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

SILVIA COTRISS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civil Action No.**
	)	**1:16-CV-04589-MHC**
CITY OF ROSWELL, the ROSWELL CHIEF OF POLICE, JAMES RUSSELL GRANT, Individually and in his Official Capacity, and the ROSWELL CITY ADMINISTRATOR, KATHERINE GAINES LOVE, Individually and in her Official Capacity,	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

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COMES NOW Plaintiff, Silvia Cotriss, and pursuant to Local Rule 7.1, files this her Memorandum in Opposition to Defendants' Motion to Dismiss Complaint. For the reasons set forth in detail below, Defendants' Motion to Dismiss with prejudice Plaintiff's Original Complaint (Doc. 1) should be denied, as Plaintiff's Original Complaint states a plausible claim for relief.

STATEMENT OF THE CASE

Cotriss does not dispute the Defendants' general descriptions of her claim under 42 U.S.C. § 1983 in their Statement of the Case, with the following exceptions or additional factual statements.

Cotriss does not assert separate claims, one under the First Amendment and one under § 1983. She asserts a single claim under § 1983 for the Defendants' violation of her First Amendment rights.

The Defendants have accurately quoted the email sent by a single concerned citizen to Chief Grant about the Confederate flag flown at Cotriss's residence. (Defs.' Ex. A.) Cotriss calls to the Court's attention that the writer of that email expressed his support for individual rights of free speech and that he only recommended sensitivity training for the police officer in question. He did not ask or suggest that

she be disciplined in any way, much less terminated from her employment with the City of Roswell.

Cotriss admits that she had a Confederate flag flying below an American flag on a flagpole in the front yard of her private residence, but the full-sized Confederate flag complained about in the citizen's email had only been there about three or four weeks. It was placed there by Cotriss's housemate. From April 2015 until June 2016, there was only a smaller version of the Confederate flag emblem, on a different flag that featured a motorcycle. On July 11, 2016, the date of the citizen's complaint, there was no RPD police vehicle at Cotriss's residence, as Corliss did not have a police vehicle at her home after May 2016, when she had returned the vehicle that she temporarily had at her home during her leave under the Family Medical Leave Act. (Doc. 1, ¶¶ 10, 11.)

As noted by the Defendants, Cotriss gave her house mate permission to raise the new Confederate flag as a way to honor Cotriss's Southern heritage and Cotriss's late husband, with whom she had purchased the motorcycle flag about a year earlier. (Doc. 1,¶ 13.)

LEGAL STANDARDS ON MOTION TO DISMISS

When considering a motion to dismiss, a court takes the complaint's factual allegations as true and construes them in the light most favorable to the plaintiffs. *Caver v. Cent. Ala. Elec. Coop*., 845 F.3d 1135, 1140 n.2 (11th Cir. 2017).

As noted by the Defendants, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. A claim has "facial plausibility" when the plaintiff pleads factual content that allows a court to draw a reasonable inference that the defendant is liable for the misconduct alleged, and plausibility is not akin to a probability requirement. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The factual allegations in the complaint need not be detailed but must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact. *Canty v. Fry's Elecs., Inc*., 736 F. Supp. 2d 1352, 1370 (N.D. Ga. 2010).

On a motion to dismiss for failure to state a claim, the question for the trial court is not whether the plaintiff will ultimately prevail but whether her complaint is sufficient to cross the federal court's threshold. *Skinner v. Switzer*, 562 U.S. 521, 529-30 (2011).

Even if it is extremely unlikely that a plaintiff will recover, a complaint may nevertheless survive a motion to dismiss for failure to state a claim, and a court reviewing such a motion should bear in mind that it is testing the sufficiency of the complaint and not the merits of the case. *Lowman v. Platinum Prop. Mgmt. Servs.*, 166 F. Supp. 3d 1356, 1360 (N.D. Ga. 2016) (motion to dismiss Fair Housing Act claim denied (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007))).

ARGUMENT AND CITATION OF AUTHORITY

I. PLAINTIFF HAS ALLEGED A FIRST AMENDMENT VIOLATION

The four-part showing required for a First Amendment retaliation claim is as described by the Defendants. *See Bryson v. City of Waycross*, 888 F.2d 1562, 1565-66 (11th Cir. 1989). Only the first two of those elements—(1) Plaintiff's speech involved a matter of public concern; and (2) her free speech interests outweighed the Government's interest in effective and efficient fulfillment of its responsibilities—are discussed by the Defendants. Contrary to the Defendants' contentions, in this case Cotriss's speech did involve a matter of public concern and her interests in such speech outweigh the asserted interests of the Government.

