determining a motion for summary judgment, the court must view all evidence and draw all reasonable inferences in the light most favorable to the non-moving party." Stephens v. Trust for Pub. Land, 475 F. Supp. 2d 1299, 1308 (N.D. Ga. 2007) (citing Patton v. Triad Guar. Ins. Corp., 277 F.3d 1294, 1296 (11th Cir. 2002)).

Plaintiff began working for the City of Roswell Police Department in 1996, and she became a Sergeant in 2008. Cotriss Dep. [Doc. 68 at 8:4].

Between 2014 and 2016, news stories about unarmed African-American males being shot or killed in encounters with police were widely publicized throughout the country. Grant Decl. [Doc. 69-4 at ¶ 13]. Examples included reports of the police-involved shootings or killings of Michael Brown in Ferguson in August 2014, Tamir Rice in Cleveland in November 2014, Walter Scott in North Charleston in April 2015, Freddie Gray in Baltimore in April 2015, Alton Sterling in Baton Rouge on July 5, 2016, and Philando Castile in Minnesota on July 6, 2016. These news stories were well-known throughout the Roswell Police Department, as well as in the general community, and were discussed at roll call and in command staff meetings. Id. at ¶ 14-16 ; Dunkin Dep. [Doc. 65 at 48:8-49:8, 52:15-53:17]; Grant Dep. [Doc. 63 at 14:9-19, 147:15-148:16].

Beginning in April 2015, Plaintiff began flying a flag featuring a motorcycle superimposed over the Confederate flag (the "Bike Week" flag) on the flagpole in her yard. Plaintiff asserts the meaning of this flag is about "riding with people that we know in this area, around the South." Dunkin Decl. [Doc. 69-5 ¶ 10 & Ex. C at 18:14-18:30]. About three-to-four weeks before July 11, 2016, Plaintiff authorized her roommate to replace the Bike Week flag with a second flag, featuring only the

Confederate flag. Id. at 18:35-19:07; [Doc. 68 at 173:1-174:5]. Plaintiff stated that flying the flag was "a way to honor her Southern heritage and her late husband." Compl. [Doc. 1 at ¶ 13]. The flagpole was in front of the house, more than fifteen feet tall, and unobstructed from the frequently trafficked road. [Doc. 68 at 156:9-157:3, 157:4-14, 169:23-170:2].

At least between March 15, 2016 and March 31, 2016, Plaintiff parked her Roswell Police Department patrol car in the driveway by her house with the Confederate flag flying overhead. Dunkin Dep. [Doc. 65-1 Ex. 1 at 3, fn. 1].

On July 10, 2016, less than a week after the police shootings of Alton Sterling and Philando Castile, Chief Grant of the Roswell Police Department attended Eagle's Nest Church, which has a predominantly African-American congregation. At the invitation of the church's pastor, Chief Grant spoke to the congregation. On July 11, 2016, Chief Grant received the following email:

> Chief Grant,
>
> I was in attendance at eagles nest church [sic] 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 [sic] taking my daughter and son to their pre-school to see a home on west Wiley bridge road [sic] flying a confederate flag [sic] with a Roswell Police department explorer [sic] 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.

> [sic] 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.

[Doc. 63 Ex. 3 at 1, 7-8].

Following this complaint, Chief Grant directed Captain Dunkin to perform an internal investigation. [Doc. 65 at 7:11-24]; [Doc. 69 ¶ 8 & Ex. D]. During her investigation, Captain Dunkin determined that the Confederate flag referenced in the email was in front of Plaintiff's home. [Doc. 65 at 8:25-9:2]; [Doc. 69. Ex. D]. Plaintiff admitted to flying the flags and parking her police car next to them. [Doc. 68 at 200:19-23]. For those reasons, the investigation concluded that she was in violation of Roswell Police Department and City of Roswell 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 employees from "conduct on or off duty that reflects unfavorably on the City as an employer." [Doc. 1 at ¶ 14].

