

No.

IN THE
Supreme Court of the United States

Norman A. Mallory

Petitioner(s)

V.

Rocky Mountain Human Service (SSVFT)


Veteran Services

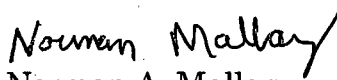
Respondent(s)

On Petition For Writ Of Certiorari
To The (Court whose judgement you seek to review)

PETITION FOR WRIT OF CERTIORARI

Subscribed and sworn before me in the
County of Larimer, State of Colorado,
this 28th day of February, 2023.


(Notary Official Signature)


Norman A. Mallory

Pro. Se.

P.O. Box 683

Fort Collins, CO 80522

970-294-1523

FELICIA WHALEY
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20094034636
MY COMMISSION EXPIRES 10-22-2025

QUESTION(S) PRESENTED

I Isn't this race discrimination, when a black elderly veteran applied to a veterans program for some help during the covid-19 pandemic and was treated differently than other white veterans by denying the elderly black veteran entry into the veterans program?

II Does ("Title VII") of the Civil Right Act Law of 1964 prohibit someone from being denied access to the facilities or services of a business or other public places including local and state government?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

1. March 21st, 2022 A.

Racial discrimination lawsuit filed against Google, on behalf of blacks and minorities.

2. September 15th, 2020 A.

DC man sues luxury apartment complex for racial discrimination. He claims he was kicked out of his apartment building for being shot.

3. Chicago Meat Authority settles discrimination lawsuit on May 21st, 2022. The Meat Authority fired a black employee because of his race. And in retaliation for his reporting of the racial discrimination act.

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Rocky Mountain Human Services (SSVFT) Veterans Services

Respondents

STATUTES AND RULES

Rules 10-14 (petition for Certiorari)

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Rule 30 (Computation and extension of time)

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OTHER

Black lives matter in other racism case's such as Rodney King was a victim of police brutality on March 3, 1991.

Black lives matter again with the police brutality of George Floyd's death on May 25th, 2020.

And again with the police and the EMT action of injection resulted in the death of Elijah McClain on August 30th, 2019.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 30th, 2022.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 30th, 2022, and a copy of the order denying rehearing appears at Appendix _____.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including August 30th, 2022 (date) on November 30th, 2022 (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appellant's constitutional rights to equal protection under 42US(198) were violated.

STATEMENT OF THE CASE

Intentional Race Discrimination

The true facts that a qualifying black elderly veteran applied to a veteran program and was denied entry into that covid-19 relief program that the respondents SSVFT Veteran Service offers.

The elderly black veteran applied on November 9th 2020 to respondents and their SSVFT Office and nothing was ever done with the application. Respondents and their SSVFT Office broke the Civil Rights Act of 1964 Law ("Title VII"). Respondents and the SSVFT Office are both in violation of the appellants Civil Equal legal rights for all American citizens. The appeals court Judge ruled in favor of the respondents which was the wrong decision of the appeals court. Even after hearing how the respondents deliberately discriminated against an elderly black veteran who was deprived of the veterans necessities of life, including leaving the veteran outside in the cold winter months which is dangerous and harmful.

REASONS FOR GRANTING THE PETITION

The elderly black appellant applied for some help during the covid-19 pandemic outbreak to the respondents SSVFT Veteran Corona Virus Relief Program and was denied entry into the respondents program.

The elderly appellant has a covid-19 layoff letter that he presented to the respondents Veteran program.

The elderly black appellant feels that justice will have been served when the respondents are held accountable for their intentionally race discriminated crime that the respondents committed.

CONCLUSION

The Petition for a writ of certiorari should be granted for these 3 reasons below:

I An Act of Intentionally Race discrimination was committed.

II ("Title VII") of the Civil Rights Act Law of 1964 was broken.

III Appellant's Constitution rights to equal protection under 42US (198) were violated.

