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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

DUSTIN LAW PORTER and STEVEN DROLLETTE,

Plaintiffs,

v.

DAGGETT COUNTY, et al.,

Defendants.

JOSHUA ASAY,

Plaintiff,

v.

DAGGETT COUNTY, et al.,

Defendants.

JOSHUA OLSEN,

Plaintiff,

v.

DAGGETT COUNTY, et al.,

Defendants.

DAGGETT COUNTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT & REQUEST FOR HEARING

Case Nos. 2:18-cv-389 (Consolidated)
2:18-cv-422
2:19-cv-188

District Judge David Barlow
Magistrate Judge Daphne A. Oberg

Defendants, Daggett County, Sheriff Erik Bailey in his official capacity, and former Sheriff Jerry Jorgensen (hereinafter Daggett County Defendants), through their attorney Frank D. Mylar, respectfully move this court for summary judgment and request a hearing.

INTRODUCTION

Three lawsuits were brought by four plaintiffs in this consolidated action, alleging claims against state officials Mike Haddon and Jeffrey Toone and county officers Benjamin Lail, Joshua Cox, Logan Walker, and Rodrigo Toledo, all of whom have been dismissed, settled, or defaulted. The only remaining defendants, Daggett County, Erik Bailey in his official capacity as the current Sheriff, and Jerry Jorgensen in his personal capacity as the former Sheriff, bring this motion for summary judgment. All claims against all defendants are based solely upon the misconduct and illegal activity of a single former Deputy Sheriff, who was promptly terminated when his conduct was discovered by administrators. All allegations against the dismissed defendants are largely irrelevant to this motion.

Plaintiffs allege claims under the Eighth Amendment of the United States Constitution and under Article I, Section 9 of the Utah Constitution against all defendants. Plaintiff Olsen also alleged a duplicative claim under Article I, Section 7 of the Utah Constitution. The law has been clear for over 40 years that governments and supervisors are not liable for the misconduct of their employees for constitutional violations. For this reason, all claims should be dismissed against the County Defendants.

GROUNDS FOR MOTION AND RELIEF SOUGHT

Summary Judgment should be granted based upon the following grounds:

1. Jerry Jorgensen is entitled to qualified immunity in that he did not personally violate the plaintiffs' state or federal constitutional rights and did not violate clearly established law at the time and further did not act with deliberate indifference. For the same reasons, the state Constitutional claims should also be dismissed.

2. Erik Bailey is sued in his official capacity so all claims against him are only against the County as a matter of law.

3. No basis exists in fact or law for liability against Daggett County under either the state or federal constitutions.

WHEREFORE: Based upon the undisputed facts, summary judgment should be granted in favor of Daggett County, Jerry Jorgensen, and Erik Bailey.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Daggett County is a governmental entity and a political subdivision of the State of Utah. It has not had a Jail since April 2017. The last inmates were removed from the Jail in about February 2017. They were all Utah State prisoners under the jurisdiction of the Utah Department of Corrections. (Declaration of Jerry Jorgensen ¶ 27).

2. From 2011 through 2017 Jerry Jorgensen was the duly elected Sheriff of Daggett County, Utah. During all relevant times he was certified by the Utah Division of Peace Officers Standards and Training (POST) as a law enforcement officer. He retired from being the Sheriff in April 2017. (*Id.* ¶ 1.)

3. After 30 years in corrections and law enforcement, Jorgensen was recruited by Daggett County to manage its Jail in 2008, following a prisoner escape in 2007. (See *id*. ¶¶ 2-7.)

4. Jorgensen instituted many improvements to safety and security of inmates when he became Jail Commander such as installing a security camera monitoring system and helping create a contract with the Utah Department of Corrections that ensured monthly or bi-monthly Jail inspections by corrections officials who ensured inmates were being properly cared for and treated well. (*Id.* ¶ 7.)

5. In 2010, Jorgensen was elected as the Daggett County Sheriff. However, he continued to also serve as the Jail Commander until the beginning of his second term in 2015, to ensure that the Jail was operating properly and to save the County money. (*Id.* ¶ 8.)

6. As Sheriff, Jorgensen was also a member of the Utah Sheriffs' Association and regularly attended numerous meetings and trainings every year. He was the only Sheriff in the state of Utah who served both as a Sheriff and a Jail Commander at the same time. In Utah, the Jail Commander is a position appointed by the Sheriff and serves at the discretion of the Sheriff. (*Id.* ¶ 9.)

7. In 2015, after Jorgensen's second election to Sheriff, the inmates had helped build a new Sheriff's Office building that was close to the Jail in proximity but was a separate building about a block away from the Jail. At that time, Jorgensen moved his office from the Jail to the Sheriff's Office and he appointed Sgt. Ben Lail as the Jail Commander. (*Id.* ¶ 10.)

8. Sgt. Lail had worked in the Daggett County Jail since about 2009 as a certified Corrections Officer by POST. POST required about six weeks of intense training on all aspects of supervising and dealing with inmates in a prison or jail, including security, the constitutional duty to protect inmates, and to care for their basic needs. It also required that the officer take an oath to

uphold all the laws in the state of Utah, which especially included upholding and enforcing laws relating to the health and wellbeing of inmates. (*Id.* ¶ 11.)

9. All corrections officers had to be POST certified before they could work in the Jail as a corrections officer. The Jail also had control room officers, who stayed in a locked control room during their shifts, who did not need to be certified. However, all jail staff went through a mandatory FTO training which consisted of being assigned to an FTO (i.e., Field Training Officer) to help the new officer to learn the Jail policies and practices and how to treat and properly supervise Jail inmates. The FTO had to "sign off" and attest that the new officer knew the policies and was ready to work alone as a Corrections Officer. In addition, all the new officers had to sign a paper stating that they had read and understood all the Jail policies and practices. (*Id.* ¶ 14.)

10. At the beginning of Jorgensen's second term as Sheriff in 2015, after he appointed the Jail Commander, he did not frequently interact with inmates and often did not go into the housing areas of the Jail. Even as Jail Commander, prior to 2015, it was not the Jail Commander's primary job to supervise inmates, but to supervise the corrections officers, control room workers, and the Sergeants at the Jail, who in turn did supervise the inmates directly. (*Id.* ¶ 15.)

11. The Jail Commander was responsible for making sure that all staff were appropriately following policies and practices that would protect inmates from harm and that all Jail staff received all necessary training to do their jobs. POST certification required a minimum of 40 hours per year of training. This training covered a variety of subjects that helped officers address the constitutional and practical needs of prisoners. Some of these trainings included training on how officers should treat inmates and to not harm or allow inmates to be harmed. In addition, there

were other opportunities for training with the Sheriffs' Association during the year for all officers. (*Id.* ¶ 16.)

12. In addition, the Jail Commander received additional training specifically for Jail Commanders throughout the year, sponsored and conducted by the Sheriffs' Association's Jail Commander Certification training. I was aware that Lt. Ben Lail received that additional training to help make him a better Jail Commander. In addition, Lt. Lail was a certified Taser instructor. (*Id.* ¶ 17.)

