IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DEREK O. CID,

Plaintiff,

v. Case No. 5:18-cv-04012-DDC-KGS

BOARD OF COUNTY COMMISSIONERS OF RILEY COUNTY, KANSAS, RILEY COUNTY POLICE DEPARTMENT, RILEY COUNTY LAW BOARD, BRIAN W. LONDON, STEVE C. BOYDA, JOSH D. KYLE, and BRADLEY J. SCHOEN,

Defendant.

Motion to Dismiss

Defendants move, pursuant to F.R.Civ.P. 12(2), (5) and (6) to dismiss plaintiff's claims in their entirety.

Memorandum in Support of Motion to Dismiss

The Board of County Commissioners of Riley County, Kansas (BOCC), the Riley County Law Enforcement Agency (RCLEA) (and defendant Schoen in his official capacity) and the Riley County Police Department (RCPD) must be dismissed for the reasons set forth herein.

Nature of the Case

Derek Cid was employed as a police officer. When transferred to the midnight shift, his supervisors rated his performance as "below standards" for failing to meet performance goals on arrests, and particularly DUI arrests. Cid complained to his direct supervisors, his Lieutenant and his Captain that his performance appraisals were retaliation for his complaints against what he perceived to be "quotas." Cid was placed on an improvement plan and he elected to resign.

Cid claims under § 1983 (Counts I and III) and state law (Count II) that he was constructively discharged in violation of the First Amendment and public policy.

Statement of Issues

I. The Board of County Commissioners of Riley County, Kansas (BOCC) is not a proper party and the Cid fails to state a claim against the BOCC.

II. The RCPD is not an entity with the capacity to be sued.

III. RCPD must be dismissed for insufficiency of process and service of process.

IV. The Amended Complaint fails to state a claim under § 1983.

A. Cid alleges no conduct at all as to the BOCC, RCLEA, or Schoen.

B. Cid's "speech" was not protected speech under the First Amendment.

1. Cid's "speech" was pursuant to his official duties and is not protected speech under Garcetti.

2. Cid's "speech" was not on a matter of public concern.

C. Cid was not constructively discharged—no adverse action was taken.

E. Defendants London, Boyda, Kyle and Schoen (in his individual capacity) are entitled to qualified immunity.

F. Cid fails to state a *Monell* claim a: (1) There is no underlying constitutional violation upon which to base such liability and (2) Cid does not allege any unconstitutional custom or policy that caused any constitutional violation.

1. There is no underlying constitutional violation upon which Cid could base a *Monell* claim.

2. Cid does not identify any custom or policy that caused the violation of his constitutional rights.

G. Cid fails to state a claim of public policy retaliatory discharge under Kansas law.

1. Cid fails to state a claim under Kansas law.

2. Cid was not constructively discharged.

Statement of Facts

This statement of facts is based upon the allegations in the amended complaint. Because these "facts" are taken from the pleadings and are viewed in the light most favorable to plaintiff,

defendants reserve the right to dispute these allegations should this case survive the motion to dismiss.

1. Plaintiff Cid was hired by the RCPD in January 2012 and worked Watch 3 (2-10 pm) until September 2015 when he was assigned to Watch 1 (the midnight shift). ECF 5, ¶ 16, 17, 30.

2. Sgt. Brian was one of Cid's supervisors on Watch 1. *Id.* ¶ 31.

3. Beginning October 6, 2015 through the remainder of Cid's employment with the RCPD, Sgt. London and other supervisors emphasized arrest statistics and DUI arrest goals. *Id.* ¶¶ 32–95.

4. In November 2015, Cid "expressed his concern to Sgt. Bortnick that mandatory compliance with the quota system would likely force officers to make unsupported stops resulting in departmental violations and Fourth Amendment issues." *Id.* ¶ 35.

5. Thereafter, Cid contends his evaluations were "below expectations," in part, for failing to meet goals, "stats" or quotas for enforcement activities including DUI arrests. *Id.* ¶¶ 32-95.[1]

6. When confronted about his "arrest numbers and 'quotas'" "Cid again explained that he was engaging in proactive policing but that he could not blindly adhere to mandatory quotas, that he believed it made officers abandon their discretion and required them to engage in unjustified stops, false arrests, and unsupported summonses, and hurt the department's relationship with the community." *Id.* ¶ 43-44.

7. In February 2016, Sgt. London to Cid his latest evaluation was "below expectations" "mainly because of his failure to reach his DUI quota" to which Cid said his own

[1] Defendants deny Cid's allegations about "quotas" and deny any quota existed. For purposes of a motion to dismiss, however, defendants accept the well-pleaded allegations as true.