Respectfully submitted,

Norman A Mallory

Date: February 28th, 2023

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Byron White United States Courthouse

1823 Stout Street

Denver, Colorado 80257

(303) 844-3157

Clerk@ca10.uscourts.gov

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

October 11, 2022

Mr. Jeffrey P. Colwell
United States District Court for the District of Colorado
Office of the Clerk
Alfred A. Arraj U.S. Courthouse
901 19th Street
Denver, CO 80294-3589

RE: 22-1141, Mallory v. Rocky Mountain Human Service SSVFT
Dist/Ag docket: 1:21-CV-00133-RMR-SKC

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's August 30, 2022 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court.

Please contact this office if you have questions.

Sincerely,



Christopher M. Wolpert
Clerk of Court

cc: Norman A. Mallory
John Roger Mann
Ann Purvis
Anna Reinert

CMW/sds

Appendix A

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 30, 2022

**Christopher M. Wolpe
Clerk of Court**

NORMAN A. MALLORY,

Plaintiff - Appellant,

v.

ROCKY MOUNTAIN HUMAN
SERVICE SSVFT,

Defendant - Appellee.

No. 22-1141
(D.C. No. 1:21-CV-00133-RMR-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH, BALDOCK, and McHUGH**, Circuit Judges.

Pro se Plaintiff Norman A. Mallory filed suit against Defendant Rocky Mountain Services, a Colorado nonprofit organization, alleging that it had discriminated against him because of his race in violation of Title VII. Plaintiff, however, failed to plead an employer-employee relationship between him and Defendant in his complaint. He conceded that no such relationship existed when he amended his complaint pursuant to a magistrate judge's order. Plaintiff's amended

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

complaint nevertheless reasserted his claim under Title VII and added a theory of liability based on 42 U.S.C. § 1983.

Defendant moved for judgment on the pleadings and for summary judgment. The magistrate judge assigned to the matter issued a report and recommendation that recommended Defendant's motion for judgment on the pleadings be granted. The magistrate judge reasoned that Plaintiff's admission that no employer-employee relationship existed between him and Defendant precluded any relief under Title VII and that his § 1983 claim failed because Plaintiff had both failed to plead any facts showing Defendant acted under color of state law or support it in response to Defendant's motion. Plaintiff objected. The district court considered Plaintiff's objection, independently reviewed the magistrate judge's recommendation, and concluded "[f]or the reasons stated in the Recommendation, the Amended Complaint . . . should be dismissed because Plaintiff fails to state a Title VII claim and does not plausibly allege a Section 1983 claim." *Mallory v. Rocky Mountain Human Serv. SSVFT*, No. 1:21-CV-00133-RMR-SKC, 2022 WL 1295443, at *2 (D. Colo. Mar. 28, 2022) (citation omitted).

But the district court did not stop there—it also considered Defendant's motion for summary judgment. It granted that motion "[f]or similar reasons that Magistrate Judge Crews recommended that the Court grant Defendant's Motion for Judgment on the Pleadings." *Id.* at *3. In doing so, the district court considered documents presented by Defendant showing that it is a nonprofit and not a governmental organization. *Id.* at *4. Thus, the district court concluded that Defendant had carried

its burden to make a prima facie showing that there was no triable issue of fact. *Id.* In the view of the district court, Plaintiff failed to meaningfully respond to that showing and did not carry his burden to show a triable issue of fact. *Id.* Therefore, the district court adopted the magistrate judge's recommendation and granted both Defendant's motion for judgment on the pleadings and motion for summary judgment. *Id.*

We have independently reviewed the magistrate judge's report and recommendation, the district court's order granting Defendant's motion for judgment on the pleadings and motion for summary judgment, and the record on appeal. We discern no error in the district court's disposition of this case and "see no useful purpose in writing at length." *Andrew v. Walzl*, 834 F'Appx. 472, 473 (10th Cir. 2021) (unpublished). Accordingly, we **AFFIRM** the decision below for the reasons stated in the district court's order.

Entered for the Court

Bobby R. Baldock
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez**

Civil Action No. 1:21-cv-00133-RMR-SKC

NORMAN A. MALLORY,

Plaintiff,

v.

ROCKY MOUNTAIN HUMAN SERVICE SSVFT,

Defendant.

