IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-01052-RM-NRN

RAVERRO STINNETT.

Plaintiff.

v.

REGIONAL TRANSPORTATION DISTRICT, a political subdivision of the State of Colorado;
UNIVERSAL PROTECTION SERVICE, LP, d/b/a ALLIED UNIVERSAL SECURITY SERVICES, a California corporation;
SERGEANT TAYLOR TAGGART, in his official capacity;
OFFICER JAMES HUNTER, in his official capacity;
OFFICER VICTOR DIAZ, in his official capacity; and
OFFICER AARON FOUGERE, in his official capacity.

Defendants.

DEFENDANT REGIONAL TRANSPORTATION DISTRICT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND JURY DEMAND (ECF 1)

Defendant Regional Transportation District ("RTD"), through undersigned counsel, hereby submits Defendant Regional Transportation District's Motion to Dismiss Plaintiff's Complaint and Jury Demand (ECF 1) Pursuant to Fed. R. Civ. P. 12(b)(6) ("Complaint" or "Compl."), as follows:

COMPLIANCE WITH JUDGE RAYMOND P. MOORE'S PRACTICE STANDARDS (SECTION IV.N.2.(a)-(d))

On May 13, 2020, undersigned counsel for RTD sent a conferral letter to Plaintiff's counsel outlining deficiencies in Plaintiff's Complaint, with supporting legal authority. Plaintiff's counsel responded by indicating that Plaintiff would not agree to amend the Complaint.

INTRODUCTION

Plaintiff Raverro Stinnett's ("Plaintiff") Complaint attempts to impose *Monell*[1] liability on RTD based upon an atrocious, isolated incident of illegal conduct of Transit Security Officers ("TSO" or "TSOs") employed by Defendant Universal Protection Service, LP, d/b/a Allied Universal Security Services ("Allied"). During this incident, the TSOs abandoned their duties, employment and training and committed a criminal act that was an aberration and not the result of any RTD policy or custom.

RTD is dedicated to serving the public by providing safe, clean, reliable, courteous, accessible, and cost-effective transit service. **The criminal and reprehensible acts of the TSOs were contrary to RTD's mission and policies. RTD condemns any violence perpetrated against its riders, customers, or those who use its facilities and does not tolerate racial discrimination in any form.**

Although writhe with conclusory allegations, legal conclusions, redundant, immaterial and impertinent facts, the Complaint[2] fails to sufficiently allege that 1) cognizable constitutional violations were committed; 2) RTD's policies or customs were the direct causal link to the alleged constitutional violations; and 3) the TSOs' abhorrent conduct was within the scope of their employment and under color of law. Accordingly, pursuant to Fed. R. Civ. P. 12(b)(6), all claims against RTD should be dismissed with prejudice.[3]

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[1] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

[2] The Complaint does not comply with Fed. R. Civ. P. 8, because it is not concise, it contains a separate unnumbered introduction, 456 paragraphs and 73 pages. It also violates Fed. R. Civ. P. 12(f) because it includes numerous photographs, instances of repeated allegations, legal conclusions, redundant, immaterial and impertinent facts.

[3] While Complaint asserts claims against the TSOs only in their official capacities (Compl. ¶¶10-13, 333, 383, 394), there is no vicarious liability under Section 1983. *Estate of Olivas by & Through Miranda v. City & Cty. of Denver*, 929 F. Supp. 1329, 1337 (D. Colo. 1996). Without vicarious liability, liability cannot be imposed on RTD based solely on the conduct of the TSOs.

STANDARD OF REVIEW

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (internal quotation marks and alteration marks omitted).

A claim must be dismissed if the complaint does not contain enough facts to make the claim "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A court is not required to accept as true legal conclusions and mere conclusory statements. *See id.* at 555 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *see also Moya v. Schollenbarger*, 465 F.3d 444, 455-57 (10th Cir. 2006) (when considering a Rule 12(b)(6) motion, a court may consider only facts actually alleged and should disregard all conclusory allegations made without supporting factual averments).