"statistics were comparable to others on his shift and showed he was making appropriate traffic stops and was being proactive despite not always meeting the DUI quota." *Id*. ¶¶ 49-50.

8. Sgt. London rated Cid "below expectations" on his annual evaluation in May 2016, and Cid was passed over for his annual merit raise as a result. *Id.* ¶¶ 53-54.

9. Cid argued to Sgt. London his low evaluation was unwarranted, claiming the DUI arrest statistics reported in his annual evaluation by Sgt. London were wrong and artificially low and gave "several examples of complex cases and other time-consuming activities and services he had provided to the department and community that were required to be taken into account when rating an officer's productivity, but that were not mentioned in his evaluation." *Id.* ¶¶ 61-62.

10. Cid was placed on a Performance Improvement Plan (PIP) by Sgt. London. *Id*. ¶ 64.

11. Cid met with Lt. Boyda and complained about his annual review and "confided that he felt he was being retaliated against for bringing his concerns about the mandatory quota system" to his Watch 1 supervisors. *Id.* ¶¶ 66, 68.

12. Cid told Lt. Boyda "he couldn't just arrest a driver who was not going to test for a DUI violation" and that he would appeal his annual review. *Id.* ¶¶ 70-71.

13. Cid was passed over for an interview for a detective position because of his "below expectations annual evaluation and under conditions of a PIP." *Id*. ¶ 75.

14. On June 30, 2016, Cid met with Cpt. Kyle "regarding his annual evaluation, the PIP, his concerns about the quotas and unlawful stops and arrests" saying "he felt he was being targeted for expressing these concerns." *Id*. ¶ 83.

15. "Immediately after meeting with Cpt. Kyle, Officer Cid submitted an appeal of his annual evaluation and PIP." *Id*. ¶ 86.

16. Cpt. Kyle, on July 7, 2016, referred Cid's appeal to Director Schoen with a memo stating his conclusions that "Cid's evaluation was proper and that he had been treated fairly" while "failing to mention [Cid's] complaints about the quotas or his request for an investigation." *Id*. ¶ 87.

17. On July 18, 2016, Sgt. London told Cid his first monthly evaluation under the PIP would be "below expectations" "based solely on his arrest statistics." *Id.* ¶ 88-89.

18. Cid concluded his supervisors were taking "the initial steps toward termination" and submitted his resignation on July 28, 2016, in which he mentioned "his inability to comply with the quota system and subsequent as a factor." *Id*. ¶ 93-94.

19. Cid's resignation was accepted with a notation "denying that the actions taken against Officer Cid were in any way related to his complaints about the quota system." *Id.* ¶¶ 94-95.

20. While Cid alleges, at ¶ 133 of the amended complaint, "The Defendants made it a term and condition of employment that the Plaintiff and others effect arrests without probable cause to meet quotas set by the Defendants," nowhere does he allege that he or anyone else at the RCPD arrested anyone without probable cause.

Arguments and Authorities

I. Standards of Review

A. Standard for motion to dismiss based on lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2).

When a defendant files a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), the burden shifts to the plaintiff to make a prima facie showing of personal jurisdiction. *AST Sports Sci., Inc. v. CLF Distrib. Ltd.*, 514 F.3d 1054, 1056 (10th Cir. 2008).

B. Standard for motion to dismiss based on insufficient service of process under Fed. R. Civ. P. 12(b)(5).

A defendant may move to dismiss a complaint for insufficient service of process under Rule 12(b)(5). Fed. R. Civ. P. 12(b)(5). For a court to exercise personal jurisdiction over a defendant, the plaintiff must have served process in accordance with Federal Rule of Civil Procedure 4. *Wanjiku v. Johnson Cty.*, 173 F. Supp. 3d 1217, 1223 (D. Kan. 2016). "[P]laintiff bears the burden to make a prima facie case that he has satisfied statutory and due process requirements so as to permit the Court to exercise personal jurisdiction over defendants." *Fisher v. Lynch*, 531 F. Supp. 2d 1253, 1260 (D. Kan. 2008).

C. Failure to state a claim, F.R.Civ.P. 12(b)(6).

When ruling on a motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., the Court assumes as true all well-pleaded factual allegations and views them in the light most favorable to the nonmoving party to determine whether they plausibly give rise to an entitlement of relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011). The pleading standard arising from the decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal* (coined the *Twiqbal* standard), requires that a complaint plead facts sufficient to show that the claims have substantive plausibility. *Twiqbal* emphasizes the tenet that a court must accept as true all of the allegations contained in a complaint *is inapplicable* to legal conclusions, which instead must be supported by facts. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim which is plausible—and not merely conceivable—on its face. *Iqbal*. at 679–80; *Twombly*, 550 U.S. at 555. When determining whether a complaint states a plausible claim for relief, the Court draws on its judicial experience and common sense. *Iqbal*, 556 U.S. at 679.