13. All jails and prisons in Utah have TASERS to use as a last resort to deal with critical and dangerous inmate non-compliance issues. Jorgensen recalls that these tasers needed to be inspected and "dry-fired" each shift, every day. When a TASER is "dry-fired" it cannot hurt anyone. (*Id.* ¶ 18.)

14. Prior to 2017, Jorgensen was never aware of and never heard of any inmate in the Daggett County Jail being "tased" by a staff member or anyone else. It would have been immediately investigated and prompt disciplinary action taken if he had ever heard of such misuse of tasers. (*Id.* ¶ 19.)

15. Although there was one incident where Ben Lail dry-fired a TASER in the presence of a Jail teacher, he was reprimanded for the action by his supervisor, Chris Collett, and told to apologize to the teacher. It was Jorgensen's understanding that the TASER could not have hurt the teacher, but it did make a snapping noise that might have scared her. It was also Jorgensen's understanding that the TASER was not pointed at the jail teacher but pointed at the ground at the time in question. In 2016, Jorgensen was not aware of any other misuse of a TASER at the Jail at any time. (*Id.* ¶ 20.)

16. Jorgensen was never made aware of any instances in the Jail, while he was the Sheriff in 2011-2016 that demonstrated a need for more training in any particular area of inmate supervision. (*Id.* ¶ 21.)

17. It never would have crossed Jorgensen's mind that a Daggett County deputy, like Joshua Cox, would intentionally "tase" inmates. It is illegal to "tase" a prisoner when force is not required and, as a law enforcement officer, who had sworn an oath with POST to uphold the laws of Utah, it was obviously illegal what Joshua Cox did in "tasing" inmates. He was put on administrative leave when the allegations were first made, and he was terminated from the Sheriff's Office when the investigation was complete with respect to him. (*Id.* ¶ 22.)

18. The Sheriff never had any suspicion or reason to think that Joshua Cox, or any other officer, was harming inmates in an illegal manner prior to 2017, either with a TASER or a dog. In fact, in Jorgensen's nearly 40 years of law enforcement and corrections experience, he had never heard of a law enforcement officer that had used his TASER to "tase" inmates at a Jail or have a dog bite the inmates, as some sort of joke or a game, when no force was justified or required. Such actions are so obviously illegal that no officer would need to be told or trained not to do such things. (*Id.* ¶ 23.)

19. Jorgensen was shocked to hear the allegation that Cox had taken a dog into the Jail or had him around inmates. Jorgensen had no knowledge about Cox bringing a dog into the Jail when he was alleged to have done so. He did not authorize it and he did not believe any County administrator or manager ever authorized it. (*Id.* ¶ 25.)

20. Sheriff Jorgensen had no knowledge or notice whatsoever that Joshua Cox was training a dog at the Jail for K9 use or that he might be using inmates to help train the dog. He did not see or hear about any interaction between an inmate and the dog whatsoever. (*Id.* ¶ 26.)

21. The Utah Department of Corrections conducted inspections and reviews that the Jail had to pass to qualify the Jail to house state inmates. Daggett County never failed any of these inspections while Jorgensen worked for the County. Moreover, the Utah State Prison sent an inspector every couple of months to physically inspect the Jail. It was the state inspector's job to ensure that the Jail was operating in a safe manner. Moreover, a state caseworker, Jeffrey Toone, met with inmates every week. This person further was able to take any complaints or grievances made by any of the inmates at the Jail and to help get any grievances resolved in a timely manner. (*Id.* ¶ 28. See also the Declaration of Christopher Collett ¶ 30.)

22. In addition to the bi-monthly inspections by the Department of Corrections, the Utah Sheriffs' Association inspected the Jail annually to ensure that the Jail met minimum correctional standards. To the Sheriff's knowledge, the Jail always passed those inspections during the time he worked for Daggett County. (Jorgensen Decl. ¶ 29.)

23. The Sheriff was the sole and final policymaker for the Daggett County Jail. As the top administrator, it was his responsibility to oversee the general activities of the office, road operations, jail operations, court bailiffs, and community relations. He did not get involved in the daily supervision of inmates or generally have personal knowledge of them. (*Id.* ¶ 30.)

24. Jorgensen was not aware of circumstances that would cause him to believe there was a need for more or better policies, procedures, or training to eliminate the risk of a law enforcement officer assaulting inmates in the Jail. He was not aware of any deficiencies relating to the

supervision and treatment of inmates at the jail. In fact, he believed that he had improved the administration and operations of the Jail since the time he took over as Jail Commander in 2008. (*Id.* ¶ 31.)

25. Jorgensen personally made improvements when he personally served as Jail Commander and he then hired Lt. Lail, who worked hard to make more improvements. Specifically, Lail worked with Darin Durfey, who was the Jail Commander in Utah County and the Utah Sheriff's Association Jail auditor, to make many policy and procedure improvements at the Daggett County Jail. (*Id.* ¶ 32.)

26. Generally, if policies need to be written or amended, the Sheriff relied upon subordinates in the various work areas to identify such needs and they would recommend policy changes and proposed policies. Generally, the Jail Commander would make recommendations if there was a need for policy changes or additional training in any area. However, the Sheriff's approval and signature were required for the proposal to become official policy. (*Id.* ¶ 33.)

27. In 2011 Sheriff Jorgensen hired Chris Collett to serve the Daggett County Sheriff's Office as Chief Deputy with the rank of captain. (Collett Decl. ¶ 6.)

28. As Chief Deputy of Daggett County, Collett oversaw all three departments that were under the Sheriff's Office, specifically the Flaming Gorge Dam security, the Patrol Division, and the Jail Division. He also assisted in the hiring of employees for all three departments. (*Id.* ¶ 7.)

29. Jail grievance forms were available in every housing section of the Jail. For state prisoners, the grievances were initially given to the caseworker from the Utah Department of Corrections. (*Id.* ¶ 16.)

30. Prior to the prisoner complaint by Drollette in 2017, Collett had never heard of an officer or anyone else deploying a charged taser or a dog against an inmate in a jail for fun or for no legitimate corrections objective. To do so would be obviously against county policy but also directly contrary to the oath taken to be certified as a Corrections Officer by POST. (*Id.* ¶ 21.)

31. The Daggett County Taser Policy specifically stated, "the taser shall not be used to punish or unlawfully coerce subjects regardless of the circumstances." The policy further stated that tasers may only be used by trained officers to protect others or to effectuate a lawful arrest and the use of a taser against anyone was required to be reported to the deploying officer's supervisor for a review of the incident. (Daggett County Taser Policy, attached as Exhibit 1.) The Jail policy specifically stated:

a. force may never be used to punish an inmate.

b. force may never be used in a purposeless, malicious, or sadistic manner.

c. Force will never be used for the sole purpose of causing harm.

See Policy F 05.02.03, Attached as Exhibit 2. Using a taser was considered a "use of force" under the policy. Deputy Cox directly violated this policy by tasing the Plaintiffs in these cases. (Collett Decl. ¶ 22.)

32. It was against the law and a criminal violation for an officer to ever deploy a charged taser against an inmate, absent an emergency or legitimate use of force incident. A Daggett County officer would be fired if he or she was ever found to have deployed a taser against an inmate and this is exactly what happened to Josh Cox. (*Id.* ¶ 23.)