"[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citation omitted), *see also Bueno v. Chekush*, 355 F. Supp. 3d 987 (D. Colo. 2018) (dismissing official capacity claims as barred pursuant to the Eleventh Amendment). In the District of Colorado, individual defendants named in their official capacity have been dismissed from the case because the individuals had no decision-making authority. *See Saleh v. Fed. Bureau of Prisons*, 2008 U.S. Dist. LEXIS 110087 (D. Colo. July 29, 2008). "Particularly where the individual defendants have not also been sued in their individual capacities, courts have found that the prudent and preferable course is for plaintiffs to sue the entity itself." *Id.* at 16-17 (citations omitted); *see e.g. Davoll v. Webb*, 943 F. Supp. 1289, 1295 (D. Colo. 1996). Naming both is redundant and leads to confusion. Thus, the claims against the TSOs in their official capacities should be dismissed and their names removed from the pleading caption.

I. THE COMPLAINT FAILS TO ALLEGE COGNIZABLE CONSTITUTIONAL VIOLATIONS UNDER §1983.

"[N]ot every condemnable act by a public official represents a constitutional violation." *Williams v. Berney*, 519 F.3d 1216, 1225 (10th Cir. 2008). Under *Monell*, the Complaint must demonstrate a cognizable constitutional violation. 436 U.S. at 694. It fails to do so.

A. The Complaint Fails to State a Claim for Excessive Force Under the Fourth Amendment.

The Complaint fails to allege *Monell* liability upon RTD pursuant to the excessive force allegation against Hunter, Compl., ¶334, because it does not allege that Plaintiff ever seized, arrested, handcuffed, restrained or detained under the Fourth Amendment.

A Fourth Amendment excessive force claim is governed by a purely objective standard: "A police officer violates an arrestee's . . . Fourth Amendment right to be free from excessive force during an arrest if the officer's actions were not 'objectively reasonable' in light of the facts and circumstances confronting him." *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1213 (10th Cir. 2019) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989) (further quotation omitted)). The Complaint fails to allege that a violation occurred while Plaintiff was arrested or seized.

Pursuant to *California v. Hodari D.*, 499 U.S. 621, 624 (1991), the word "seizure" means bringing something within physical control by application of physical force. "A person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Id*. at 554 (defendant not seized within the meaning of the Fourth Amendment when federal agents asked to

see defendant's identification because the totality of the circumstances supported the finding that defendant voluntarily consented to accompany the officers).

The Complaint does not plead that Plaintiff was not free to leave after his conversation with the TSOs, therefore, the assault perpetrated on Plaintiff did not occur during a seizure, arrest, detention, stop or any other authorized security activity. Although it is undisputed that pursuant to a suggestion from Hunter, Plaintiff went into the bathroom where he was assaulted, Compl., ¶72, Plaintiff was never seized, arrested, handcuffed, restrained or detained. Rather, the Complaint alleges that Plaintiff voluntarily went to the bathroom believing that he could wait for his train there. Compl., ¶73. Thus, the Complaint fails to allege a Fourth Amendment violation.

B. The Complaint Fails to State a Claim for Violation of Substantive Due Process.

The Complaint similarly fails to allege *Monell* liability on RTD pursuant to the Fourteenth Amendment as a fundamental right to bodily integrity, Compl., ¶¶385-387, because a claim for assault which occurred outside the assailant's scope of employment cannot serve as a basis for a substantive due process violation.

To state a claim for substantive due process under the Fourteenth Amendment, a plaintiff must show that government action either (1) infringed upon his fundamental right; or (2) was shocking to the conscience. *See Seegmiller v. Laverkin City*, 528 F.3d 762, 767 (10th Cir. 2008). Claims under the right to bodily integrity are only available in very narrow circumstances, such as abortions, end-of-life decisions, birth control decisions and instances where individuals were subjected to dangerous and invasive procedures with personal liberty restrained. *See Moore v. Guthrie*, 438 F.3d 1036, 1039-40 (10th Cir. 2006). "An assault—standing alone—does not suffice to make out a constitutional substantive due process claim." *Williams*, 519 F.3d. at 1223 (finding