ORDER

This matter is before the Court on Magistrate Judge S. Kato Crews' Recommendation Re: Motion for Judgment on the Pleadings, ECF No. 68. Also pending before the Court are Defendant's Motion to Strike Plaintiff's Surreply to Defendant's Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c), ECF No. 46; Defendant's Partially Unopposed Motion to Modify Scheduling Order, ECF No. 58; Defendant's second Partially Unopposed Motion to Modify Scheduling Order, ECF No. 60; and Defendant's Motion for Summary Judgment, ECF No. 61.

On February 25, 2022, Magistrate Judge Crews filed the Recommendation, in which he recommended that Defendant's Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c), ECF No. 36, be granted. See ECF No. 68 at 10. On March 4, 2022, Plaintiff, proceeding *pro se*, filed a document with the title "Plaintiff is providing argument supporting section 1983 claim in response to the motion." ECF No. 69. The

Court construes this document as Plaintiff's timely filed Objection to Magistrate Judge Crews' Recommendation, pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b)(2). On March 18, 2022, Defendant filed its Response to Plaintiff's Objection to Recommendation Re: Motion for Judgment on the Pleadings. ECF No. 70.

Having received and considered de novo the Recommendation, along with Plaintiff's Objection and the entire record, the Court OVERRULES Plaintiff's Objection, ECF No. 69, and ACCEPTS AND ADOPTS the Recommendation, ECF No. 68. Accordingly, Defendant's Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c), ECF No. 36, is GRANTED. In addition, for the reasons stated below, the Court also GRANTS Defendant's Motion for Summary Judgment, ECF No. 61. As such, the Court FINDS AS MOOT Defendant's Partially Unopposed Motions to Modify Scheduling Order, ECF Nos. 58, 60, and Defendant's Motion to Strike Plaintiff's Surreply to Defendant's Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c), ECF No. 46.

I. THE RECOMMENDATION

The Court is required to make a de novo determination of those portions of a magistrate judge's recommendation to which a specific, timely objection has been made, and it may accept, reject, or modify any or all of the magistrate judge's findings or recommendations. 28 U.S.C. § 626(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); Fed. R. Civ. P. 72(b)(3) ("The district

judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.").

"[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Property*, 73 F.3d 1057, 1060 (10th Cir. 1996). In the absence of a proper objection, the district court may review a magistrate judge's recommendation under any standard it deems appropriate. See *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); see also *Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."). When no proper objection is filed, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."¹ Fed. R. Civ. P. 72(b) advisory committee's note to 1993 amendment.

In his Objection, Plaintiff argues that he "disagrees with the court's recommends [sic] granting the motion, for these reasons." ECF No. 69 at 1.

- "Reason number one: Plaintiff did not abandon his section 1983 claim." *Id.*
- "Reason number two: Plaintiff is still claiming that RMHS is still in violation of the Plaintiff's constitutional rights to equal protection under 42 U.S. C [sic] (1983)." *Id.*

¹ This standard of review is something less than a "clearly erroneous or contrary to law" standard of review, Fed. R. Civ. P. 72(a), which in turn is less than a de novo review, Fed. R. Civ. P. 72(b). See, e.g., *National Jewish Health v. WebMD Health Servs. Grp., Inc.*, 305 F.R.D. 247, 249 n.1 (D. Colo. 2014) (Daniel, J.).

- “Reason number three: the Plaintiff filed his race discrimination lawsuit under the Public Accommodations Law which hold the same consequences as the employment law does.” *Id.*
- “The bottom line is that the RMHS deliberately and intentionally discriminated against an elderly black veteran, who was deprived of the necessities of life including leaving the Plaintiff outside in the cold winter months which is both dangerous and in harms way, which breaks the Civil Rights Act of 1964 Law (“Title VII”). *Id.*