A. Plaintiff's Display Of The Confederate Flag Was Speech On A Matter Of Public Concern

In a public employee's First Amendment retaliation action, a court cannot determine in the procedural posture of a motion to dismiss whether the speech involved a matter of public concern, because that determination must be made after an examination of the content, form, and context of the statement, as revealed by the whole record. *Gadling-Cole v. W. Chester Univ.*, 868 F. Supp. 2d 390, 399 n.3 (E.D. Pa. 2012); *Harrison v. Coffman*, 35 F. Supp. 2d 722 (E.D. Ark. 1999) (issue of whether former state administrative law judge's ("ALJ") rulings were matters of "public concern" that were protected by the First Amendment or, instead, speech regarding "parochial concerns" of an employee could not be resolved at employer's motion to dismiss ALJ's § 1983 claim alleging that her termination violated her free speech rights).

Even if the issue were proper for consideration at this early juncture of the case, or if it is considered a question of law rather than fact, Cotriss has more than sufficiently alleged that her display of the Confederate flag at her home involved a matter of public concern.

As noted by the Defendants, speech involves a matter of public concern, as opposed to a matter of only personal interest, when it can be fairly considered as relating to any matter of political, social, or other concern to the community. *Connick v. Myers*, 461 U.S. 138, 146 (1983). Cotriss also has no quarrel with the principle stated by the Defendants, that a court should consider an employee's motive to determine whether the employee was trying to bring issues to the public's attention, subject to protection under First Amendment, or whether the employee was merely concerned with how such issues affected his or her personal interest. *Lawrenz v. James*, 852 F. Supp. 986 (M.D. Fla. 1994), *aff'd*, 46 F.3d 70 (11th Cir. 1995).

Contrary to the Defendants' contention, the reasons for Cotriss having displayed the Confederate flag on a flagpole at her home were not purely personal but, rather, sprang from a matter of public concern. As alleged in her Complaint, in addition to the personal interest of honoring her late husband, Cotriss displayed the flag to express her pride in her Southern heritage. (Doc. 1, ¶¶ 13, 21.) The Defendants' dismissal of this expression as being purely personal is unsound factually and legally. Rather, this was the conveying of a social and political message to the public, by means of flying a flag at Cotriss's home. Cotriss's expressing her stance on an issue—the meaning of the Confederate flag, the Confederacy, and what they

stand for—has captured much public attention and debate. The Defendants cannot seriously be heard to claim otherwise.

In their Memorandum, the Defendants concede that displaying the Confederate flag can sometimes entail a matter of concern, but they then engraft an additional element that may sometimes be present but which the courts have not treated as essential to a finding of "public concern." That supposed requirement, in the Defendants' words, is that the flag be accompanied by "some other compelling public statement that situated the flag within a specific public debate." This is a requirement of the Defendants' own making. It is not found in the controlling case law and is, in fact, antithetical to Supreme Court precedents. In short, the prominent display of the Confederate flag, especially when accompanied by the property owner's explanation that the motive for such expressive conduct is to honor Southern heritage, is sufficient to make the expression a matter of public concern.

Lest there be any doubt, consider the Supreme Court's statements about the meaning of flags when it overturned a criminal conviction for burning an American flag:

> Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, *Spence, supra*, at 409-410, 94 S.Ct., at 2729-30;

> refusing to salute the flag, *Barnette*, 319 U.S., at 632, 63 S.Ct., at 1182; and displaying a red flag, *Stromberg v. California*, 283 U.S. 359, 368-369, 51 S.Ct. 532, 535-36, 75 L.Ed. 1117 (1931), we have held, all may find shelter under the First Amendment. *See also Smith v. Goguen*, 415 U.S. 566, 588, 94 S.Ct. 1242, 1254, 39 L.Ed.2d 605 (1974) (WHITE, J., concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." *Id.*, at 603, 94 S.Ct., at 1262 (REHNQUIST, J., dissenting). Thus, we have observed:
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> > "[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." *Barnette, supra*, at 632, 63 S.Ct., at 1182.
>
> Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."