no substantive due process violation for criminal act of physical assault where defendant was not authorized to use force in performing his daily job and did not rely on the authority of his official position during the commission of the assault). "[W]hat differentiates a constitutional transgression from an ordinary common law tort is a 'level of executive abuse of power . . . that . . . shocks the conscience.'" *Id*. at 1220 (citing *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). Because governmental actors operating in their official capacities are ordinarily afforded latitude, the court recognizes constitutional torts only "in the narrowest of circumstances." *Becker v. Kroll*, 494 F.3d 904, 922 (10th Cir. 2007). "The tortious conduct alleged 'must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing *government* power. . . . [It] must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.'" *Williams*, 519 F.3d at 1221 (citing *Livsey v. Salt Lake County*, 275 F.3d 952, 957-58 (10th Cir. 2001) (emphasis added) (quotation omitted)).

As discussed above, Plaintiff was never in the TSOs' custody and the injury he sustained occurred pursuant to criminal and unsanctioned conduct by Hunter. Hunter committed a crime when he assaulted Plaintiff, and such acts are not government action and, therefore, are outside the narrow scope of the Fourteenth Amendment.

II. THE COMPLAINT FAILS TO ALLEGE RACE DISCRIMINATION IN VIOLATION OF §1981.

The Complaint's broad and unsupported allegation that Plaintiff was singled out based on his race is insufficient, without any specific facts, to plead a constitutional violation. Compl., ¶399. Under *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091, 1101-02 (10th Cir. 2001), in order for a plaintiff "to establish a prima facie case of race discrimination under § 1981," he must show

"1) that the plaintiff is a member of the protected class; 2) that the defendant had the intent to discriminate on the basis of race; and 3) that the discrimination interfered with a protected activity as defined in §1981." A plaintiff who sues under 42 U.S.C. §1981 must plead and prove race was a but-for cause of plaintiff's injury. *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020).

The Complaint does not satisfy the second and third elements of *Hampton*. Because the Complaint fails to allege any prior specific incidents of targeting African Americans by involved TSOs, it fails to support an allegation that the TSOs or RTD had an intent to discriminate. The Complaint does not allege that the TSOs were previously involved in similar incidents where their conduct was motivated by Plaintiff's race. Given the need to prove intent by circumstantial evidence, courts have found that the probative value of prior acts evidence is especially great. *Burke v. City of Santa Monica*, 2011 U.S. Dist. LEXIS 165475, at *45 (C.D. Cal. 2011); *see also Hampton*, at 1270 n.9 (finding that evidence of prior incidents of targeting African-Americans was relevant to show motive, intent, and knowledge of defendant).

As to the third element of *Hampton*, the Complaint alleges that Plaintiff was denied his right to the enjoyment of all benefits, privileges, terms and conditions of being an RTD passholder that are afforded to white RTD patrons. Compl., ¶397. However, as pled, the Complaint failed to allege a violation because alleged discrimination did not occur during a protected activity.

In *Lewis v. Commerce Bank & Tr.*, after reviewing a variety of federal cases alleging denial of equal right protection, a court stated that "[t]he cases which have permitted 1981 actions to proceed upon a claimed violation of the equal benefit clause [ ]allege detentions or arrests or searches by police or security personnel." 333 F. Supp. 2d 1019, 1021 (D. Kan. 2004). In this case, as set forth

above, the Complaint failed to allege a detention, seizure, search or arrest necessary to allege a Fourth Amendment violation. Therefore, Plaintiff's Complaint fails to plead a constitutional violation of racial discrimination.

III. THE COMPLAINT FAILS TO PLAUSIBLY ALLEGE *MONELL* LIABILITY AGAINST RTD.

It is well settled that a local government "may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell*, 436 U.S. at 694. Before RTD can be held liable for the TSOs' alleged constitutional violations, Plaintiff must show that by enforcing an RTD policy an employee caused the constitutional violation. *See Hinkle v. Beckham Cty. Bd. of Cty. Comm'rs*, 2020 U.S. App. LEXIS 19309, at *65 (10th Cir. June 22, 2020) (citing *Monell*, 436 U.S. at 694). Specifically, Plaintiff "must prove '(1) official policy or custom[,] (2) causation, and (3) state of mind.'" *Id*. (citing *Burke v. Regalado*, 935 F.3d 960, 998 (10th Cir. 2019) (alteration in original)). A local governmental entity "is only liable when it can be fairly said that the [entity] itself is the wrongdoer." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 122 (1992).