Based on these alleged violations, lack of candor during the investigation, and prior disciplinary action, 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, Chief Grant, and Katherine Gaines Love, Roswell City Administrator, in their official and individual capacities. [Doc. 1 at ¶ 5, 16-19; Pl.'s Br. in Opp'n to Defs.' Mot. [Doc. 16 at 2]. This Court granted Defendants' Motion to Dismiss regarding Grant and Love in their individual capacities. [Doc. 20].[1]

II. Legal Standard

Under Federal Rule of Civil Procedure 56, the Court should grant summary judgement "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears "the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1259 (11th Cir. 2004) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (internal quotations omitted)).

[1] Said Motion was decided by the Judge previously assigned to this case.

"When that burden has been met, the burden shifts to the nonmovant to demonstrate that there is a genuine issue of material fact, which precludes summary judgment." Lamar v. Wells Fargo Bank, 597 Fed. App'x. 555, 557 (11th Cir. 2014) (citing Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991)). "The applicable substantive law identifies which facts are material." Stephens v. Trust for Pub. Land, 475 F. Supp. 2d 1299, 1307 (N.D. Ga. 2007) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 258 (1986)).

III. Discussion

Plaintiff alleges violation of her right to free speech as protected under the First Amendment. "Congress shall make no law . . . abridging the freedom of speech." U.S Const. amend. I. She brings suit through 42 U.S.C. § 1983, under which Congress has authorized civil actions for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C. § 1983. "To prevail on a claim under § 1983, a plaintiff must demonstrate both (1) that the defendant deprived her of a right secured under the Constitution or federal law and (2) that such a deprivation occurred under color of state law." Arrington v. Cobb County, 139 F.3d 865, 872 (11th Cir. 1998).

Plaintiff argues that Defendants, Roswell Police Department and its agents, violated her freedom of speech by terminating her from employment after she displayed a Confederate flag on a flagpole in her yard. A public employer may not terminate an employee in response to 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)). The Supreme Court has recognized that a government employee "accepts[s] certain limitations on her freedom" when entering government service, id. (internal punctuation omitted) (quoting Garcetti v. Ceballos, 547 U.S. 410, 418 (2006)), but 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).

In Pickering, the Supreme Court set out requirements for a plaintiff suing on a First Amendment claim under 42 U.S.C. § 1983, aiming to strike a balance between the employee's rights "and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

> To prevail under this analysis, an employee must show that: (1) the speech involved a matter of public concern; (2) the employee's free speech interests outweighed the employer's interest in effective and efficient fulfillment of its responsibilities; and (3) the speech played a substantial part in the adverse employment action. If an employee satisfies her burden on the first three steps, the burden then shifts to the employer to show by a preponderance of the

> evidence that it would have made the same decision even in the absence of the protected speech

Cook v. Gwinnett Cty. Sch. Dist., 414 F.3d 1313, 1318 (11th Cir. 2005) (citing Bryson, 888 F.2d at 1565).

"The first two steps are questions of law; the final two steps are 'questions of fact designed to determine whether the alleged adverse employment action was in retaliation for the protected speech.'" Cook, 414 F.3d at 1318 (quoting Anderson v. Burke County, Ga., 239 F.3d 1216, 1219-20 (11th Cir. 2001)).

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

Defendants argue that Plaintiff's display of the Confederate flag was not speech involving a matter of public concern, or even her own speech. On the other hand, Plaintiff argues the display was a matter of public concern. As to this issue, the Court agrees with Plaintiff.

The First Amendment protects government employee speech if the employee speaks "as a citizen upon matters of public concern." Connick v. Myers, 461 U.S. 138, 147 (1983). 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).

To determine if Plaintiff spoke as a citizen, 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, there is no indication that Plaintiff's speech was in any way connected to her responsibilities as a Sergeant for the Roswell Police Department. Defendant argues that Plaintiff's display of the flag cannot be her private speech because the flag was her husband's speech rather than her own. However, Plaintiff continued flying the "Bike Week" flag after her husband's death, and she granted her roommate permission to fly the second flag. Infra at 3. She flew the flag over her home, indicating that she adopted the speech as her own. Therefore, the Court finds Plaintiff spoke as a citizen when flying the Confederate flag.