Texas v. Johnson, 491 U.S. 397, 404-05 (1989). The Court in *Johnson* also recognized the "bedrock" principle underlying the First Amendment, that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. *Id.* at 414.

Thus, when Cotriss displayed the Confederate flag, that act, with nothing more being necessary, was speech on a matter of public concern. But if any doubt remained on that issue, it was removed when she stated to the Defendants that her purpose in flying the flag was to honor her Southern heritage. (Doc. 1, ¶¶ 13, 21.)

In *Duke v. Hamil*, 997 F. Supp. 2d 1291 (N.D. Ga. 2014), relied upon by the Defendants, a deputy chief of police for a state university police department spoke as a citizen on a matter of public concern in posting an image of a Confederate flag on his personal social networking page with the statement, "It's time for the second revolution," after recent elections. *Id.* at 1300. Therefore, his speech was protected by the First Amendment for purposes of his § 1983 action against the chief, alleging retaliation in violation of the First Amendment.

On the question of there being an issue of public concern, as distinguished from a personal concern, *Duke* and the instant case are very similar. As in *Duke*, Cotriss expressed herself by personal means, which did not identify her employment with the Defendant City, and she did not refer to any of the Defendants' policies, practices, or employees. There is no indication that Cotriss spoke pursuant to or about her official duties in any way. She spoke as a citizen, not as an employee of the Defendants. Moreover, Cotriss's display of the flag was motivated by an additional

personal viewpoint that certainly is on a matter of public concern and debate, that is, pride in her Southern heritage, as symbolized by the Confederate flag. This message, even if it is seen as controversial, was, in fact, relatively innocuous compared to the menacing and even threatening call for a "revolution" by the police officer in *Duke*. Expression of pride in one's heritage cannot be compared to a supervisory police officer's call for insurrection.

The Defendants' attempt to distinguish *Erickson v. City of Topeka*, 209 F. Supp. 2d 1131 (D. Kan. 2002), from the instant case is not convincing. There, the court ruled that for purposes of determining the constitutionality of a city policy as applied to prohibit an employee from displaying a Confederate battle flag vanity plate on his truck in an employee parking lot, the employee's display of a "flag tag," which included the words "HERITAGE NOT HATE," involved speech, not merely symbolic speech mixing elements of speech and conduct or falling only within the outer ambit of free speech protection. Such speech involved a "matter of public concern," even if the tag or words expressed on it were not the subject of a "raging debate" in the locale. The City in Erickson admitted its awareness of the public debate about the meaning of the Confederate battle flag, but even had it not done so, the court would find that plaintiff's speech was on a matter of public concern. *Id.* at 1140. On this

issue, *Erickson* is in all relevant respects like the instant case, where there is the same combination of a display of the Confederate flag, coupled with an intent to honor or express pride in Southern heritage.

Tellingly, the court in *Erickson*, citing *Johnson*, also said this:

> Flags and other symbols are entitled to First Amendment protection as variants of speech. . . . Thus even if plaintiff's flag tag were nothing other than a symbol of the confederate flag, it would be entitled to protection.

Id. at 1138; *see also Webber v. First Student, Inc.*, 928 F. Supp. 2d 1244, 1263-64 (D. Or. 2013) ("[T]he court finds that a genuine question of material fact exists as to whether Webber intended his [Confederate] flag to convey a message of history and heritage which is entitled to First Amendment protection. The question of whether Webber's flag touches on a matter of public concern is therefore not appropriate for determination on summary judgment, and is properly resolved at trial."); *Hartwell v. City of Montgomery*, 487 F. Supp. 2d 1313 (M.D. Ala. 2007) (question of whether public employee should be permitted to display body tattoo depicting Confederate flag while rendering public service and interacting with members of the community at large was public question, and content of African-American firefighter's speech

complaining about such a tattoo on coworker touched on a "matter of public concern," for purposes of his First Amendment retaliation claim).