33. Collett never heard of any inmate ever getting bitten by a dog at the Daggett County Jail. No inmate, officer, or anybody else ever reported that an officer was allowing a dog to bite

an inmate or that an officer was ever tasing an inmate until 2017, after the investigation into Josh Cox began. Moreover, Drollette's complaint letter from 2017 did not mention anything about inmates getting bit by dogs. (*Id.* ¶ 24.)

34. Collett was a part of the hiring process of Mr. Josh Cox, including the interviewing and selection process. Cox had worked as a POST certified officer in Cache County which was helpful in deciding to employ him. Experienced officers were not always easy to find in Daggett County. Collett had no knowledge of any misbehavior by Cox in his prior law enforcement job. (Collett Decl. ¶ 25.)

35. During the state investigation, Collett learned that Mr. Toledo and Mr. Walker were present when Mr. Cox tased prisoners. Collett confronted Mr. Toledo about his failure to report the incident. Mr. Walker had already resigned from the Daggett County so he was unable to confront him. It was contrary to Walker and Toledo's POST certification oaths to fail to report Josh Cox' criminal conduct toward the inmates. (*Id.* ¶ 26.)

36. When Sheriff Jorgensen first informed Collett of the letter from inmate Drollette in 2017, they agreed to immediately contact the Department of Corrections (UDC) to request a formal investigation. (*Id.* ¶ 28.)

37. In 2017, Collett confronted Mr. Cox regarding his involvement in tasing inmates. Collett agreed with Sheriff Jorgensen to place Mr. Cox on administrative leave immediately. At once Collett stripped Cox of his badge, his gun, and his patrol vehicle. As the allegations were substantiated during the investigation, action was taken right away to terminate his employment. Collett took away the rest of his equipment and personally wrote the necessary letter of termination to Mr. Cox. (*Id.* ¶ 29.)

38. The Jail Commander also never heard of any officer, including Cox, tasing inmates or allowing a dog to bite any inmates. (See Declaration of Benjamin Lail ¶¶ 9 and 12.)

ARGUMENT

I. Standard of Review:

Rule 56(a) of the Federal Rules of Civil Procedure mandates that the Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See also* *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Undisputed facts are established by citing to the "record" such as to depositions and declarations. *See* Fed. R. Civ. P. 56(c). Defendants, in this motion, establish that the "material" facts are not in dispute, although there are disputes as to some non-material facts. These facts are established by the filed declarations and the depositions of witnesses as stated above in the statement of material facts. Based upon these facts, the Court should enter summary judgment in favor of all Daggett County Defendants.

II. Plaintiffs have not stated a claim for which relief can be granted and the complaints have some identical duplicative claims that must be dismissed.

There are four Plaintiffs and three complaints in this consolidated suit, yet Plaintiffs' Complaints are all deficient on their face because it is unclear what Daggett County, Jerry Jorgensen, or Erik Bailey are alleged to have done that violated their civil rights. In addition, Plaintiffs have wrongfully duplicated many claims.

A. Plaintiffs cannot state a claim upon which relief can be granted.

Even after numerous depositions and discovery, it is still unclear exactly what Plaintiffs claim these three Defendants did or did not do that could have violated the Plaintiffs' civil rights. A complaint must contain "a short and plain statement of the claim showing that the pleader is

entitled to relief." Fed. R. Civ. P. 8(a)(2). The Complaint fails "to state a claim upon which relief can be granted" and, therefore, should be dismissed. Fed. R. Civ. P. 12(b)(6). A complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). A plaintiff must "plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Legal conclusions can provide a framework for a complaint, but they must be supported by factual allegations. *Id*. at 679.

Particularly, in a Section 1983 context "[a plaintiff] must allege facts sufficient to show (assuming they are true) that the [defendant] plausibly violated [his or her] constitutional rights, and that those rights were clearly established at the time. This requires enough allegations to give the [defendant] notice of the theory under which [his or her] claim is made." *Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008). "It is particularly important in such circumstances that the complaint make clear exactly who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state [or county in this case]." *Id*. at 1250. The collective use of the term Defendants, with no distinction as to what acts are attributable to whom, makes it impossible for individuals to ascertain "what particular unconstitutional acts they are alleged to have committed." *Id*. at 1250.

In their pleadings, Plaintiffs continually group together "defendants" when referring to alleged wrongdoing of any defendants. In this case, the term "defendant" includes the Department of Corrections and its two employees as well as several other employees of the County who have been dismissed from this suit. An example of this is paragraphs 51 and 52 of the Olsen Complaint

which merely states that "Although Defendants were aware of the abuse…." And "upon information and belief, the defendants who worked at the Jail…." These sorts of allegations do not specifically allege wrongdoing on behalf of Jorgensen or the County. It is impossible to determine from the complaints exactly what Jorgensen knew and what he did that violated the Plaintiffs' civil rights. For this reason, the claims should be dismissed as required by *Robbins v. Oklahoma*.

B. An official capacity suit is the same as a suit against the entity.

In addition, Plaintiffs bring duplicative claims such as claims Fifteen and Sixteen of the Porter Complaint and claims Thirteen and Fourteen in the Asay Complaint, which are supposedly against Sheriff Bailey in his official capacity. These claims are identical to and duplicate the first and second claims in these two complaints against the County in that a claim against an employee in his or her official capacity is the same as a claim against the government entity. *See* *Moss v. Kopp*, 559 F.3d 1155, 1166 (10th Cir. 2009) (*quoting* *Kentucky v. Graham*, 473 U.S. 159, 161, 165-66 (1978)). Therefore, all official capacity claims against Erik Bailey are in reality claims against Daggett County. Therefore, the Court should dismiss all claims against Erik Bailey.

C. The Olsen's complaint has several duplicate claims.

Although Olsen does not seem to make the official capacity mistake in his complaint, he does incorrectly duplicate his claims. The Second and Third Causes of action have no legal difference from the First Cause of Action. All are brought for alleged Eighth Amendment violations under 42 U.S.C. § 1983. Therefore, the Second and Third claims are redundant and must be dismissed.

Further, the Fifth and Sixth Causes of Action under the Utah Constitution cannot both be asserted. The Fifth Cause of Action seeks damages under Art. I, § 7 of the Utah Constitution, which

is an alleged Due Process violation. The Utah Due Process Clause does not expand on any federal protections and it is "substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution." *In re Discipline of Sonnenreich*, 2004 UT 3, ¶ 37 (*quoting In re Worthen*, 926 P.2d 853, 876 (Utah 1996)). Under federal law, prisoners who are convicted prisoners are protected by the Eighth Amendment of the United States Constitution and not the Due Process Clause. The Tenth Circuit followed the Supreme Court determining that cases involving prisoner treatment and protection from harm or the lack thereof are to be examined under the Eighth Amendment. *Adkins v. Rodriquez*, 59 F.3d 1034, 1037 (10th Cir. 1995) (although the plaintiff, a prisoner, alleged claims under the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments, her claim remained bounded by the Eighth Amendment); *Hostetler v. Green*, 323 Fed. Appx. 653, 659 (10th Cir. 2009) (though plaintiff as a pretrial detainee asserted a right stemming from the Fourteenth Amendment, the court noted that it applied an analysis identical to the Eighth Amendment cases). Therefore, Olsen's claim under Art. 1, § 7 of the Utah Constitution is redundant of his Art. 1, § 9 claim and in fact precluded because he is a prisoner. Each Plaintiff may only have one Eighth Amendment claim and one claim under the state counterpart, Art. 1, § 9 of the Utah Constitution. All other claims must be dismissed.