The Court need not accept as true those allegations which state only legal conclusions. *See id.*; *Hall v. Bellmon*, 935 F.3d 1106, 1110 (10th Cir. 1991). Plaintiffs bear the burden of

framing their complaint with enough factual matter to suggest that they are entitled to relief; it is not enough to make threadbare recitals of a cause of action accompanied by conclusory statements. *Twombly*, 550 U.S. at 556. Plaintiffs make a facially plausible claim when they plead factual content from which the Court can reasonably infer that defendants are liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. Plaintiffs must show more than a sheer possibility that defendants have acted unlawfully—it is not enough to plead facts that are "merely consistent with" defendants' liability. *Id*. (quoting *Twombly*, 550 U.S. at 557). A pleading which offers labels and conclusions, a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement will not stand. *Iqbal*, 556 U.S. at 678. Similarly, where the well-pleaded facts do not permit the Court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not "shown"—that the pleaders are entitled to relief. *Id*. at 1950. The degree of specificity necessary to establish plausibility and fair notice depends on context, because what constitutes fair notice under Rule 8(a)(2), Fed.R.Civ.P., depends on the type of case. *Robbins v. Okla.*, 519 F.3d 1242, 1248 (10th Cir. 2008) (quoting *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 232–33 (3d Cir. 2008)).

II. The Board of County Commissioners of Riley County, Kansas (BOCC) is not a proper party and the Cid fails to state a claim against the BOCC.

Pursuant to K.S.A. 19-4424 through 19-4445, Riley County has a distinct entity responsible for regional law enforcement comprised of the Riley County Law Enforcement Agency (RCLEA) which is the oversight body over the RCPD.

> By electoral vote, Riley County (County) adopted a consolidated law enforcement agency under K.S.A. 19–4424 et seq. (In 1972, the legislature by statute authorized county elections to determine if law enforcement in the county should be consolidated.) The City and the County in 1974 consolidated the City's police department and the County sheriff department into RCLEA, with a police department branch. On December 31, 1973, all the officers ceased to be police officers for the City, and on January 1, 1974, became officers for RCLEA.

Johnson v. Kansas Pub. Employees Ret. Sys., 262 Kan. 185, 186, 935 P.2d 1049, 1051 (1997) (*Johnson*). K.S.A. 19-4429 enumerates the powers of the RCLEA as including the power to appoint, enter into contracts, establish salary schedules, and adopt organizational rules and regulations. K.S.A. 19-4429. The Law Board also has the ability to hire and fire the director of the RCPD but is otherwise not involved in the daily operations of the RCPD.

Prior to the consolidation, the RCPD was three separate institutions—the Riley County Sheriff's Office, the Manhattan, Kansas Police Department and the Ogden County Police Department. By statute, the individual agencies were relieved of all their powers and authorities, and these powers were vested in the RCPD and its director. K.S.A. 19-4435, 19-4436, 19-4438, 19-4440. As noted in *Johnson*, the officers and deputies for the County and cities from December 31, 1973, were prohibited by statute from acting law enforcement officers for their respective county or city agencies. 262 Kan. at 1053.

Riley County is responsible for funding part of the budget for the RCPD, K.S.A. 19-4443, but responsibility for oversight of the RCPD officers is reserved to the RCLEA and the Director. *See* K.S.A. 19-4429 (RCLEA is to appoint the director, adopt the budget for the RCLEA and RCPD, and adopt rules and regulations for the organization and operation of the RCLEA and RCPD) and 19-4430 (RCPD is under the exclusive supervision and control of the director).

The Amended Complaint mentions the BOCC only twice—once in the caption and once in ¶ 2 to identify the BOCC.

III. The RCPD is not an entity with the capacity to be sued.

The capacity of a party to be sued in federal court is determined by "the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3). Looking to Kansas law, the RCPD is not a separate municipality or entity with the capacity to be sued. While the complaint alleges the

"RCPD is a component of Riley County, Kansas," that allegation is a legal conclusion unsupported by any *fact* alleged in the complaint. Indeed, the RCPD is not itself a legal entity with the capacity to sue or be sued. See K.S.A. 19–4424 to 19-4440 (creating a Law Enforcement Agency separate and apart from any former Sheriff's Office and/or City police department; the RCPD is, itself, a subordinate department of that Agency).