The Defendants cannot ignore the fact that there is a long-running, vigorous, public debate about the significance and meaning of the Confederate flag. This debate distinguishes this case from *Lawrenz*, cited by the Defendants. In *Lawrenz*, a correctional officer's wearing of a "White Power" t-shirt with a swastika, and discussing with his peers his perception of racial discrimination at a correctional facility, were not matters of public concern, entitled to First Amendment protection. His beliefs relating to the swastika and the strength of white people were purely matters of personal interest, and his speech was never publicly aired. By contrast, by displaying the Confederate flag at her home, Cotriss was not commenting on anything pertaining to her workplace, and her speech was "publicly aired" in the form of a flag openly flying at her home.

B. The Police Department's Interest In Providing Efficient And Effective Law Enforcement Does Not Outweigh Plaintiff's Interest In Her Protected Speech

The factually sensitive balancing of the speaker's interest in commenting on matters of public concern against the defendant's interest is promoting efficiency

implicates only the summary judgment analysis, and, thus, such a balancing inquiry is not even warranted or appropriate at the motion to dismiss stage of the proceedings. *Hays v. LaForge*, 113 F. Supp. 3d 883, 895 n.4 (N.D. Miss. 2015). Assuming only for the sake of argument that this issue may be raised in support of a motion to dismiss as an issue of law, the Complaint still should not be dismissed on this basis. The Defendants' interest in providing efficient and effective law enforcement does not outweigh Cotriss's interest in her protected speech.

In *Duke*, the interests of a state university police department outweighed a deputy chief's interest in speaking, and therefore, the deputy chief's demotion after posting an image of a Confederate flag to his personal social networking page, with the statement, "It's time for the second revolution," did not violate his First Amendment speech rights. 997 F. Supp. 2d at 1302. It was significant in that case that the deputy chief was second in command. Given the plaintiff's supervisory responsibilities, such speech could undermine loyalty, discipline, and good working relationships among the department's employees if left unaddressed. *Id*. The court's language indicates how easily distinguishable *Duke* is from the instant case, where Cotriss was only a sergeant in the Uniform Patrol Division and where there was

nothing remotely like a call for "revolution" in her chosen form of expression. (Doc. 1, ¶ 8.)

> *Because Plaintiff was the Deputy Chief of Police*, his conduct reflected on the Department's reputation more significantly than the conduct of other officers. It is also plain that many in the community would take offense to his chosen form of speech, not just because they disapprove of it, but because it raises concerns of Plaintiff's prejudice—and the Department's. *Appearing to advocate revolution*, coming from a police officer charged with upholding law and order, could also undermine confidence in the Department. In sum, the speech at issue was capable of impeding the government's ability to perform its duties efficiently.

997 F. Supp. 2d at 1302 (emphasis added).

The court in *Duke* also took into account that the Confederate flag and the "call for revolution" eventually was disseminated widely throughout the community on Facebook. Cotriss's flag (without any additional incendiary commentary) was visible only to whomever happened to drive by it. Dissemination of expression by flying a flag is clearly more limited in scope than dissemination by means of a Facebook page.

In addition, the Defendants have made the bald, unsupported assertion that flying the Confederate flag near a police vehicle risked impeding the RPD's ability to perform its job. First, there was never a police vehicle present when the larger flag was flown for only several weeks. (Doc. 1, ¶ 10.) Second, the only reaction to the expression by Cotriss was the single email by one concerned citizen, and even he

acknowledged the right to free speech and asked only that the police officer in question have cultural sensitivity training. (Defs.' Ex. A.) The Defendants have stretched this one meager fact beyond the breaking point in their contention that this solitary email is proof that the flag in the Cotriss yard had already tarnished the RPD's reputation and eroded the public trust in the RPD.

Lawrenz, cited by the Defendants, is readily distinguishable from this case. Flying the Confederate flag at one's home does not carry the same risks of violence and disruption of the environment at governmental workplaces that were raised by the swastika and "White Power" expressions by the correctional officer in *Lawrenz*. 852 F. Supp. at 991. The court in *Lawrenz* was especially concerned about the risk of correctional officers sustaining injuries from hostile, violent inmates as a result of such statements having been made. The same cannot be said of the flag flown by Cotriss, meant only to honor her heritage and her deceased husband. There was no incitement to violence in anything Cotriss did or said, nor any reasonable fear that such violence would result.