D. To the extent equitable relief is requested, it is moot.

It is undisputed that Daggett County has not had a jail or operated a jail since April 2017. They have not had any inmates whatsoever in a Daggett County jail of any kind since about February 2017. (Jorgensen Decl. ¶ 27). Although Plaintiffs have not correctly pled this claim, any claims for equitable relief are moot. See *Tandy v. City of Wichita*, 380 F.3d 1277, 1290-91 (10th Cir. 2004).

III. Daggett County did not violate Plaintiffs' Eighth Amendment rights.

The starting point in analyzing a failure to protect claim is that a jail cannot guarantee the safety of prisoners. *Berry v. Muskogee*, 900 F.2d 1489, 1499 (10th Cir. 1990). In addition, not every injury suffered by a prisoner translates into constitutional liability for corrections officials. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Instead, Plaintiff must show that he or she was incarcerated under conditions which posed a "substantial risk of serious harm," and that each Defendant was "deliberately indifferent" to that risk of harm. *Id.* However, there are several requirements beyond deliberate indifference that must be proved to show county liability.

A governmental entity under 42 U.S.C. § 1983 may only be liable "if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person to be subjected to such deprivation. *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (*citing Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692 (1978)). "But, under § 1983, local governments are responsible only for 'their own illegal acts.' They are not vicariously liable under § 1983 for their employees' actions." *Id.* (internal citations omitted). A plaintiff must prove that "action pursuant to official municipal policy" caused their injury. *Id.* "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id.* Thus, a plaintiff must show (1) a constitutionally defective policy or custom, (2) that the final policymaker who implemented the policy or custom acted with "deliberate indifference" to the constitutional rights of the plaintiff, and (3) that the policy or custom "directly caused" and was the "moving force" behind an underlying constitutional violation that caused constitutional harm to the plaintiff. *See generally*

Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397 (1997). In this case, the policy had to have been the moving force that directly caused Joshua Cox to physically harm the Plaintiffs.

Further, "[d]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor [in this case the Sheriff as the final policymaker for the Jail] disregarded a known or obvious consequence of his action." *Id.* at 410. "That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation; the plaintiff will simply have shown that the employee acted culpably. *Id.* at 406-07. In this case, Plaintiffs' harm was all caused by former Deputy Cox. He has been sued. Moreover, arguably Walker and Toledo knew of the misconduct and did not intervene. These two Defendants were also sued. None of them were the final policymaker as a matter of law.

Since Daggett County is a governmental entity that can only act through its final policymaker, liability under 42 U.S.C. § 1983 is far more difficult to prove. *See Milligan-Hitt v. Bd. of Trs. of Sheridan Cty. Sch. Dist. No. 2*, 523 F.3d 1219 (10th Cir. 2008). Even if disputes of material facts exist as to individual employee conduct, Plaintiff still cannot meet the other burdensome requirements for County liability. "A [county] may not be held liable under 42 U.S.C. § 1983 simply because it employs a person who violated a plaintiff's federally protected rights." *Jenkins v. Wood*, 81 F.3d 988, 993 (10th Cir. 1996) (*quoting Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978)).

Only officials who have "final policymaking authority" may be subject to § 1983 supervisory liability. *Pembaur v. Cincinnati*, 475 U.S. 469, 482-483 (1986). Persistent practices may amount to policy within a municipality, but they must be "so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 563 U.S. 51, 60 (2011). In limited

circumstances a failure to train can give rise to a § 1983 claim. *Id.* at 61. However, "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Id.* This failure to train must at least amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Id.* (internal citations and quotations omitted). "Without notice that a course of training is deficient in a particular respect, decision makers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Id.* at 62.

During the relevant time in 2016, Sheriff Jorgensen was the final policymaker regarding jail policy issues for the County (although not for hiring and firing decisions), and as a matter of law, in that he is charged with keeping the Jail within his county. *See* Utah Code Ann. §17-22-4(1); *see also Morro v. City of Birmingham*, 117 F.3d 508, 510 (11th Cir. 1997). However, Plaintiffs fail to identify a constitutionally defective policy or training that the Sheriff implemented, that directly caused their alleged constitutional injury, and there is no evidence that Sheriff Jorgensen acted with "deliberate indifference" to the constitutional rights of Plaintiffs in implementing such a policy. Failure of Plaintiffs to prove any one of these three elements requires dismissal with prejudice of all claims against the County.

1. Plaintiffs fail to identify a constitutionally defective County policy.

Plaintiffs all allege that former Deputy Cox assaulted them with a taser and perhaps with his dog. However, it a far stretch to say that tasing inmates or allowing dogs to bite inmates was a county policy or training. Plaintiffs fail to allege in their Complaints a specific policy or training that was "constitutionally defective." It is not sufficient for Plaintiffs to merely claim that the policy or training was deficient in some way if they cannot prove it was "constitutionally"

deficient. Jails are not required to have perfect or even good policies, rather they cannot be so constitutionally deficient that they directly cause Plaintiffs to be deprived of their constitutional rights. Without the identification of a specific policy, Plaintiff fails to meet the first prong of *Brown* and all claims against the County must be dismissed on this basis alone. *Brown*, 520 U.S. at 403-404. However, there is no requirement to train or implement policies for rare or unforeseen events. *Walker v. City of New York*, 974 F.2d 293, 297 (2nd Cir. 1992).

Sheriff Jorgensen never experienced a problem with a deputy gratuitously tasing an inmate or having a deputy's dog bite an inmate without provocation. (Jorgensen Decl. ¶ 23.) He could not have been put on "notice' that a problem existed requiring a particular policy to address the misconduct because the problem had never occurred. "Without notice that a course of training is deficient in a particular respect, decision makers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Connick*, 563 U.S. at 62. On the other hand, the Jail did not have any dogs, so it is not unreasonable that they did not have policies specific to dogs. Yet, a dog biting an inmate as allowed by an officer is a "use of force" and the Jail had very good use of force policies that far exceed constitutional minimums.

The Jail had adequate policies relating to use of tasers and use of force and it is undisputed that Cox violated them. The Sheriff's Office policy that applied to all officers required the following:

a. Tasers deployed only according to the policy.
b. Cannot be used to punish or unlawfully coerce subjects regardless of circumstances.
c. Only deputies who successfully completed training can use a taser.
d. Deputies must attend annual taser training.
e. The taser may be used to protect people from bodily harm or to effectuate an arrest.
f. Must attempt verbal persuasion before deployment.
g. Must give a verbal warning before deployment.
h. Must give the person a reasonable amount of time to comply before deployment.

i. The deputy who deployed the taser must take photographs and book into evidence.
j. The deputy's immediate supervisor is notified and completes a taser use report.