Plaintiff does not further elaborate on these arguments in any way. These objections constitute conclusory arguments that are arguably not specific enough to warrant de novo review of the Recommendation. *See id.*; *Summers*, 927 F.2d at 1167; *see also Thomas*, 474 U.S. at 150. Nevertheless, the Court has reviewed the Recommendation, ECF No. 68; the Objection, ECF No. 69; and the entire record de novo and concludes that, under either a de novo or a clear error standard of review, the Recommendation accurately sets forth and applies the appropriate legal standards. For the reasons stated in the Recommendation, the Amended Complaint, ECF No. 6, should be dismissed because Plaintiff fails to state a Title VII claim and does not plausibly allege a Section 1983 claim. *See* ECF No. 68 at 6–10. Therefore, the Court OVERRULES Plaintiff’s Objection, ECF No. 69, and ACCEPTS AND ADOPTS the Recommendation, ECF No. 68. Accordingly, Defendant’s Motion for Judgment on the Pleadings, ECF No. 36, is GRANTED.

II. THE MOTION FOR SUMMARY JUDGMENT

On January 21, 2022, Defendant also filed a Motion for Summary Judgment. ECF No. 61. Plaintiff responded on February 9, 2022, ECF No. 66, and Defendant filed a Reply on February 24, 2022, ECF No. 67. Defendant’s Motion for Summary Judgment is ripe for review. The Court’s adoption of the Recommendation to grant Defendant’s Motion

for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c), ECF No. 36, arguably moots Defendant's pending Motion for Summary Judgment, ECF No. 61. However, even if granting Defendant's Motion for Judgment on the Pleadings did not moot Defendant's Motion for Summary Judgment, upon review the Motion for Summary Judgment and the full record, for the reasons stated below, the Court would grant Defendant's Motion for Summary Judgment.

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." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). "A fact is 'material if under the substantive law it is essential to the proper disposition of the claim.'" *Wright ex rel. Tr. Co. of Kan. v. Abbot Lab'ys, Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)); *see also Anderson*, 477 U.S. at 248 ("As to materiality, the substantive law will identify which facts are material."). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; *see also Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000). "[T]he dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Allen v. Muskogee, Okla.*, 119 F.3d 837, 839 (10th Cir. 1997); *see also Anderson*, 477 U.S. at 248. "To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Bones v. Honeywell, Int'l, Inc.*, 366 F.3d 869, 876 (10th Cir. 2004).

“[O]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). However, “the nonmovant that would bear the burden of persuasion at trial may not simply rest upon its pleadings” at this stage. *Adler*, 144 F.3d at 671. If the movant carries “the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law,” then “the burden shifts to the nonmovant to go beyond the pleadings and ‘set forth specific facts’ that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.” *Id.* at 670–71.

Ultimately, the Court’s inquiry is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251–52. “[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Id.* at 249–50 (citations omitted).

For similar reasons that Magistrate Judge Crews recommended that the Court grant Defendant’s Motion for Judgment on the Pleadings, the Court also grants Defendant’s Motion for Summary Judgment, ECF No. 61. Plaintiff’s operative Amended Complaint alleges that Defendant denied Plaintiff access to its Support Services for Veteran Families (“SSVF”) Program (which “offers a range of supportive services to eligible veteran families that are designed to promote housing stability,” ECF No. 14 ¶ 2)

“[a]ll because [Plaintiff] was Black.” ECF No. 6 at 4 (“[T]hey have no Black veterans in the Northern Rocky Mountain Human Services SSVFT² COVID-19 relief program, and the SSVFT people plan to keep it that way.”). Plaintiff alleges that “[b]ased on my race and the color of my skin I was treated different and unjust in comparison to other white veterans that applied for some COVID-19 relief during the pandemic.” *Id.*

Plaintiff’s Amended Complaint expressly identifies Title VII of the Civil Rights Act of 1964 as the basis for his claims. *Id.* However, as Magistrate Judge Gallagher did in ordering Plaintiff to file his Amended Complaint, Magistrate Judge Crews also liberally construed Plaintiff’s Amended Complaint as “attempting to assert an equal protection claim” under 42 U.S.C. § 1983. See ECF No. 5 at 3; ECF No. 68 at 7–10. Here, the Court also liberally construes Plaintiff’s Amended Complaint as attempting to assert both a Title VII claim and an equal protection claim under Section 1983. See *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972)) (“A pro se litigant’s pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers.”). In doing so, the Court has not “assume[d] the role of advocate for the pro se litigant.” See *id.*