To determine whether speech relates to a matter of public concern, "the Court must examine '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 v. Myers, 461 U.S. 138, 147-48 (1983)). "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.'" (quoting

Connick, 461 U.S. at 146). In City of San Diego v. Roe, 543 U.S. 77, 83-84 (2004), the Supreme Court characterized a public concern as "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."

Plaintiff states that she intended to "honor her Southern heritage" by flying the Confederate flag. While this motive may seem private on its face, the nationwide social and political context make her display of the Confederate flag a statement of public concern. The Fourth Circuit addressed the flag in its ruling in United States v. Blanding, 250 F.3d 858, 861 (2001):

> 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.

Even if Plaintiff merely meant to express more innocent views of Southern heritage rather than that interpretation, the Confederate flag is still clouded by its history. The flag represented the Confederate States of America, which seceded from the United States to fight for the States' right to continue enslavement of African-Americans. Therefore, it makes sense that for many Americans, the "flag is a symbol of racial separation and oppression." Id. at 861. Given the adoption of the flag by

modern groups avowing such messages of racial separation and oppression, the view naturally persists.

However, Plaintiff's stated message about heritage is in direct contrast to that view. While many adhere to the view expressed in Blanding, others like Plaintiff recognize the flag as simply representing the South. Those who identify the Confederate flag as representing "Southern heritage" are advocating the position that the flag does not stand for "racial separation and oppression." Thus, the contrast in the public perceptions of the Confederate Flag inserts Plaintiff's speech into the public debate about meaning and symbolism of the flag itself. Given the ongoing discussion surrounding incidents of police violence towards African-Americans and racism throughout our society, Plaintiff's display of the Confederate flag is certainly a statement of public concern.

Moreover, courts throughout the country that have addressed this issue have recognized that displaying a Confederate flag as symbol of heritage is a statement of public concern. In Duke v. Hamil, 997 F. Supp. 2d 1291 (N.D. Ga. 2014), a Deputy Chief of Police was demoted after posting an image of the Confederate flag along with the phrase, "It's time for the second revolution," on Facebook. Id. at 1293. A judge in this district held "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), another district court reached a similar result in analyzing whether a government employee's license plate displaying the Confederate flag and the phrase "HERITAGE NOT HATE" was protected speech. The court found that regardless of any debate about the meaning of the flag, "the 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 quotations and citations omitted).

In Greer v. City of Warren, No. 1:10-CV-01065, 2012 U.S. Dist. LEXIS 39735, at *20 (W.D. Ark. Mar. 23, 2012), a district court held that a police officer's display of a Confederate flag in his home and on social media constituted public speech. "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." 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.").

Regardless of whatever private statements Plaintiff might have intended to convey, courts have consistently held that display of the Confederate flag is statement of public concern. The Court finds Plaintiff's display of the Confederate flag involved a matter of public concern and thus satisfies the first prong of the Pickering analysis.

B. Employer's Interest in Effective and Efficient Fulfillment of its Responsibilities Outweighs Plaintiff's Interest

Next, Defendant argues that the city's interest in operating an effective police department outweighs Plaintiff's interest in her right to free speech. The Court agrees.

"To prevail under this analysis, an employee must show that . . . the employee's free speech interests outweighed the employer's interest in effective and efficient fulfillment of its responsibilities." Cook, 414 F.3d at 1318. When balancing the interests at stake, a court should consider factors including, "(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. Opa-Locka, 971 F.2d 708, 712 (11th Cir. 1992) (citations omitted) (quoting Bryson, 888 F.2d at 1567). Here, Defendant's strong interest in effectively fulfilling its responsibilities is most clear when considering the three factors together.