(See Collett Decl. ¶ 22 and Exhibit 1 attached to Chris Collett's Declaration.) In addition, the Jail had specific, but similar policies that applied to the Jail that are found in the Use of Force policies, which include tasers and dogs. These policies required:

a. Force may never be used to punish an inmate.
b. Force will never be used in a purposeless, malicious, or sadistic manner.
c. Force will never be used for the sole purpose of causing harm.

(See Collett Decl. ¶ 22 and Exhibit 2, attached to the Declaration of Chris Collett.) It is also undisputed that all officers learn such things as part of their POST certification. All officers further learned County Jail policies and practices during their mandatory FTO training which had to be signed off on showing completion by the Field Training Officer. (See Jorgensen Decl. ¶ 14 and Collett Decl. ¶ 9.) These policies, if they had been followed, would have prevented Plaintiffs' harm from the taser and the dog. However, that is not the legal standard. Plaintiffs must show that the policies are unconstitutional. In this case, the policy or training must be to allow officers to tase inmates or have a dog bite them without any provocation or legitimate penological reason. That is not the policy. The above Sheriff's Office and Jail policies preclude County liability. The Court need not even consider two other elements of municipal liability.

Moreover, the enforcement of the policy was demonstrated by how Cox was treated when allegations of misconduct were first raised by inmate Drollette. It is undisputed that neither Jorgensen nor Collett had any knowledge that a Daggett County inmate was ever tased or that a dog bit an inmate until after the Drollette letter was received in 2017. (See Collett Decl. ¶ 24 and Jorgensen Decl. ¶¶ 19 and 23.) In fact, it was not only against policy what Cox did, but also contrary to the criminal law in Utah which would require a prompt investigation. (See Collett Decl.

¶ 23 and Jorgensen Decl. ¶ 22.) But that is exactly what happened. Jorgensen and Collett called the Utah State Department of Corrections to begin an investigation of the Drollette letter the day that Jorgensen read the letter. (Collett Decl. ¶ 28.) Collett then immediately met with Cox and took his badge, weapons, vehicle and placed him on administrative leave, pending the outcome of the investigation. (Collett Decl. ¶ 29). Based upon the investigation, Collett processed Cox's termination. (Collett Decl. ¶¶ 23 and 29). What happened in this case showed that the policy worked in terms of enforcement.

2. The final policymaker did not act with "deliberate indifference."

Second, only if the County had an unconstitutional policy would Plaintiffs then have to also prove that the Sheriff acted with deliberate indifference in implementing the policy. If there is no unconstitutional policy, then summary judgment must be entered in favor of the County. This point nonetheless shows that even if an unconstitutional policy or training existed, it would not be sufficient to show County liability. Plaintiffs failed to discover any wrongful acts of the final policymaker, Sheriff Jorgensen, that could support a claim that he acted with deliberate indifference to Plaintiffs' constitutional rights in implementing an unconstitutional policy or training. More importantly, all testimony from numerous depositions fail to show that Jorgensen had any knowledge that Cox or anyone else would deploy a taser or a dog to harm an inmate at the Jail and Plaintiffs cannot produce any evidence to contradict that Jorgensen had no knowledge regarding such misconduct. The conduct of Cox was illegal and contrary to the oath taken when an officer is certified by POST. (Jorgensen Decl. ¶ 22.)

Jorgensen could not have acted with deliberate indifference in implementing an unconstitutional policy or training because he lacked knowledge that any officer would tase an

inmate or have a dog bite an inmate. An official is not responsible to take action to protect against an unknown risk. *See generally* *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). In addition, "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838. However, officials who know of a substantial risk are free from liability if they responded reasonably to the risk even though harm was not averted. *Id.* at 844.

The Fifth Circuit Court of Appeals entertained a somewhat legally similar case when police investigators were sued under Section 1983 for failing to prevent sexual assaults. In applying the "deliberate indifference" standard, they quoted *Farmer v. Brennan* stating: "The state actor's actual knowledge is critical to the inquiry" –a "failure to alleviate 'a significant risk that he should have perceived but did not,' while 'no cause for commendation,' does not rise to the level of deliberate indifference." *Whitley v. Hanna*, 726 F.3d 631, 641 (5th Cir. 2013). Plaintiffs cannot create a disputed issue of fact with admissible evidence showing that Sheriff Jorgensen acted with deliberate indifference to Plaintiff's constitutional rights when he lacked knowledge of the harm but did in fact take some action to implement policies and training that would alleviate the harm.

There is no question that the policy stated above regarding Use of Force and the Taser would help alleviate in some fashion the harm sustained in this case. In fact, it is reasonable for Jorgensen to believe that the policy, the criminal prohibition, and the officers POST certification oath, would all but eliminate the potential harm. These facts, along with Jorgensen's lack of knowledge of the risk, more than preclude deliberate indifference of Jorgensen when he implemented the policies.

Jorgensen further had no knowledge of a need for more policy or training relating to officers harming inmates with tasers or dogs. (Jorgensen Decl. ¶ 21.) As stated above, an officer cannot be deliberately indifferent if he never perceived the harm suffered by Plaintiffs. *See generally* *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

Jorgensen had no reason to perceive the risk of harm suffered by Plaintiffs. When Jorgensen became Jail Commander, he instituted several reforms to prevent escapes and to make the Jail safer. (Jorgensen, ¶ 32). He installed a camera system that covered many areas inside the Jail and he contracted with the State Department of Corrections, his former employer, to provide onsite inspections monthly or bi-monthly. He further had the Utah Sheriffs' Association make periodic inspections of the Jail. (See Jorgensen Decl. ¶¶ 28-29 and Collett Decl. ¶ 30.) None of these inspections yielded a warning of what happened to the Plaintiffs. (Jorgensen Decl. ¶¶ 29 and 31-33, and Collett Decl. ¶ 30.) The fact that Jorgensen implemented such inspections, and that they failed to reveal any significant problems in protecting inmates, further negates deliberate indifference.

Sheriff Jorgensen had no knowledge that an officer would tase an inmate or have his dog bite an inmate. Therefore, Plaintiffs cannot show the County's final policymaker acted with deliberate indifference, and for this reason alone, Plaintiffs' claims against the County must be dismissed.

3. Plaintiffs cannot show a County policy "directly caused" their alleged harm.

It is undisputed that Sheriff Jorgensen was not personally involved in monitoring Plaintiffs or that he in anyway authorized the alleged misconduct. The County and the Sheriff cannot be held liable based upon the conduct of any particular employee. However, even if Plaintiffs could

identify a policy and that the Sheriff acted with deliberate indifference to their constitutional rights, they would still have to show "a direct causal link" between an official County policy or training and the constitutional violation, to show county liability under 42 U.S.C. § 1983. *Board of County Commissioners v. Brown*, 520 U.S. 397, 404 (1997). "That is, a plaintiff must show that the [County] 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.* Moreover, *Brown* ruled that more rigorous standards of causation must be employed when a plaintiff claims injury resulted from the acts of a municipal employee by stating, "rigorous standards of culpability and causation must be applied to ensure that the municipality [or county in this case] is not held liable solely for the actions of its employee." *Id.* at 405. *Brown* further states that claims against a governmental entity which do not involve a claim that the entity directed or authorized the deprivation of federal rights, "present much more difficult problems of proof." *Id.* at 406. Plaintiffs cannot satisfy any of these legal burdens.

