Davis appealed, arguing that the court erred in relying solely on the job description, and that, in practice, the SHO did not exercise sufficient discretionary authority to be considered a "policymaker."

City officials conceded that Davis was terminated for political reasons, and the only issue on appeal was whether the SHO was a position subject to political termination. The U.S. Court of Appeals for the Seventh Circuit, using the test of whether "the position authorize[d], either directly or indirectly, meaningful input into government decisionmaking on issues where there [was] room for principled disagreement on goals or their implementation," held that the starting point of the inquiry should be the ordinances establishing the SHO position, and not the job description, because, unlike job descriptions, which could have little resemblance to a position's actual duties, an ordinance's terms were not open to contest. "The ordinances give the SHO substantial discretion to flesh out policy by promulgating regulations. While Davis argues that the discretion exercised by the SHO is professional rather than political, this contention is belied by the fact that Davis was a political hire with no technical expertise at the time of his appointment." Here, the City ordinances conferred "sufficient policymaking responsibilities to the SHO such that political loyalty was a valid qualification." The district court's decision was affirmed. *Davis v. Ockomon*, No. 10-2589, 2012 U.S. App. LEXIS 2088 (7th Cir. Feb. 03, 2012).

Practice and Procedure

Access to Litigant's Facebook Account

Lela Tompkins, the plaintiff, claimed she incurred back and other injuries as a result of a slip and fall accident at Detroit Metropolitan Airport. She claimed to be impaired in her ability to work and to enjoy life as a result of these injuries. The defendants included the Airport Authority and Northwest Airlines. Northwest sought to have Tompkins sign authorizations for her medical records and for the release of records from her Facebook account. It alleged that the plaintiff's public postings, as well as some surveillance photographs, showed the relevance of the private postings (the public postings, attached as an exhibit, were photographs showing Tompkins holding a very small dog and smiling, and standing with two other people at a birthday party; the surveillance photos showed her pushing a grocery cart). The plaintiff, however, maintained her objection to the production of her entire Facebook account, including those sections she had designated as private and which she claimed were not available for viewing by the general public.

The request to have the plaintiff sign authorizations to access her Facebook account was denied. Other courts had come to varying conclusions as to the discovery of information posted on social networking sites such as Facebook. Here, the court held that material posted on a 'private' Facebook page, accessible to a selected group of recipients but not available for viewing by the general public, was generally not privileged, nor was it protected by common law or civil law notions of privacy. Nevertheless, the defendant did not have "a generalized right to rummage at will through information that Plaintiff has limited from public view." Rather, consistent with Rule 26(b) and with the caselaw, "there must be a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence. Otherwise, the Defendant would be allowed to engage in the proverbial fishing expedition, in the hope that there might be something of relevance in Plaintiff's Facebook account."

In this case, the pictures and surveillance relied on were not inconsistent with the plaintiff's claim of injury or with the medical information she provided. She did not claim that she was bed-ridden, or incapable of leaving her house or participating in modest social activities. "If the Plaintiff's public Facebook page contained pictures of her playing golf or riding horseback, Defendant might have a stronger argument for delving into the non-public section of her account. But based on what has been provided to this Court, Defendant has not made a sufficient predicate showing that the material it seeks is reasonably calculated to lead to the discovery of admissible evidence." *Tompkins v. Detroit Metro. Airport*, No. 10-10413, 2012 U.S. Dist. LEXIS 5749 (E.D. Mich. Jan. 18, 2012).

Search and Seizure

Allegedly Defective Warrant

The Santa Maria Police Department (SMPD) was investigating a drive-by shooting in which a young boy was injured. Witnesses recognized the car and the man's voice calling out from the car, and gave investigators a list of gang members believed to be associated with the shooters. The list included Javier Bravo, Jr. Based on this and other information, the officers obtained a warrant that authorized the search of seven individuals suspected of harboring weapons and evidence relating to the drive-by shooting, as well as a search of those persons' residences and vehicles, and a search of any persons or vehicles present at the time of the warrant's execution. Officer Tanore's affidavit listed Javier Jr.'s address as his parents' residence and contained a brief summary of his criminal history, but failed to mention that Javier Jr. had been sentenced, and was over six months into serving, a two-year sentence in state prison for his crimes. (A detective said he *had* checked but was told by the sheriff's office that Javier Jr. was not in custody, but no check of state prison custody had been done).

The Santa Barbara Police Department (SBPD) SWAT team served the warrant on the Bravo residence at 5:30 am by shooting off the front door locks and deploying two "flashbang" grenades outside the back door. Inside were Mr. and Mrs. Bravo and their eight-year-old granddaughter. Mrs. Bravo told officers her son was in jail and that they would find a recent letter from him on the dining room table. The Bravos remained detained in their living room, but at no

point did the officers handcuff, strike, or touch the Bravos.