The fact that South Carolina permanently removed the Confederate flag from its state capitol, about a year before the citizen email was sent concerning the flag flown by Cotriss, because of negative reactions to the flag by many parts of the

community only confirms that this is an issue of public concern; it does not show or even suggest that the Cotriss's flag had interfered with the efficiency or effectiveness of the RPD. The Defendants ask this Court to take judicial notice of the controversies surrounding the Confederate flag, perhaps because evidence of disruption in the City of Roswell is so lacking. But judicial notice of the controversies would amount only to judicial notice of the presence of a matter of public concern—the meaning of symbols of the Confederacy—about which Cotriss expressed her view in a reasonable manner, on her property rather than at her workplace. The Defendants cannot be heard to argue that the meaning and significance of the Confederate flag is not a matter of public concern while at the same time arguing that it is so controversial among the public that expression on the subject by governmental employees should be punished with termination.

The Defendants' reliance on cases concerning employees involved with, or making statements sympathetic toward, the Ku Klux Klan, or employees who donned "black face," is misplaced. Such cases, including *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985), are easily distinguished from the instant case. The flying of the Confederate flag by Cotriss, as a statement of pride in Southern heritage, does not carry the potential for, or the reality of, disruption of the RPD that can be expected

to accompany support for an organization such as the Ku Klux Klan, which is especially known for its violence toward minorities and persecution of people based on their race or other characteristics. However controversial the Confederate flag and the Confederacy itself may be, Cotriss did not exhibit any such bigotry, nor did she give her support to violent persecution of anyone, when she merely displayed the Confederate flag. She also made no statements expressing racial bigotry or intolerance. Cotriss strenuously disagrees with the Defendants' argument that such KKK cases and her case involve "the very same concerns."

As for a case favorable to Cotriss that the Defendants relegate to a footnote and attempt to distinguish, to the contrary it weighs heavily in favor of Cotriss. Strictly speaking, *Greer v. City of Warren*, No. 1:10-CV-01065, 2012 WL 1014658 (W.D. Ark. Mar. 23, 2012), is not binding on this Court, but it is no less persuasive for that. It is not based upon any standard not applicable in the Eleventh Circuit but, rather, is grounded in the universally applicable and binding principles from *Connick*, 461 U.S. 138.

In *Greer*, a police officer faced termination, in part because he displayed the Confederate flag at his residence, as did Cotriss. Because the court in *Greer* cited other cases involving display of the Confederate flag by public employees to support

its conclusions that there was an expression on a matter of public concern, and that the interests of the City did not outweigh the right to free speech, the opinion is quoted here at some length:

> As an initial matter, based upon this Court's review of the federal cases addressing this issue, it appears only a few other federal courts have addressed the issue of whether the display of a Confederate Flag is protected speech. Notably, in *Carpenter v. City of Tampa*, No. 8:03-cv-451, 2005 WL 1463206, at *3 (M.D. Fla. June 21, 2005), the Middle District of Florida held the display of a Confederate Flag "constituted a matter of public concern and was clearly protected by the First Amendment."
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> Such a holding is consistent with the Fourth Circuit's holding in *Dixon v. Coburg Dairy, Inc.*, 330 F.3d 250 (4th Cir.2003), *vacated on other grounds by Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811 (4th Cir.2005) (en banc). In *Dixon*, the Fourth Circuit held that "[t]he act of displaying a Confederate flag is plainly within the purview of the First Amendment." *Id.* at 262. Further, the *Dixon* holding is entirely consistent with holdings from the Supreme Court addressing flags and protected speech. In *Texas v. Johnson*, the Supreme Court held that even the act of burning of an American flag was protected speech under the First Amendment. 491 U.S. 397, 406 (1989). In *Texas*, the Supreme Court recognized "the communicative nature of conduct relating to flags." *Id.* at 404. In this case, Plaintiff stated his display of the Confederate Flag was related to his interest in history and heritage. ECF No. 30 ¶ 24; ECF No. 37-5 at 25:4-12. 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.
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> Under *Connick*, the interests of Defendant City must also be balanced. *Connick*, 461 U.S. at 159. Defendant City claims Plaintiff's

> display of a Confederate Flag was unnecessarily disruptive to the functioning of the police department. ECF No. 29 at 9-10. In support of its claim that Plaintiff's actions were disruptive, Defendant City relies upon the testimony of Defendant Peek. ECF No. 29 at 10. Defendant Peek testified that "at least two African-American members of the Department were concerned that Plaintiff might be a racist based on the flags and expressed that they would prefer not to serve with him." *Id.* In contrast, Defendant Martin testified he was not aware of a disruption in the police department because of the Confederate Flag being displayed. ECF No. 37-4 at 26:24-25 to 27:1-3.
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> Even assuming two African-American members of the City of Warren Police Department expressed concern on this issue, Plaintiff displayed the Confederate Flag at his private residence and on a private MySpace account. There is no indication Plaintiff displayed this Confederate Flag at the workplace where other employees of the police department would be exposed to it while in the workplace. Accordingly, this Court finds the potential disruption to the City of Warren Police Department did not outweigh Plaintiff's protected right to display this Confederate Flag.