Under Kansas law, in the absence of specific statutory authority granting a governmental entity the capacity to sue or be sued, a governmental body is not capable of being sued. Kansas subdivisions, agencies, or departments of governmental entities do not have the capacity to sue or be sued in the absence of a statute providing otherwise. *See Hopkins v. State*, 237 Kan. 601, 606, 702 P.2d 311, 316 (1985). "Subordinate government agencies, in the absence of statutory authorization, ordinarily do not have the capacity to sue or be sued." *Lindenman v. Umscheid*, 255 Kan. 610, 628, 875 P.2d 964, 977 (1994). Neither a city police department nor the Kansas Highway Patrol have the capacity to sue or be sued. *Brodzki v. Topeka Police Dep't*, 437 F. App'x 641 (10th Cir. Aug. 22, 2011); *Dellinger v. Harper Cnty. Social Welfare Bd.*, 155 Kan. 207, 124 P.2d 513, 517 (1942) (establishing that subordinate governmental agencies do not have the capacity to sue or be sued in the absence of a statute providing otherwise) *Whayne v. State of Kansas*, 980 F. Supp. 387, 391 (D. Kan. 1997) (city police department is a sub-unit of city government not subject to suit); *Hopkins*, 237 Kan. at 606-07 (Kansas Highway Patrol is a subordinate agency of the State without the capacity to be sued); *Mason v. 26th Judicial District of Kansas*, 670 F. Supp. 1528, 1535 (D. Kan. 1987) (Kansas Judicial District was not an entity with the capacity to sue or be sued).

The RCPD is a subordinate governmental agency and does not have the capacity to be sued. *Rivera v. Riley Cty. Law Bd.*, No. 11-CV-02067-JAR-JPO, 2011 WL 4686554, at *2 (D. Kan. Oct. 4, 2011) *citing Lowery v. County of Riley*, No. 04–3101–JTM, 2005 WL 1242376, *7

(D.Kan. May 25, 2005) (in turn citing *Hopkins*, 237 Kan. at 606-07). No statute confers capacity upon the RCPD to be sued. *Id*. (citing K.S.A. 19-4424 to 19-4440). The complaint, therefore, fails to state a claim upon which relief may be granted as it fails to sue any defendant with the capacity to be sued.

IV. RCPD must be dismissed for insufficiency of process and service of process.

Because the RCPD is not a separate entity, it is not subject to service of process, nor is any individual authorized as an agent for receipt of service of process for such a department.

Consequently, plaintiff's claims against the RCPD should also be dismissed for insufficiency of process and insufficiency of service of process under Fed. R. Civ. P. 12(b)(4) and (5).

V. Cid fails to state a claim under § 1983.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48–49 (1988) (citations omitted); *Northington v. Jackson*, 973 F.2d 1518, 1523 (10th Cir.1992).

A. Cid alleges no conduct at all as to the BOCC, RCLEA, or Schoen.

Dismissal under Fed.R.Civ.P. 12(b)(6) for failure to state a claim is warranted when the complaint sets forth no allegations of misconduct specific to a specific defendant. *Dwire v. Toth*, 64 F. App'x 668, 670 (10th Cir. 2003).

The BOCC is mentioned only in the caption and ¶ 2.

The RCLEA is mentioned in the caption and ¶¶ 4 (identifying the RCLEA) and 69 (stating "DUI statistics had to be presented to the Law Board and low statistics made the department look bad").

Defendant Schoen is mentioned in the caption, ¶¶ 3 (identifying Schoen to be served for RCPD), 9 (specifying Schoen is sued individually and in his official capacity), 87 (as the recipient of Capt. Kyle's memo), 92 (stating Cid had been told Schoen had initiated an investigation when it was actual Capt. Kyle that did so), and in the headings for Counts I, II and III. *See Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir.1997) (holding that "[i]ndividual liability under § 1983 must be based on personal involvement in the alleged constitutional violation")

Because the complaint alleges no conduct by the BOCC, RCLEA and/or Schoen (in either capacity), the complaint fails to allege a claim against them and they must be dismissed.

B. Cid's "speech" was not protected speech under the First Amendment.

To demonstrate an infringement of her First Amendment rights, an employee must show: (1) the speech involved a matter of public concern; (2) the employee's interest in speaking out outweighs the employer's interest in regulation; (3) the speech was a substantial motivating factor behind the employer's decision to take an adverse employment action against the employee. *Baca v. Sklar*, 398 F.3d 1210, 1218-19 (10th Cir.2005).

"[A] public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick v. Myers*, 461 U.S. 138, 140 (1983). "Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). However, the interests of public employees in commenting on matters of public concern must be balanced with the employer's interests "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *see also Garcetti*, 547 U.S. at 420 ("The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on

matters of public concern and to respect the needs of government employers attempting to perform their important public functions."). To balance the competing interests, courts developed the five-step *Garcetti*/*Pickering* test:

> (1) Was the speech was made pursuant to an employee's official duties?
>
> (2) Was the speech was on a matter of public concern?
>
> (3) Do the interests of the government/employer in promoting efficiency of public service outweigh the plaintiff's free speech interests?
>
> (4) Was the protected speech a motivating factor in the adverse employment action? and
>
> (5) Would the defendant have reached the same employment decision in the absence of the protected conduct?