Effective operation of a police department requires maintaining positive relations with the community it serves. If the community mistrusts the police department, the department's responsibilities become more difficult and more dangerous. DeSimone Report [Doc. 69-3 at p. 4.]. This principle is reflected in Defendant's official policies. According to Roswell Police Department Policy 16.5(A), addressing an employee's conduct duties, "[o]n/[o]ff Duty an Officer must conduct themselves as to merit the confidence and respect of the public and fellow officers." Similarly, Policy 16.82 covering "Conduct Unbecoming" of an employee states: "On/Off Duty engaging in conduct which adversely affects the efficiency of the RPD and has tendency to destroy public respect for the employee or RPD or destroys confidence in the operation of the City service is conduct unbecoming and is prohibited." Infra at 4-5.

The Eleventh Circuit has also recognized this principle. In Busby v. City of Orlando, 931 F.2d 764, 775 (11th Cir. 1991) (overruled by statute on other grounds), an officer working for the Orlando Police Department police sued her employer

alleging violation of her right to free speech. While working through this second prong of the Pickering test, the Eleventh Circuit recognized "a favorable reputation with the public" as one of the police department's interests. Furthermore, "[t]he government's legitimate interest in avoiding disruption does not require actual disruption. Reasonable probability of adverse harm is all that is required." Moss v. City of Pembroke Pines, 782 F.3d 613, 622 (11th Cir. 2015).

Meanwhile, the events giving rise to Plaintiff's claim occurred in the summer of 2016. In the years preceding, police shootings of African-American men were well-publicized and hotly discussed. Michael Brown in Ferguson (August 2014), Tamir Rice in Cleveland (November 2014), Walter Scott in North Charleston (April 2015), Freddie Gray in Baltimore (April 2015), Alton Sterling in Baton Rouge (July 2016), and Philando Castile in Minnesota (July 2016) inspired intense discussion about the relationship between police departments and African-American communities. These events were discussed during meetings within the Police Department. Infra at 2. Chief Grant was concerned enough about tensions nationwide to reach out to a predominately African-American church in order open a dialogue and foster relations with the community. Infra at 3.

For the very reasons that displaying the Confederate flag is inherently a matter of public speech, Plaintiff's actions threatened to undermine the effective operation

of her employer. While the flag flew in her yard, Plaintiff's patrol car was parked in the driveway. Infra at 3. This invites an obvious association between the flag and Defendant, and in fact, at least one member of the community made that very association. Infra at 3-4. Regardless of the message Plaintiff intended to convey, courts have recognized the symbolism of racism and racial division the Confederate flag carries. See Blanding, 250 F.3d at 861; Gray v. City of Dothan, No. 1:14CV592-MHT, 2015 U.S. Dist. LEXIS 80212, at *26 (M.D. Ala. June 22, 2015) ("While Confederate memorabilia, including the flag, have historical significance, they have also been used as symbols of racial hostility towards African-Americans and other minorities.").

At a time of heightened scrutiny regarding police treatment of African-Americans, Plaintiff flew a flag widely associated with racism while her patrol car was parked nearby. This action threatened to undermine the community's confidence in its Police Department, which would impede Defendant's ability to effectively do its job. If members of the community concerned with how police treat African-Americans see a local police officer flying a flag associated with racism, it will only diminish the community's trust in the police department. Given the context and nature of Plaintiff's speech, Defendant had a strong interest in minimizing its impact.

On the other hand, Plaintiff never identified a coherent interest in her speech. She provided only vague references to "Southern heritage" and "riding motorcycles" or deflected the speech to that of her husband or roommate. Infra at 3. As a matter of law, Defendant's interest in effective fulfilment of its operations outweighs Plaintiff's free speech interests.

As Plaintiff has failed to satisfy the second prong of the Eleventh Circuit's Pickering analysis, the Court finds that Plaintiff' §1983 claim must fail.

IV. Conclusion

For the reasons stated, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment [Doc. 69] is **GRANTED** and that Plaintiff's Motion for Summary Judgement [Doc. 73] is **DENIED**. The Clerk of Court is directed to close this file.

IT IS SO ORDERED, this 3rd day of July 2019.

William R. Ray II

WILLIAM RAY, II
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF GEORGIA