Id. at *6-7; *see also Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246, 1248-49 (11th Cir. 2003) (the Confederate flag can be a political symbol for state's rights and a decentralized form of government).

Thus, contrary to assertions by the Defendants, the court in *Greer* did not simply "brush aside" the fact that two African-American officers complained about display of the flag but, rather, concluded that such evidence was insufficient to show the potential disruption needed to outweigh the right of free speech. The same can

be said of the isolated complaint by one citizen in the instant case. If anything, complaints by two officers within the police department, as in *Greer*, would appear to be better evidence of departmental disruption than a complaint from one citizen. If the court in *Greer* did not discuss the potential impact of the flag on the police department's image and reputation in the community, it was likely due to the absence of any evidence showing the same. That is true in this case as well. Finally, the Defendants contend that *Greer*, decided in 2012, should be discounted because it predates some of the more recent national controversies concerning race relations generally and, presumably, the Confederate flag in particular. It cannot seriously be maintained that these issues, which have been prominent at least since the Civil War, only came to the fore since 2012, so that the court in *Greer* could not have been aware of them.

II. DEFENDANTS GRANT AND LOVE ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEIR ACTIONS VIOLATED A CLEARLY ESTABLISHED RIGHT

Cotriss does not dispute the Defendants' description of the principles governing the defense of qualified immunity, including the requirement that for liability, the

Defendants must have violated clearly established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

However, contrary to the Defendants' argument, the First Amendment right at issue here, not merely generally or in an abstract sense, but as it concerns display of the Confederate flag, in particular, is clearly established. A reasonable official in the positions held by Defendants Grant and Love could not have believed objectively that the termination of Cotriss for displaying the Confederate flag at her residence did not violate her constitutional right to free speech. It is settled law that so long as public employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

The clearly established law in this instance consists in part of the authorities discussed in the preceding parts of this Memorandum. Such authorities include cases from within the Eleventh Circuit, whether they be cases with adverse outcomes for public employees but which are obviously distinguishable from the instant case or cases decided in favor of such employees. Moreover, no police chief or city administrator could objectively and reasonably believe that termination of Cotriss was proper and lawful in light of the relevant Supreme Court precedents concerning

the free speech rights of public employees, discussed above. Most notable among these controlling precedents are *Garcetti, Connick*, and especially *Johnson*, the latter of which, on the expressive quality of flags, figures prominently and decisively in many of the cases involving display of the Confederate flag by public employees.

In addition, the Eleventh Circuit has long held that government officials may not retaliate against private citizens because of the exercise of their First Amendment rights. *See, e.g.*, *Cate v. Oldham*, 707 F.2d 1176, 1186 (11th Cir. 1983) (punishment for exercise of First Amendment rights violates First Amendment); *Ga. Ass'n of Educators v. Gwinnett County Sch. Dist*., 856 F.2d 142, 145 (11th Cir. 1988) (the Government may not retaliate against individuals or associations for their exercise of First Amendment rights by imposing sanctions for the expression of particular views it opposes).

The Defendants quote *Busby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991), for the proposition that a public employer has immunity from suit unless the *Pickering* balance would lead to the inevitable conclusion that the discharge of the employee was unlawful. *Id.* at 774. Cotriss submits that in light of the controlling case law on this issue, as applied to the facts of her situation, hers is such a case in which the conclusion should have been inevitable that her termination was unlawful

and unconstitutional. Accordingly, the defense of qualified immunity is not available to the individual Defendants.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied in its entirety.

This 17th day of March 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT has been prepared in compliance with Local Rule 5.1(B) in 14-point, Times New Roman type face.

s/ David Ates
David Ates, Esquire
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March 2017, I electronically filed the foregoing PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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