Like the plaintiff in *Brown*, Plaintiffs seek to hold the County liable for the wrongful acts of an employee even though the County's final policymaker had no personal involvement in the incidents and did not authorize the misconduct. To hold the County liable, Plaintiffs cannot show merely a defect in a policy or training but must show that a constitutionally defective policy "directly caused" the injury and that the Sheriff made a "conscious choice among various alternatives to implement a policy or training which would and did cause the constitutional deprivation. *See generally City of Oklahoma v. Tuttle*, 471 U.S. 808, 824 (1985).

In this case, the Use of Force and Taser policies preclude the actions taken by Cox. Further, state policy in terms of the criminal law and the oath taken by POST certified officers are clearly

aimed at preventing the types of harm that occurred, but certainly not directly causing it. Plaintiffs will no doubt make a very common argument made by the plaintiff's bar, that there was some sort of relaxed or juvenile atmosphere at the Jail and this led to the constitutional violations by Cox. However, a lax environment among officers toward inmates does not equate to directly causing physical harm to inmates. There is absolutely no evidence of misconduct by officers towards inmates of any kind prior to 2017. The County policies and training could never have "directly caused" the Plaintiffs' constitutional harm at the hands of a deputy. The County also had training on how to implement the policies and how to protect inmates from harm. There was never a policy to "cause harm" to inmates. A single deputy directly caused the harm, not a policy or training. For this reason, Plaintiffs cannot show that a county policy or training directly caused Plaintiffs' constitutional violations.

IV. Jerry Jorgensen is entitled to qualified immunity from suit.

Even if Jorgensen was found to have violated Plaintiffs' Eighth Amendment rights, he would still be entitled to qualified immunity. A defendant who raises an affirmative defense of qualified immunity effectively shifts the burden to the plaintiff as a matter of law to show that (1) the defendant's actions violated a constitutional right and (2) the right was clearly established at the time of the defendant's conduct. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Romero v. Board of County Comm'rs*, 60 F.3d 702 (10th Cir. 1995). Ordinarily a Tenth Circuit Court of Appeals or United States Supreme Court decision on point is needed to show a law is clearly established. *Woodward v. Worland*, 977 F.2d 1392, 1397 (10th Cir. 1992). If a plaintiff fails on either prong of qualified immunity, the case must be dismissed in favor of the defendant. Plaintiff cannot satisfy either element in this case.

Qualified immunity shields an officer from suit "when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). It is further important to emphasize that the inquiry must be made in light of the specific context of the case and not as a broad proposition. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). The inquiry is the more "particularized" acts of the defendants in the case at hand. *Id*. at 199.

Qualified immunity must be granted "if a reasonable officer might not have known for certain that the conduct was unlawful." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017) (underlining added). It "does not require a case directly on point for a right to be clearly established, [but] existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal citation omitted). The Supreme Court has repeatedly told courts "not to define clearly established law at a high level of generality." *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) (internal citation omitted). "[T]he clearly established law must be 'particularized' to the facts of the case." *White*, 137 S. Ct. at 552 (*citing Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). That is, "the clearly established right must be defined with specificity." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019).

Qualified immunity "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). It protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* Plaintiff cannot show that Defendants were "plainly incompetent" or knowingly violated the law. Qualified immunity protects officials from liability insofar as their conduct does not violate clearly established constitutional law "of which a reasonable person would have known." *See Pearson v.*

Callahan, 555 U.S. 223, 231 (2009). Defendants could not have known he was violating Bradshaw's constitutional rights because no appellate decisions put him on notice.

Jorgensen is being sued as a supervisor and final policymaker of the Jail as it relates to his responsibilities to keep inmates safe and secure. As stated above, the Court must focus on the "case at hand" and not general notions of law. *See* *Brosseau*, 543 U.S. at 198. The inquiry is the more "particularized" acts of the defendants in the case at hand. *Id*. at 199. This Court must then review the actions taken by Jorgensen to determine whether a reasonable officer would know that he or she is violating the Plaintiffs' constitutional rights.

Once a defendant raises the defense of qualified immunity, it is the plaintiff's burden to cite cases to this court, within the Tenth Circuit or United States Supreme Court, which fairly demonstrate that Jorgensen actions were previously found to be a constitutional violation and that no reasonable officer could think otherwise. See *District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018) (Thus we have stressed the need to "identify a case where an officer acting under similar circumstances… was held to have violated the Fourth Amendment.") and *Rife v. Jefferson*, 742 Fed. Appx. 377; 2018 U.S. App. LEXIS 21426 (Holding that the plaintiff "must identify a case in which a defendant "acting under the same circumstances as" Jeffererson, Willis, and Dale 'was held to have violated" the Eighth or Fourteenth Amendments.') Plaintiffs cannot do this because there are no such cases.

A. Plaintiffs cannot show the first prong of qualified immunity.

Plaintiffs cannot meet their burden to show that Jerry Jorgensen violated their constitutional rights. Jorgensen is sued as the Sheriff or supervisor and policymaker of the Sheriff's Office in terms of his responsibilities to keep inmates safe and secure in the Jail. However,

supervisory liability, technically does not exist under 42 U.S.C. § 1983 and really never did. To state a valid claim against a supervisory under 42 U.S.C. § 1983, a plaintiff must show an affirmative link or "personal participation" of the defendants in causing the alleged constitutional violation. *See* *Rizzo v. Goode*, 423 U.S. 362 (1976), *and* *Durre v. Dempsey*, 869 F.2d 543, 548 (10th Cir. 1989). However, more recent decisions from the United States Supreme Court more clearly limit any claims against supervisors.

For supervisory defendants, plaintiffs have a much more difficult burden. They must demonstrate deliberate indifference in addition to other requirements. The Tenth Circuit reiterated the maxim that a plaintiff must show an "affirmative link" between the supervisor and the constitutional violation. *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010). *Dodds* articulated three elements that a plaintiff must prove to show "supervisory liability:" (1) personal involvement; (2) causation; and (3) culpable state of mind. *Id.* However, *Dodds* noted the Supreme Court in *Iqbal* enumerated a stricter standard for the personal involvement element. *Id.* at 1199.

Iqbal held "[b]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). "[A] supervisor's mere knowledge of his subordinate's" conduct is not enough to impose liability. *Id.* at 677. A plaintiff must now show that the supervisor acted with "purpose rather than [just] knowledge" to impose supervisory liability. *Id.*

Essentially, a supervisor cannot be liable for an incident in which they had no personal involvement in the actual underlying constitutional deprivation. Otherwise, a defendant could promulgate a policy or training years before and arguably be liable for how that policy or training

played itself out in a constitutional violation. Such a "tenuous" link was rejected years ago as insufficient for liability under § 1983. *See* *Grimsley v. MacKay*, 93 F.3d 676, 680 (10th Cir. 1996).