Helget v. City of Hays, Kansas, 844 F.3d 1216, 1221-22 (10th Cir. 2017). "The first three steps concern questions of law for the courts, and the last two concern questions of fact." *Id*. at 1222.

Speech made "pursuant" to an employee's duties is not accorded First Amendment protection. *Garcetti*, 547 U.S. at 420–21. Further, when a public employee speaks upon matters of personal interest, that speech is not protected by the First Amendment. *Connick*, 461 U.S. at 140. "In deciding whether a particular statement involves a matter of public concern, the fundamental inquiry is whether the plaintiff speaks as an employee or as a citizen." *David v. City and Cty. of Denver*, 101 F.3d 1344, 1355 (10th Cir. 1996) (citing *Connick*, 461 U.S. at 147). When distinguishing between employee or citizen speech, "courts must consider the 'content, form, and context of a given statement, as revealed by the whole record.'" *Id.* (quoting *Connick,* 461 U.S. at 147–48).

"The court will also consider the motive of the speaker to learn if the speech was calculated to redress personal grievances [and therefore spoken as an employee] or to address a broader public purpose [and therefore spoken as a citizen]." *Workman v. Jordan*, 32 F.3d 475,

483 (10th Cir. 1994). Accordingly, an employee's internal complaints of discrimination and harassment are not matters of public concern. *David*, 101 F.3d at 1356.

Cid's alleged "speech" was not protected by the First Amendment because it was both speech pursuant to his official duties under *Garcetti* and of a personal interest and, thus, not a public concern under *Connick*. In sum, Cid's "speech" amounted to purely internal statements to his supervisors of his opposition to performance expectations for arrests generally and DUI arrests in specific. Likewise, his complaints and appeal were personal and not of a public concern. Accordingly, Cid was speaking pursuant to his official duties as an Officer for the RCPD, not as a citizen, and his speech was not protected by the First Amendment. Likewise, the content, form, and context reveal the speech was internal in scope, personal in nature and, accordingly, not on a matter of public concern.

1. Cid's "speech" was pursuant to his official duties and is not protected speech under Garcetti.

Employee speech made "pursuant" to the employee's professional duties is not accorded First Amendment protection. *Garcetti*, 547 U.S. at 420–21. The Court explained, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id*. at 421–22.

The objective inquiry into whether a public employee spoke "pursuant to" his or her official duties is "a practical one." *Garcetti*, 547 U.S. at 424. Further, an employee need not owe an affirmative duty to speak for employee speech to be pursuant to his or her official duties. The *Garcetti* Court cautioned against construing a government employee's official duties too narrowly, underscoring that

> [f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Id. at 424-25.

The Tenth Circuit takes a broad view of whether speech falls within an employee's official duties, typically analyzing whether the conduct "involves the type of activities that the employee was paid to do … ." *Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708, 713 (10th Cir. 2010). Speech may pertain to an employee's official duties "even though it addresses an unusual aspect of the employee's job that is not part of his everyday functions … ." *Id.* at 714 (internal quotation marks omitted). Moreover, speech may be official even if "it deals with activities the employee is not expressly required to perform … ." *Thomas v. City of Blanchard*, 548 F.3d 1317, 1324 (10th Cir. 2008); *see also*, *Brammer-Hoelter*, 492 F.3d at 1203 (holding that if speech "reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties.").

"[S]peech directed at an individual or entity within an employee's chain of command is often found to be pursuant to that employee's official duties under *Garcetti/Pickering*." *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 747 (10th Cir. 2010). But, "an employee's decision to go outside of their ordinary chain of command does not necessarily insulate their speech. Rather … the proper focus is ultimately still whether the speech 'stemmed from and [was of] the type … that [the employee] was paid to do,' regardless of the exact role of the individual or entity to which the employee has chosen to speak." *Id.* (quoting *Green v Bd. Of Cnty. Com'rs*, 472 F.3d 794, 798 (10th Cir. 2007)). *Accord Winder v. Erste*, 566 F.3d 209, 215 (D.C. Cir. 2009).

Other circuit courts have likewise concluded that speech that government employers have not expressly required may still be "pursuant to official duties," so long as the speech is in furtherance of such duties. *See, e.g.*, *Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York*, 593 F.3d 196, 201-02 (2d Cir. 2010); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007); *Lyons v. Vaught*, 875 F.3d 1168, 1174 (8th Cir. 2017); and *Winder v. Erste*, 566 F.3d at 215.