It is only when the "execution of a government's policy or custom . . . inflicts the injury" that the governmental entity or its policy makers may be held liable under § 1983. *Monell*, 436 U.S. at 694. A municipal policy or custom may take the form of (1) "a formal regulation or policy statement"; (2) an informal custom "amoun[ting] to 'a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law'"; (3) "the decisions of employees with final policymaking authority"; (4) "the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval"; or (5) the "failure to adequately train or supervise employees,

so long as that failure results from 'deliberate indifference' to the injuries that may be caused." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189-90 (10th Cir. 2010) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) and *City of Canton v. Harris*, 489 U.S. 378, 388-91 (1989) (internal quotation marks omitted)). *Monell* liability can be sustained pursuant to either a facially unlawful policy or facially constitutional policy. *Hinkle*, at *67-68.

After establishing a policy or custom, a plaintiff must demonstrate "a direct causal link between the policy or custom and the injury alleged." *Waller v. City and Cty. of Denver*, 932 F.3d 1277 (10th Cir. 2019). A plaintiff must allege sufficient facts to show that a municipality's own unconstitutional or illegal policy or custom caused his injury. *Connick v. Thompson*, 563 U.S. 51, 60 (2011). For causation, "the challenged policy or practice must be 'closely related to the violation of the plaintiff's federally protected right.'" *Hinkle*, at *68 (citing *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013)). When a policy is facially constitutional, the burden of establishing causation (and culpability) is heavy. *Id.* (citing *Brown* 520 U.S. at 405). "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Id.* (citations omitted).

Finally, for claims of inadequate hiring, training or other supervisory practices, a plaintiff must demonstrate that the local governmental entity's "action was taken with 'deliberate indifference' as to its known or obvious consequences." *Waller*, 932 F.3d at 1284 (citing *Brown*, 520 U.S. at 407). The deliberate indifference standard may be satisfied when the entity "had actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional

violation, and it consciously or deliberately chooses to disregard the risk of harm." *Id.* (citing *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998). This notice is typically demonstrated by the existence of a pattern of tortious conduct; absent such a showing, deliberate indifference will only be found in a "narrow range of circumstances where a violation of federal rights is a 'highly predictable' or 'plainly obvious' consequence of [the entity's] action or inaction." *Id.*

Here, the Complaint fails to plead that RTD had an unconstitutional or illegal policy or custom or that any nexus whatsoever exists between the Allied TSOs' isolated, unexpected and unprecedented incident of criminal conduct and RTD's customs, policies, and training.

A. The Complaint Fails to State a Claim for Inadequacies in RTD's Hiring Practices.

As to RTD's adjustment of its TSO hiring standards, the Complaint fails to allege a direct causal link to Plaintiff's injury. While RTD notified Allied that it was willing to 1) accept military veterans in addition to its acceptance of law enforcement experience; 2) eliminate patrol experience requirement; 3) reduce amount of minimum qualifying reserve police officer experience from 3 years to 2 years; and 4) accept an equivalent of 2 years law enforcement supervisory experience for supervisors, the Complaint does not plausibly allege that such a decision was (1) unconstitutional or illegal; or (2) amounted to deliberate indifference to a risk that such experience would pose to the public. Comp. ¶¶230-235, 345, 350-351.