In *Grimsley*, the Tenth Circuit Court of Appeals held that since one prison administrator no longer worked at the prison, he could not possibly be liable as a supervisor since he did not "personally participate" in the incident in question, even though he may have been involved in policy or training issues in the recent past. *Id.* Now, *Iqbal* has clarified that a plaintiff must show that a defendant was actively and personally involved in the underlying constitutional violation. Although at least "knowledge" of the harm is required for municipal liability, *Iqbal* holds that "mere knowledge" is not enough for individuals. *Iqbal*, 556 U.S. at 677. This holding in *Iqbal* is not a significant departure from past Tenth Circuit Court of Appeals decisions that required "personal participation" in the wrongdoing. *See generally* *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996).

This standard in *Iqbal* does not mean a supervisor can never be liable for an underlying constitutional deprivation. The crucial issue comes down to "personal involvement." For example, supervisors who swear out an affidavit and obtain a warrant may still be liable post-*Iqbal* for the subsequent search. *See* *Poolaw v. Marcantel*, 565 F.3d 721 (10th Cir. 2009). Such officers could be said to have "personally participated" in the search because the search would not have happened without the warrant and if no probable cause existed for the warrant, the officers who swore out the affidavit violated the constitution and "personally participated" in the underlying constitutional violation. No such facts exist with respect to Sheriff Jorgensen. He had no participation in Deputy Cox' actions toward Plaintiffs.

Plaintiffs make assault allegations that are somewhat similar to the claims against officials in *Hovater v. Robinson*, 1 F.3d 1063 (10th Cir. 1993). In that case, a corrections officer made sexual advances and propositioned an inmate. The next day he called her to the library where he forcibly sodomized her. *Id.* at 1064-65. Prior to the alleged sexual assault of Ms. Hovater, no female inmate had complained of sexual misconduct by Mr. Robinson or any other detention officer. *Id.* at 1064. Ms. Hovater alleged that the county and the sheriff were responsible:

> [F]or implementing a de facto policy and custom of allowing defendant Robinson to have unsupervised access and custody of female inmates over an extended period of time with deliberate indifference to the consequences, for failure to train the detention officers to prevent the policy and custom from occurring in the first place, for failure to supervise and protect.

Id. at 1065. The Tenth Circuit Court of Appeals stated, "[t]o find a harm present in these circumstances would, in effect, require a conclusion that every male guard is a risk to the bodily integrity of a female inmate whenever the two are left alone. There is absolutely no evidence in the record to support that conclusion." *Id.* at 1068. Additionally, the court held that failure to follow a policy prohibiting female inmates from being supervised by male guards is not a constitutional violation. *Id.*

Similarly, in *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998), based upon similar facts, the Tenth Circuit affirmed a dismissal of charges against the sheriff saying "[e]ven if courses concerning gender issues and inmates' rights were less than adequate, we are not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates. Specific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior." *Id.* at 1311. The *Barney* Court went on to note that the plaintiffs must produce evidence that the sheriff was aware of facts that put him on notice of a

substantial risk of harm (i.e. officer's prior sexual misconduct or previous incidents of sexual assaults by staff against prisoners). *Id.*

There are absolutely no allegations of officers harming inmates while Jorgensen was Sheriff. What Deputy Cox did with his taser and his dog are arguably even less likely to occur than a male officer's sexual assault upon a female inmate. The Sheriff could not have been on notice of something that never occurred. He was not required to fashion policy or training to tell officers that they should not violate the criminal law or violate their POST certification oath. Law enforcement officers need not implement policies or be trained specifically not to engage in criminal conduct such as assaulting an inmate because such misconduct is obviously forbidden for any certified officer. *See* *Schneider v. City of Grand Junction*, 717 F.3d 760, 774 (10th Cir. 2013) ("Specific training unnecessary for an officer to know that sexually assaulting inmates is inappropriate behavior."); *and* *Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998). *See also* *Andrews v. Fowler*, 98 F.3d 1069, 1077 (8th Cir. 1996) (holding that "[i]n 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.").

Since Sheriff Jorgensen did not personally participate with Cox in assaulting inmates and never intended inmates to be so assaulted, he cannot be liable for an Eighth Amendment violation. Plaintiffs have failed to meet the first element of qualified immunity and for this reason, all claims against Jorgensen must be dismissed.

B. Jorgensen's actions were not contrary to clearly established law.

As stated above, Plaintiffs must find a case from the United States Supreme Court or the Tenth Circuit Court of Appeals that demonstrate, beyond a doubt, that a reasonable officer would

know that Jorgensen was violating the Plaintiffs constitutional rights by his actions in 2016. See *Rife v. Jefferson*, 742 Fed. Appx. 377; 2018 U.S. App. LEXIS 21426, quoting *White v. Pauly*, 137 S.Ct. 548, 552 (2017). This requires the Court to review Jorgensen's actions as a supervisor.

It is very common that Sheriffs, like Jorgensen, do not get involved in the day-to-day activities of supervising inmates in a jail. Not surprisingly, there are no facts to suggest that Jorgensen had any knowledge of any officer attempting to tase or have a dog bite an inmate at the Jail. No case law shows that Jorgensen, by allowing a Jail Commander to run the Jail, is violating Plaintiffs' rights in 2016. In any event, Chris Collett was the direct supervisor of the Jail Commander. The Sheriff supervised Collett and sometimes Lail. In any event, neither Lail nor Collett had knowledge that inmates were being assaulted by an officer at the Jail.

The Court can look at all of the actions of Jorgensen in the statement of facts of this memorandum and his affidavit and none of those facts would have put Jorgensen on notice that he was violating clearly established law in 2016. This second prong of qualified immunity is much more difficult for a Plaintiff to prove and this is even more true when a supervisor is sued for the misconduct of a subordinate. No case law holds a Sheriff liable based upon facts similar to this case. The Plaintiffs have already sued the officer who is directly responsible. No supervisor is responsible for line officer misconduct under case law, unless they personally participated in the wrongful acts. Therefore, Jorgensen is entitled to qualified immunity on the second prong regardless of whether the first prong is met.

V. Plaintiffs' Utah constitutional claims are not cognizable.

Finally, the Court must dismiss Plaintiffs' claims deriving from Utah state law. Plaintiffs all allege a violation of Article I, Section 9 of the Utah Constitution. Porter, Drollette, and Asay

incorrectly style this as an "excessive rigor" claim although the constitutional text discusses "unnecessary rigor." Additionally, Plaintiff Olsen alone alleges a violation of the Due Process Clause of the Utah Constitution under Article I, Section 7. However, the undisputed material facts show that Plaintiffs cannot recover on any of their Utah constitutional claims.

First, as it relates to Olsen's due process allegation as stated in point II of this memorandum, the Utah Due Process Clause does not expand on any federal protections and it is "substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution." *In re Discipline of Sonnenreich*, 2004 UT 3, ¶ 37 (*quoting In re Worthen*, 926 P.2d 853, 876 (Utah 1996)). Under federal law, prisoners who are convicted prisoners are protected by the Eighth Amendment of the United States Constitution and not the Due Process clause. Based upon the case law cited above, inmates do not have a Due Process claim when they can assert a "cruel and unusual punishment" cause of action.