Cid's alleged speech was, in its entirety, directed to his direct supervisors and those in his chain of command by which he expressed disagreement with his performance evaluations and appraisal criteria. He was speaking pursuant to his official duties and not as a citizen. Accordingly, Cid's speech was not protected by the First Amendment, and this Court need not address whether it related to a "matter of public concern." *Garcetti*, 547 U.S. at 421-22 (finding "the controlling factor" to be whether the employee-speech at issue was made pursuant to official duties and declining to examine whether it related to an issue of public concern).

2. Cid's "speech" was not on a matter of public concern.

Whether speech is on a matter of public concern is a question of law. *Leverington v. City of Colorado Springs*, 643 F.3d 719, 726-27 (10th Cir. 2011). "Matters of public concern are those of interest to the community, whether for social, political, or other reasons." *Brammer–Hoelter*, 492 F.3d at 1205 (internal quotation marks omitted). It is important to note that Supreme Court precedent strongly implies that some speech may be protected and some may not. *Connick*, 461 U.S. at 146-47. Only when a public employee speaks upon matters of public concern, not matters of personal interest, is a federal court an appropriate forum in which to review the wisdom of a personnel decision made by a public agency. *Id.* "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

In *Connick*, the Supreme Court held Myers use of a questionnaire to fellow staff members in an attempt to forestall a transfer that she opposed was not of public concern. *Id.* Putting it another way, the Court stated that

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147. The First Amendment "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state." *Id.* Courts "construe 'public concern' very narrowly … ." *Flanagan v. Munger*, 890 F.2d 1557, 1563 (10th Cir. 1989).

Cid's "speech" about performance evaluations and expectations—even if related to police enforcement actions and arrest "quota"—does not attain the status of public concern simply because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." *Salehpoor v. Shahinpoor*, 358 F.3d 782, 788 (10th Cir. 2004) (internal quotation marks omitted); *see also Lee v. Nicholl*, 197 F.3d 1291, 1295 (10th Cir. 1999) ("[I]t is insufficient that the speech relates generally to a subject matter of public importance.").

Under *Connick*, Cid's "speech" seeking advancement and to rebut his poor performance appraisals was not a matter of public concern as revealed by "the content, form, and context." 461 U.S. at 147-48. Consideration is given to "the motive of the speaker and whether the speech is calculated to disclose misconduct or merely deals with personal disputes and grievances unrelated to the public's interest." *Lighton v. Univ. of Utah*, 209 F.3d 1213, 1224 (10th Cir. 2000). Speech that simply airs "grievances of a purely personal nature" typically does not involve matters of public concern. *Id.* at 1225. Cid's speech was internal in scope and personal in

nature and, accordingly, not on a matter of public concern. *Id*.; *and see Brammer-Hoelter*, 492 F.3d at 1205.

C. Cid was not constructively discharged—no adverse action was taken.

The plaintiff must establish an adverse employment action. *Maestas v. Segura*, 416 F.3d 1182, 1188 n.5 (10th Cir. 2005) (citing *Vanderhurst v. Colorado Mountain College Dist.,* 208 F.3d 908, 914 n. 1 (10th Cir. 2000)) ("we have never held employment action which may tend to chill free speech is necessarily adverse"). The "actions" of which Cid complains are not adverse actions that would support a retaliation claim under the First Amendment. *Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ*., 232 F.3d 1334, 1339–40 (10th Cir. 2000) (placement on an improvement plan did not amount to adverse employment action). As *Lybrook* explains, although "employers' acts short of dismissal may be actionable as First Amendment violations, we have never ruled that all such acts, no matter how trivial, are sufficient to support a retaliation claim." *Id*. at 1340; *see Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990); *Schuler v. City of Boulder*, 189 F.3d 1304, 1309–10 (10th Cir. 1999).

E. Defendants London, Boyda, Kyle and Schoen (in his individual capacity) are entitled to qualified immunity.

1. Standard of review—qualified immunity.

"[The] defense of qualified immunity ... shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law. Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Gutierrez v. Cobos*, 841 F.3d 895, 899 (10th Cir. 2016) (citations and internal quotation marks and ellipsis omitted).