Regardless of whether these adjustments to minimum qualifications were good policy, the Complaint fails to allege a deliberate indifference to a known or obvious risk.[4] *See, e.g., Waller*, 932 F.3d at 1285. As the Supreme Court has explained, "[c]ases involving constitutional injuries

[4] The Complaint alleges that Taggert, Hunter and Diaz did not meet minimum experience qualification requirements before they were hired. Compl., ¶¶239, 241-248. However, pursuant to *Brown*, generalized risk of harm does not establish the deliberate indifference requirement. *Brown*, 520 U.S. at 415.

allegedly traceable to an ill-considered ***hiring decision*** pose the greatest risk that a municipality will be held liable for an injury that it did not cause." *Bd. of the Cty. Comm'rs v. Brown*, 520 U.S. 397, 415 (1997) (emphasis added). Specifically, "[m]erely showing that a municipal officer engaged in less than careful scrutiny of an applicant resulting in a generalized risk of harm is not enough to meet the rigorous requirements of 'deliberate indifference.'" *Id.* at 411. In this case, the Complaint also fails to plausibly allege a direct causal link between the hiring standards and screening and Plaintiff's injury, and therefore, fails to allege a *Monell* violation.

B. The Complaint Fails to State a Claim for Failure to Train.

Although the Complaint alleges that RTD failed to properly train the TSOs on use of force, de-escalation, non-discrimination and racial sensitivity, Compl., ¶¶357-358, 402, it specifically acknowledges that RTD required Allied to provide such training. Compl., ¶¶250, 252, 253. The Complaint fails to allege a direct causal link between RTD's training requirements and Plaintiff's injury and fails to meet the stringent deliberate indifference standard.

As to a failure to train allegation, a "municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick*, 563 U.S. at 60; *see also Oklahoma City v. Tuttle*, 471 U.S. 808, 822-823 (1985) (plurality opinion) ("[A] 'policy' of 'inadequate training'" is "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*"). A municipality's failure to train its employees in relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton*, 489 U.S., at 388. Only then "can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.*, at 389.

"[A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." *Hinkle*, at *69-70, citing to *Brown*, 520 U.S. at 407, 410 ("deliberate indifference" is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action). To satisfy this standard, "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary'"; "[w]ithout notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Waller*, 932 F.3d at 1285 (citing *Connick*, 563 U.S. at 62).

In *Waller*, the Tenth Circuit recently held that a government entity is not obligated to explicitly train officers not to engage in criminal conduct: "[W]e are not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates." *Waller*, 932 F.3d at 1288 (citing *Barney*, 143 F.3d at 1388); *see also Andrews v. Fowler*, 98 F.3d 1069, 1077 (8th Cir. 1996) ("In light of the regular law enforcement duties of a police officer, we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women."). The Tenth Circuit stressed that "the conduct at issue [ ] did not involve an officer making the wrong call regarding the level of force to employ against an individual who posed a threat to the officer or other individuals or was actively resisting arrest," therefore, "use of force was improper not because of the amount of force he used, but because no force was warranted in the first place." *Id.* at 1288. Accordingly, no additional specified training would be needed to put TSOs on notice that they may not violently assault an individual.

Besides conclusory allegations that RTD was deliberately indifferent to the risk of alleged training deficiency, not a single fact in the Complaint supports this allegation. "[I[t is not enough for a plaintiff to show that there were general deficiencies in a county's training program []". *Sawyers v. Norton*, 2019 U.S. Dist. LEXIS 91017, at *20-21 (D. Colo. May 31, 2019). "Rather, he must identify a specific deficiency in the county's training program closely related to his ultimate injury, and must prove that the deficiency in training actually caused [defendant] to act with deliberate indifference to his safety." *Id.*

Plaintiff's Complaint also fails to allege that RTD's policymakers were on notice that alleged omissions in the training of TSOs caused alleged constitutional violations. In most cases, plaintiffs meet this standard by demonstrating that a pattern of constitutional violations has put the government entity on notice that its training is inadequate, and that the continued adherence to its training thus constitutes deliberate indifference. *Allen v. Muskogee*, 119 F.3d 837, 846 (10th Cir. 1997). As this Court stated in *Guy v. Jorstad*, "[a] single incident in question does not show an obvious need for training or supervision." 2014 U.S. Dist. LEXIS 55055, at *10 (D. Colo. Apr. 21, 2014) (finding no showing of deliberate indifference). The Complaint is factually bare as to any other similar incident that would put RTD on notice that alleged training omissions caused or will cause constitutional violations and then deliberately refused to properly re-train TSOs. Thus, Plaintiff's Complaint fails to factually support his allegation of a failure-to-train against RTD.