The Bravos sued the City of Santa Maria, Santa Barbara County, the City of Santa Barbara, and individual officers, alleging their Fourth Amendment rights were violated by the issuance and execution of a search warrant whose application failed to disclose that their son was (and had been) incarcerated in prison and, therefore, not only was not present in the home, but could not have been involved in the drive-by shooting or the storage of weapons used in it. They claimed the search warrant was invalid because it was obtained through the intentional or reckless omission of facts "required to prevent technically true statements in the affidavit from being misleading."

The district court concluded that the omission of Javier Jr.'s custody status was not material to a finding of probable cause and that, in any event, the Bravos presented no evidence to support an inference of intentional or reckless conduct on Officer Tanore's part.

The U.S. Court of Appeals for the Ninth Circuit, on appeal, disagreed on both counts. To determine the materiality of omitted facts, the court considered whether the affidavit, once corrected and supplemented, established probable cause. If probable cause remained after this amendment, then no constitutional error had occurred. Here, once the affidavit was supplemented with the challenged omission (Javier Jr.'s sentence imposed over six months prior to the incident occasioning the warrant, and his consequent incarceration in prison at the time of the shooting and the warrant's execution), it could not establish probable cause for the search and "especially [did] not meet the heightened standard of justification required for nighttime SWAT service."

On whether the Bravos made a substantial showing that Tanore deliberately or recklessly omitted Javier Jr.'s custody status, the court, viewing the evidence and drawing all inferences in the light most favorable to the Bravos, concluded that the district court erred in finding Tanore "negligent at most." The Bravos made the required substantial showing that Tanore may have intentionally or recklessly omitted Javier Jr.'s two-year sentence from his affidavit (Tanore testfied that he reviewed Javier Jr.'s rap sheet in preparing the affidavit, and, though he could not recall with certainty whether he had observed the two-year sentence, acknowledged that he may have. The two-year sentence appeared on the rap sheet "a mere two lines below the 'convicted' disposition"). Because a reasonable jury could conclude that Tanore's failure to mention the jail sentence or to follow up and inquire about Javier Jr.'s custody status amounted to at least reckless disregard for the truth, summary judgment was improperly granted. *Bravo v. City of Santa Maria*, No. 09-55898, 2011 U.S. App. LEXIS 24383 (9th Cir. Dec. 09, 2011).

Use of Deadly Force

Scott Rockwell, 27, lived with his parents in Garland, Texas. Scott suffered from bipolar disorder and schizophrenia, had been diagnosed as suicidal, and had attempted suicide more than once. He had stopped taking his prescribed medication and refused to see a doctor. He was hearing voices and was behaving unpredictably, and his parent believed he was using illegal drugs. One evening, he was in his bedroom, hitting the walls and cursing. He came out and raised his fist as if to strike his mother, and his parents called 911. The dispatcher advised responding officers that Scott, a "potentially dangerous subject" was bipolar, schizophrenic, off his medication, and was pounding the walls of his room. The three officers who responded tried to talk with Scott through his bedroom door, as he had barricaded himself in the room. Another unit was called as Scott continued to hit the walls and threaten the officers. The officers decided to arrest Scott (based on a concern that he would harm his parents or himself) rather than wait to get a mental-health warrant. They decided to break down the door.

Once the door was breached, Scott, holding two eight-inch serrated knives, rushed towards an officer and attacked him with the knives, who responded by firing at Scott with a pepperball gun. Another officer saw the knives and yelled "knives" to warn his fellow officers. Scott turned and ran at another officer, injuring him with the knives. The officers responded with live rounds, and Scott died at the scene of multiple gunshot wounds.

The Rockwells, individually and on behalf of their son's estate, sued the officers for unlawful entry, excessive force, and assault and battery. The court below granted the defendants' motion for summary judgment on all claims (and on the excessive-force claims on the basis of qualified immunity), and the Rockwells appealed.

The U.S. Court of Appeals for the Fifth Circuit affirmed. To prove that the officers violated Scott's Fourth Amendment right to be free from the use of excessive force, the Rockwells had to show (1) an injury, (2) which resulted from the use of force that was clearly excessive to the need, and (3) the excessiveness of which was objectively unreasonable. The reasonableness inquiry was objective, and an officer's use of deadly force was not excessive when the officer, at the moment of the threat that resulted in the use of deadly force, reasonably believed that the suspect posed a threat of serious harm to the officer or to others. Here, Scott, a "relatively large man" known to be unpredictable and potentially violent, charged at the officers holding an eight-inch knife in each hand. The evidence indicated all of the shots were fired after Scott exited his room, when he was engaged in an armed struggle with the officers. "Under the totality of the circumstances, then, it was reasonable for the officers to believe that Scott posed a significant and imminent threat of serious physical harm to one or more of the officers." Further, the officers were entitled to qualified immunity on all of the Rockwells' unlawful-entry claims and the claim for warrantless arrest because the law at the time of the incident was unsettled.

Rockwell v. Brown, No. 10-11053, 2011 U.S. App. LEXIS 24980 (5th Cir. Dec. 15, 2011). ML