When the defendants assert a qualified immunity defense, a plaintiff must satisfy a two-pronged test to avoid dismissal. *Comprehensive Addiction Treatment Ctr. v. Leslea*, 552 Fed.Appx. 812, 815 (10th Cir.2014). Qualified immunity shields federal and state officials from

money damages unless a plaintiff establishes (1) that the official violated a statutory or constitutional right and (2) that right was "clearly established" at the time of the challenged conduct. *Id.*; *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In considering a motion to dismiss based on qualified immunity, "all well-pleaded factual allegations in the ... complaint are accepted as true and viewed in the light most favorable to the nonmoving party." *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir.2006) (quoting *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir.1999)). However, the Court must "examine whether the plaintiff has met [his] burden of 'coming forward with sufficient facts to show that the defendant's actions violated a federal constitutional or statutory right.'" *Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1337 (10th Cir. 2000) (quoting *Baptiste v. J.C. Penney Co., Inc.*, 147 F.3d 1252, 1255 (10th Cir. 1998)). Whether plaintiff has alleged a violation of his clearly established constitutional rights to overcome the individual defendants' qualified immunity defense is an issue of law. *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir.2011).

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation." *Comprehensive Addiction Treatment Ctr.*, 552 Fed.Appx. at 815–16 (quoting *McBeth v. Himes*, 598 F.3d 708, 716 (10th Cir.2010)). "Ordinarily, in order for the law to be clearly established, there must be a relevant Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains, ... such that existing precedent has placed the statutory or constitutional question beyond debate." *Id.* at 816 (internal citations omitted). "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior

caselaw to clearly establish the violation." *Id*. (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004)).

2. If Cid's speech was protected speech, the law was not clearly established.

Qualified immunity from personal damage liability "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). "Qualified immunity attaches when an official's conduct does not violate clearly established ... constitutional rights of which a reasonable person would have known." *White v. Pauly*, __ U.S. __, 137 S.Ct. 548, 551 (2017) (quotation omitted).

> A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (internal quotation marks and alteration omitted). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd,* 563 U.S. 731, 741 (2011). Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986).
>
> "We have repeatedly told courts ... not to define clearly established law at a high level of generality." *al–Kidd, supra,* at 742. The dispositive question is "whether the violative nature of *particular* conduct is clearly established." *Ibid.* (emphasis added). This inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004) (*per curiam*) (quoting *Saucier v. Katz,* 533 U.S. 194, 201 (2001)).

Mullenix v. Luna, __ U.S. __, __, 136 S.Ct. 305, 308 (2015).

Here, the law was not "clearly established" that the any of the individual defendants' conduct would violate the First Amendment. *See, e.g., Reichle*, 566 U.S. at 664-65. Although the Supreme Court "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the ... constitutional question beyond debate" at the time Dr. Cordle acted. *White*, 137 S.Ct. at 551 (quotation omitted); *and see Mullenix*, 136 S.Ct. at 308. The right at issue must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle*, 566 U.S. at 665 (quoting *Anderson v. Creighton*,

483 U.S. 635, 640 (1987)). There is no case that clearly says Cid's speech was protected by the First Amendment so as to place the question "beyond debate." *al–Kidd,* 563 U.S. at 741.

F. Cid fails to state a *Monell* claim a: (1) There is no underlying constitutional violation upon which to base such liability and (2) Cid does not allege any unconstitutional custom or policy that caused any constitutional violation.

To impose liability upon a municipality (or a government official in his/her official capacity) under § 1983, a constitutional tort must have been committed: (1) by an ultimate policymaking official of the municipality, typically the governing body of the municipality; (2) by an employee acting pursuant to a policy or custom of the municipality; or (3) by an employee as a result of deliberate indifference of the municipal governing body to training of the employee. *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 397 (1997).

1. There is no underlying constitutional violation upon which Cid could base a Monell *claim.*

Courts cannot "hold a municipality 'liable [for constitutional violations] when there was no underlying constitutional violation by any of its officers.'" *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1317-18 (10th Cir. 2002) (quoting *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993)). For the reasons discussed above, there was no constitutional violation and, for that reason alone, Cid cannot state a *Monell* claim against Director Schoen in his official capacity, the RCLEA and/or the BOCC.

2. Cid does not identify any custom or policy that caused the violation of his constitutional rights.

A municipal entity "may not be held liable under § 1983 solely because it employs a tortfeasor." *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997). Stated differently, government officials may not be held liable under § 1983 for unconstitutional conduct of their subordinates under theory of *respondeat superior*. *Iqbal*, 556 U.S. at 676; *Monell v. Dep't of Social Serv.*, 436 U.S. 658, 691 (1978). Instead, "a plaintiff seeking to impose

liability on a municipality under § 1983 [must] identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Bryan County*, 520 U.S. at 403. "The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Id*. at 404. In other words, municipal liability under § 1983 requires that a plaintiff identify a policy or custom attributable to the municipality or its policymakers that caused the alleged constitutional violation. *Bryan County*, 520 U.S. at 403-04. "A plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id*. This requirement ensures that a municipality is held liable only for federal rights deprivations resulting from decisions of the duly-constituted legislative body or of those officials whose acts may fairly be considered to be those of the municipality. *Monell*, 436 U.S. at 694; *Bryan County*, 520 U.S. at 403-04.