Second, to recover under Article I, Section 9 of the Utah Constitution, the state counterpart to the Eighth Amendment, a prisoner would have to show a corrections employee "acted with deliberate indifference" to a serious medical need to show a violation under Art. 1, § 9 of the Utah Constitution *Bott v. DeLand*, 922 P.2d 732, 740 (Utah 1996). *Bott* expressly adopted federal law relating to the Eighth Amendment in determining when corrections officials can be held liable for a Utah Constitutional claim brought by a prisoner. *Id.* In *Bott*, the Utah Supreme Court essentially engrafted into Art. 1, § 9 of the Utah Constitution the same requirements of the seminal United States Supreme Court case on the issue – *Estelle v. Gamble*, 429 U.S. 97, 103-106 (1976). *Bott* held that liability can exist for a Utah constitutional claim when a prisoner shows that the defendant-official acted with "deliberate indifference" to a serious medical need. *Bott*, 922 P.2d at

740. Therefore, *Bott* shows that the analysis for Plaintiffs' claims under Article I, Section 9 of the Utah Constitution is the same as it is for their claims under Eighth Amendment of the United States Constitution. Since Plaintiffs cannot recover under their federal claims as stated above, they are also unable to show any violation of the Utah Constitution. In fact, it is more difficult to obtain money damages for a Utah claim.

Assuming Plaintiffs could show some violation of the Utah Constitution, they would be unable to recover monetary damages because they cannot satisfy the three prong test of *Spackman v. Bd. of Educ. of the Box Elder County Sch. Dist.*, 2000 UT 87, 16 P.3d 533. This requirement is similar to, but more onerous, than the qualified immunity doctrine. However, unlike qualified immunity, the *Spackman* test applies to both individuals and governmental entities. This test requires (1) a plaintiff must establish that he or she suffered a flagrant violation of constitutional rights; (2) existing remedies do not redress his or her injuries; and (3) that equitable relief, such as an injunction, was and is wholly inadequate to protect plaintiff's rights or redress his or her injuries.

A. There was not a flagrant violation of Plaintiffs' Utah constitutional rights.

"[A] plaintiff must establish that he or she suffered a 'flagrant' violation of his or her constitutional rights" before they can obtain money damages. *Spackman*, 2000 UT 87, ¶ 23. "In essence, this means that a defendant must have violated 'clearly established' constitutional rights 'of which a reasonable person would have known.'" *Id.* (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The requirement that the unconstitutional conduct be 'flagrant' ensures that a government employee is allowed the ordinary 'human frailties of forgetfulness, distractibility, or misjudgment without rendering [him or her]self liable for a constitutional violation.'" *Id.* (*quoting Bott v. DeLand*, 922 P.2d 732, 739-40 (Utah 1996)).

This standard borrows its language from federal qualified immunity caselaw. Therefore, the Court should find there is not a flagrant state constitutional violation for the same reasons Jorgensen is entitled to qualified immunity under federal law as stated above. None of the facts show that Jorgensen or the County flagrantly violated Plaintiffs' state constitutional rights.

The burden rests upon Plaintiffs to show some clearly established law that Defendants violated. Daggett County and Jerry Jorgensen are not required to try and shoot down every conceivable theory of liability against them. Daggett County Defendants are not aware of appellate precedent which would show constitutional misconduct based upon their actions, and for this reason, Plaintiffs did not suffer a flagrant violation of their state constitutional rights. Plaintiffs' Utah constitutional claims must be dismissed with prejudice.

B. Existing remedies adequately address Plaintiffs' alleged injuries.

Moreover, Plaintiffs cannot satisfy the second prong of the *Spackman* test. The second prong states that "a plaintiff must establish that existing remedies do not redress his or her injuries." *Spackman*, 2000 UT 87, ¶ 24. "This second requirement is meant to ensure that courts use their common law remedial power cautiously and in favor of existing remedies." *Id*.

Plaintiff has an adequate remedy under 42 U.S.C. § 1983 since it is an existing remedy that addresses the alleged injuries. This is particularly true when the state constitution protects identical rights to the federal constitution. *See In re Discipline of Sonnenreich*, 2004 UT 3, ¶ 37.

When other courts have addressed this issue they have consistently declined to award damages when 42 U.S.C. § 1983 is an adequate remedy. *See Nielson v. City of S. Salt Lake*, 2009 U.S. Dist. LEXIS 98372, 2009 WL 3562081 (D. Utah 2009); *Cavanaugh v. Woods Cross City*, 2009 U.S. Dist. LEXIS 116214, 2009 WL 4981591 (D. Utah 2009); and *Hoggan v. Wasatch*

County, 2011 U.S. Dist. LEXIS 83068, 2011 WL 3240510 (D. Utah 2011). Therefore, monetary damages may not be awarded under the Utah Constitution in this instance.

Plaintiffs' claims under the Utah Constitution perfectly mirror the federal claims. They cannot show that either the County or Jorgensen acted with deliberate indifference. They cannot show that either violated clearly established law or violated the Plaintiffs' constitutional rights. It is simply not even relevant whether one clause protects a plaintiff more than the other because there is no deliberate indifference by the County or Jorgensen and neither implemented unconstitutional policies that directly caused Cox to assault the Plaintiffs. For these reasons, and for all of the reasons that there is no federal liability, there are no cognizable claims under the Utah Constitution against the remaining defendants.

C. Plaintiffs failed to file a bond for attorney fees relating to their state claims.

Finally, no Plaintiffs' filed the statutorily required bond prior to filing suit in this case. Utah Code Ann. § 78B-3-104 requires a plaintiff to file a sufficiently large bond to guarantee payment of all costs, including "a reasonable attorney's fee" as a "condition precedent" to filing suit against any person charged with the enforcement of criminal laws in this state for all state law claims. This statute is not part of the government immunity act, but it provides that a court should award attorney fees when a plaintiff sues a law enforcement officer and fails to prevail in his claims. This is a unique statute that only applies to suits against law enforcement officers and agencies under state law. The focus is the identity of the defendant. The scope of this statute is not limited by the nature of the claim in that the focus is solely upon the identity of the defendant officer, regardless of the type of suit. Defendants do not claim it is a bar to any federal claims, only the Utah Constitutional claims.

In the past, this Court has required plaintiffs to pay attorney fees or to dismiss the case for failing to post a bond. *See* *Mglej v. Garfield Cty.*, No. 2:13-cv-713, 2014 U.S. Dist. LEXIS 90438 (D. Utah July 1, 2014) No Plaintiff filed a bond of any sort in any of these suits. Such a failure requires dismissal of all state law claims as a matter of law and an award of attorney fees. *See* *Kiesel v. Dist. Court of Sixth Judicial Dist.*, 84 P.2d 782 (Utah 1938). Mandatory compliance with this act is constitutional. *Snyder v. Cook*, 688 P.2d 496 (Utah 1984). Failure to comply with this law requires dismissal of all state law claims as to all Defendants. In addition, the Court should award attorney fees as required by this statute to Defendants after an affidavit of fees is submitted.

WHEREFORE: Based upon the undisputed facts, this court should grant summary judgment in favor of the Defendants and dismiss Plaintiffs' claims with prejudice and award attorney fees for defending against all state law claims pursuant to Utah Code Ann. § 78B-3-104 .

Dated this 20th day of August, 2021.

/s/ Frank D. Mylar

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