To allege RTD's liability under *Monell*, Plaintiff must show RTD's policies/customs or training deficiencies were in fact the moving forces behind the constitutional deprivation. *Monell*, 436 U.S. at 694. The Complaint fails to allege that nexus. The Complaint acknowledges that the TSOs were trained based on the requirements established by RTD. Compl., ¶¶250, 256, 257. The

Complaint also acknowledges the TSOs' duties pursuant to RTD requirements. Compl., ¶200. Here, the TSOs went outside the scope of their employment and committed a criminal act against the Plaintiff. These TSOs were promptly terminated by Allied, criminally charged and pled guilty to various offenses. Compl., ¶¶186-189. Thus, the proximate cause of Plaintiff's alleged violations and injury was not RTD's allegedly deficient training, but the criminal conduct of these TSOs.

C. The Complaint Fails to State a Claim for Failure to Supervise and Failure to Investigate.

The Complaint alleges that RTD deliberately failed to oversee its contractor Allied (i.e. routing complaints to Allied, failing to investigate use-of-force complaints, failing to track TSOs use of force, and relying solely on Allied to report and address issues with the TSOs), Compl. ¶¶309-311; however, none of these practices are unconstitutional or illegal. The Complaint fails to plausibly allege a direct causal link between RTD's supervisory and investigative practices and Plaintiff's injury.

It makes sense that RTD would rely on its contractor to supervise and manage its own employees, thereby underscoring that the TSOs were not employees or agents of RTD. In addition, even if required, RTD had no ability to supervise and investigate the Allied TSOs, because, as alleged in the Complaint, TSOs covered up their misconduct.[5] Compl., ¶¶163-166. The Complaint does not plead any specific facts to demonstrate that RTD's practices in overseeing its contractor were a moving force behind Plaintiff's injuries, and thus, fails to allege a *Monell* violation.

The Complaint also alleges that RTD ratified TSOs conduct when it did not seek

[5] The Complaint alleges that Taggert was aware of previous comments Hunter made to other patrons "challenging them to fight" and Hunter's prior offers to patrons to settle "dispute with violence". Compl. ¶¶79-80. However, the Complaint fails to plead that Taggert informed anyone at RTD or Allied about Hunter's alleged conduct prior to this incident.

reimbursement for payments to Allied for the time it billed RTD during the TSOs assault on Plaintiff. Comp. ¶378-381. Although ratification may be a basis for municipal liability, ratification standing alone is insufficient to state a claim for supervisory liability under § 1983. *M.C. ex rel. Chudley v. Shawnee Mission Unified Sch. Dist. No. 512*, 363 F. Supp. 3d 1182, 1205 (D. Kan. 2019). "[A] municipality will not be found liable under a ratification theory unless a final decision maker ratifies an employee's specific unconstitutional actions, as well as the basis for these actions." *Bryson v. City of Okla. City*, 627 F.3d 784, 790 (10th Cir. 2010). The Complaint fails to allege a single fact supporting the allegation that RTD ratified the TSOs' conduct. On the contrary, the Complaint alleges that as soon as RTD was made aware of the incident, it performed its own internal investigation and cooperated with the police investigation which resulted in the TSOs' criminal convictions. Compl., ¶¶168, 170, 181, 186-190. Thus, the Complaint fails to allege a direct causal link between RTD's supervisory and investigative practices and Plaintiff's injury.

D. The Complaint Fails to State a Claim for Discriminatory or Inadequate Security Policies.

The Complaint alleges that RTD deliberately pursued a policy of prohibiting RTD patrons from waiting at its facilities for more than two hours, sleeping, or engaging in other behavior RTD deemed undesirable; a policy of using TSOs to remove the homeless and racial minorities from RTD facilities; and a policy of targeting minorities for greater scrutiny by the TSOs. Compl., ¶¶403-405. These allegations are conclusory. The Complaint failed to identify a specific RTD policy that allowed, condoned or encouraged racial discrimination in any form. RTD has a right to make regulations for safe, secure and efficient operations of its facilities. *See Donovan v. Pa. Co.*, 199 U.S. 279, 295 (1905) (finding that a railroad has a right to establish reasonable rules, in respect to the use of its property, and manage a station so as to convenience, comfort and safety of

passengers and shippers), *see also Colmenares Vivas v. Sun All. Ins. Co*., 807 F.2d 1102, 1105 (1st Cir. 1986) (finding that the authority in control of a public area has a nondelegable duty to maintain its facilities in a safe condition). The policy of promulgating safety and operations regulations is facially constitutional and bears no nexus to the alleged constitutional deprivations, which in this case was caused by Hunter's criminal conduct.