The amended complaint fails to identify any policy or custom that violated Cid's rights. There is no assertion that any violation of Cid's rights was caused by an officer acing pursuant to any policy or custom. In sum, Cid fails to plead facts sufficient to state a claim of *Monell* liability under § 1983.

G. Cid fails to state a claim of public policy retaliatory discharge under Kansas law.

1. Cid fails to state a claim under Kansas law.

> "Kansas historically adheres to the employment-at-will doctrine, which holds that employees and employers may terminate an employment relationship at any time for any reason, unless there is an express or implied contract governing the employment's duration." *Campbell v. Husky Hogs*, 292 Kan. 225, 227, 255 P.3d 1 (2011) (citing *Morriss v. Coleman Co.*, 241 Kan. 501, 510, 738 P.2d 841 [1987]). But there are specific exceptions to this rule; some are statutory, such as terminations based on race, gender, or disability. See K.S.A. 44–1009(a). Others have been recognized through caselaw when an employee is fired in contravention of a recognized state public policy. *Husky Hogs*, 292 Kan. at 227, 255 P.3d 1.

Lumry v. State, 305 Kan. 545, 562, 385 P.3d 479, 490 (2016). Cid claims to invokes a public policy exception.

Public-policy exceptions to the at-will employment doctrine exist only as necessary to protect strongly held state public policy. *Husky Hogs*, 292 Kan. at 230. Kansas courts narrowly recognize at least two public policy exceptions to the rule of employment at will: "(1) when an employer discharges an employee for exercising rights under the workers compensation laws and (2) when an employer discharges an employee for a good faith report or threat to report a serious infraction of rules, regulations, or law pertaining to the public health, safety, and the general welfare by a co-worker or employer (whistleblowing)." *Riddle v. Wal-Mart Stores, Inc.*, 27 Kan. App.2d 79, 85, 998 P.2d 114, 119 (2000). The Kansas Supreme Court first announced whistleblower exception in *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988). Under the whistleblower exception, an employer may not fire an employee because the employee has reported to company management or law enforcement serious legal violations by co-workers or the employer. *See Koehler v. Hunter Care Ctrs., Inc.*, 6 F. Supp.2d 1237, 1241 (D. Kan. 1998) (citing Palmer, 242 Kan. 893).

Here, Cid does not claim he was whistleblowing—he does not claim he reported anyone making an arrest without probable cause. Rather, he claims he "refused to violate the law by making arrests without probable cause, which led the Defendants to retaliate and to force the Plaintiff's constructive discharge." ECF 5, ¶ 114. Nowhere in the amended complaint does Cid allege (1) that he was instructed or required to make an arrest without probable cause or (2) that anyone else made an arrest without probable cause. Rather, Cid alleges he was expected (in a major college town) to "make at least two DUI arrests and issue fifteen parking tickets each month or he would receive an unsatisfactory rating." *Id.* ¶ 33.

2. Cid was not constructively discharged.

To support a constructive discharge claim, plaintiff must show that her working conditions became so intolerable that a reasonable person in her position would have felt compelled to resign. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004), The employer's illegal discriminatory acts must make the conditions of employment objectively intolerable, *Watson v. Lucent Techs., Inc.*, 92 F.Supp.2d 1129, 1135 (D.Kan. 2000) (citing *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 534 (10th Cir.1998)), and the voluntariness of plaintiff's resignation is determined under the totality of the circumstances, *Lighton v. Univ. of Utah*, 209 F.3d 1213, 1222 (10th Cir.2000). The bar is quite high in constructive discharge cases; plaintiff must show that he had no choice but to quit. *Garrett v. Hewlett–Packard Co.*, 305 F.3d 1210, 1221 (10th Cir. 2002). *Accord Garvey Elevators, Inc. v. Kansas Human Rights Comm'n*, 265 Kan. 484, 961 P.2d 696 (1998) (constructive discharge under Kansas law requires intolerable working conditions as would compel reasonable person to quit).

Cid's amended complaint evinces no facts to support a constructive discharge. He was not required or instructed to do anything unlawful. Rather he was expected (in a major college town) to "make at least two DUI arrests and issue fifteen parking tickets each month or he would receive an unsatisfactory rating." This is far from an intolerable expectation and Cid's election to resign rather than meet expectations is not a constructive discharge.

Conclusion

For the foregoing reasons, plaintiffs claims should be dismissed in their entirety.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing on the 21st day of June, 2018, a with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to:

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