Plaintiff claims that RTD pursued a deliberate policy of providing deficient and inadequate security services because it hired untrained and inexperienced TSOs and did not supervise them properly. Compl., ¶372. As discussed above, the change in hiring criteria is not unconstitutional or illegal. Furthermore, this is yet another conclusory allegation that fails to establish a direct nexus between Plaintiff's injury and the level of RTD's security policies. A claim must be dismissed if the complaint does not contain enough facts to make the claim "plausible on its face." *Twombly*, 550 U.S. at 570. A court is not required to accept as true legal conclusions and mere conclusory statements. *See id.* at 555 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *see also Moya v. Schollenbarger,* 465 at 455-57 (when considering a Rule 12(b)(6) motion, a court may consider only facts actually alleged and should disregard all conclusory allegations made without supporting factual averments).

Beyond conclusory allegations, the Complaint fails to allege that RTD had a formal or informal policy of targeting or removing racial minorities or the homeless from Union Station or providing deficient security service. As the Complaint fails to establish a direct causal link between any alleged policies and Plaintiff's injury, there is no basis for *Monell* liability.

E. An Isolated Incident Cannot Serve as Basis for *Monell* Liability.

This case involves an isolated, unforeseen criminal act perpetrated on Plaintiff. This incident was an aberration and not the result of any RTD custom or policy. The Complaint alleges, without specificity, a 2016 incident where Joseph Duran was assaulted by two TSOs in a dispute over a bus fare. Compl., ¶270. Likewise, the Complaint alleges 200 incidents involving use of force between 2009 and 2012. Compl., ¶226. The Complaint does not allege any impropriety or excessive force with these 200 incidents. Because these allegations are not fact specific, dissimilar and conclusory, they cannot serve as support for *Monell* liability. Moreover, the Tenth Circuit held that "[o]ne prior incident, even if it was a constitutional violation sufficiently similar to put officials on notice of a problem, does not describe a pattern of violations." *Waller,* 932 F. 3d, citing *Coffey v. McKinney Cty*, 504 F. App'x 715, 719 (10th Cir. 2012).

In *Tuttle*, the Supreme Court stated that "proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." 471 U.S. at 823-24*; see also Moss v. Kopp,* 559 F.3d 1155, 1169 (10th Cir. 2009) (typically, a "single incident" of unconstitutional behavior "is not sufficient to impose [municipal] liability."). A one-time violation might demonstrate that the violation is the result of [Defendant's] failure to train its employees, but it seems equally as likely, if not more likely, that one violation could be the result of an errant employee. *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1300 (D.N.M. 2018). Although the Tenth Circuit has never adopted a bright-line rule as to the number of similar incidents required to establish the existence of a municipal policy or custom, most courts, including the Tenth Circuit, have concluded that one

prior incident is insufficient. *See, e.g., Murphy v. City of Tulsa*, 2018 U.S. Dist. LEXIS 145310, at *38-39 (N.D. Okla. Aug. 27, 2018), *citing to Williams v. City of Tulsa*, 627 F. App'x 700, 704 (10th Cir. 2015). Accordingly, pursuant to Supreme Court and the Tenth Circuit precedent, the isolated violation alleged in the Complaint does not legally demonstrate a pattern of similar constitutional violations and cannot serve as basis for RTD's *Monell* liability.

IV. THE TSOS' OUTRAGEOUS CONDUCT WAS OUTSIDE THE SCOPE OF THEIR EMPLOYMENT AND NOT UNDER COLOR OF THE LAW.

Plaintiff's *Monell* claim against RTD relies on only one unforeseeable and isolated incident of criminal misconduct by a contractor's employee that, while abhorrent, under applicable Tenth Circuit legal precedent cannot establish that RTD is liable. Under *Monell*, "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Monell*, 436 U.S. at 694.

A. The TSOs Were Employed by Allied, Not RTD.

In *Monell*, the Supreme Court held that a local government is responsible under Section 1983 only for those injuries **caused by employees** acting in accordance with established policy or custom. *Monell*, at 694. *Monell* did not create municipal liability for constitutional violations committed by **non-employees.** *Kemp v. Harris*, 2008 U.S. Dist. LEXIS 136089, at *10 (D. Md. 2008) (finding that the City of Baltimore was not liable for constitutional violations of defendant officers employed by the state). It is undisputed that the employment relationship was between Allied and the TSOs. Compl., ¶¶8, 198, 413. Allied hired, trained, and supervised the TSOs. Compl., ¶¶425, 430, 443. Given that the individuals that committed these abhorrent acts were

undisputedly Allied's employees, Plaintiff's *Monell* claim against RTD fails.

B. The TSOs' Private Criminal Actions Were Not Performed Under Color of Law.

It is undisputed that the criminal and intentional acts of the TSOs were not authorized by any state law. Compl., ¶¶187-189. Their criminal conduct had no connection to any authority they were bestowed under state law. Therefore, their actions cannot be attributed to RTD.

In order for liability to attach pursuant to §1983, the conduct at issue must be fairly attributable to the state. *See Lugar v. Edmondson Oil Co*., 457 U.S. 922, 937 (1982). "The traditional definition of acting under color of state law requires that the [defendants] in a [§]1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (internal quotation marks omitted). "It is well settled that an otherwise private tort is not committed under color of law simply because the tortfeasor is an employee of the state." *Jojola v. Chavez*, 55 F.3d 488, 493 (10th Cir. 1995). Moreover, "it is the plaintiff's burden to plead, and ultimately establish, the existence of 'a real nexus' between the defendant's conduct and the defendant's 'badge' of state authority in order to demonstrate action was taken 'under color of state law.'" *Id*. at 494.

The under color of law determination rarely depends on a single, easily identifiable fact, such as the officer's attire, the location of the act, or whether or not the officer acts in accordance with his or her duty. *David v. City and Cty. of Denver*, 101 F.3d 1344, 1352-53 (10th Cir. 1996) (citing *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995)). Instead, one must examine "the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Id*.

Even on-duty law enforcement officers do not act under color of law in certain

circumstances. *Bacon v. Allen*, 2008 U.S. Dist. LEXIS 83411, at *19-23 (D. Kan. Oct. 16, 2008), citing to *Haines v. Fisher*, 82 F.3d 1503, 1508 (10th Cir.1996) (police officers who staged a robbery of a convenience store (as a practical joke on an acquaintance who worked there) did not act under color of law because they did not use their state authority to carry out their plan).

In this case, TSO Hunter and the other TSOs committed an intentional criminal act of assault. The pure criminal nature of the TSOs' conduct cannot be attributed to RTD.[6]

V. CONCLUSION.

The Complaint fails to state a claim for *Monell* liability on RTD based upon the isolated criminal actions of the TSOs employed by Allied which were contrary to RTD's mission and values. The Complaint falls far short of plausibly alleging that RTD established a deliberate and "widespread" custom or policy of excessive force or discrimination. Based on the above arguments, RTD requests this Court grant its Motion to Dismiss with Prejudice.

Dated this 6th day of July, 2020.

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[6] RTD charged TSOs with the following responsibilities: basic security functions, assisting RTD customers with questions, fare enforcement, as well as enforcement of RTD rules and regulations. Compl., ¶200.

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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and I hereby certify that I have mailed or served the document or paper to the following non-CM/ECF participants in the manner (mail, hand delivery, etc.) indicated by the non-participant's name: N/A

By: ***/s/ Jonathan M. Abramson***
Jonathan M. Abramson
Kissinger & Fellman, P.C.