In its Motion for Summary Judgment, Defendant argues that Plaintiff’s Title VII claim fails because “Plaintiff did not allege that he had any employment relationship with [Defendant].” ECF No. 61 at 4. In fact, Defendant notes that Plaintiff “**expressly admitted** in his Amended Complaint that he did **not** have an employment relationship

² As noted in the Recommendation, ECF No. 68 at 2 n.2, Plaintiff refers to “SSVFT,” ECF No. 6 at 4–6, but Defendant has clarified that the program is the Support Services for Veteran Families (SSVF) Program, see ECF No. 14 ¶ 1; ECF No. 61 ¶ 7.

with [Defendant].” *Id.* at 5 (emphasis in original); see also ECF No. 6 at 4 (“My complaint is not an Employer and Employee relation. Between me and [Defendant] but it is a public accommodation between me and [Defendant’s] SSVFT veteran COVID-19 relief program.”). Defendant points out that it is necessary for a plaintiff to allege an employment relationship with the defendant in order to establish a prima facie case under Title VII. See ECF No. 61 at 5 (citing *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1069 (10th Cir. 1998)).

As for Plaintiff’s Section 1983 equal protection claim, Defendant argues that even if the Court liberally construes the Amended Complaint as bringing such a claim, the Court should grant summary judgment in Defendant’s favor on that claim because Plaintiff has not, and cannot, allege any facts showing that Defendant is a state actor or acted under color of state law, as is required to establish a Section 1983 claim. *Id.* at 6–7 (citing 42 U.S.C. § 1983; *Sandy v. Baca Grande Prop. Owners Ass’n*, No. 1:18-cv-02572-RM-KMT, 2020 WL 563294, at *5 (D. Colo. Feb. 5, 2020) (Moore, J.)). Defendant attaches to its Motion for Summary Judgment a Declaration by its Chief Executive Officer, ECF No. 61-2; its Corporate Disclosure Statement (ECF No. 15), ECF No. 61-3; and what appears to be the search results from the Colorado Secretary of State’s business database regarding Defendant’s corporate information, ECF No. 61-4. These documents state that Defendant is a “Colorado nonprofit corporation,” ECF Nos. 15, 61-3; that it is “not a government organization,” ECF No. 61-2 ¶ 5; and that it “does not represent the State of Colorado or act on behalf of the State of Colorado” in implementing its SSVF Program, *id.* ¶ 6. See also ECF No. 61-4 at 1 (“Form | Nonprofit Corporation”). The Court finds

that Defendant has carried its “initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law” as to both Plaintiff’s Title VII claim and the Section 1983 claim that the Court liberally construes the Amended Complaint as bringing. *See Adler*, 144 F.3d at 670–71.

In his Response, Plaintiff argues that:

(1) RMHS broke the civil rights act of 1964 Law (Title VII) they discriminated against a qualifying Elderly Black Veteran the Covid-19 relief program they offer to qualifying veterans.

(2) RMHS, is in violation of the Plaintiffs civil rights.

ECF No. 66 at 1. Plaintiff does not elaborate further.³ *See id.* These arguments do not carry Plaintiff’s burden “to go beyond the pleadings and ‘set forth specific facts’ that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.” *Adler*, 144 F.3d at 671. Even viewing the facts, and the inferences to be drawn therefrom, “in the light most favorable to” Plaintiff, the Court finds that there remains no genuine issue of material fact, and summary judgment in favor of Defendant is warranted. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587. Therefore, the Court GRANTS Defendant’s Motion for Summary Judgment.

III. CONCLUSION

For the reasons stated above, it is

ORDERED that Plaintiff’s Objection, ECF No. 69, is OVERRULED; it is

³ Furthermore, Plaintiff has already been advised of the deficiencies related to these issues in his Complaint and given the chance to amend. *See* ECF Nos. 5–6. Nonetheless, for the reasons stated here and in Magistrate Judge Crews’ Recommendation, ECF No. 68, Plaintiff has failed to cure these deficiencies, and he has not moved for leave to amend the Complaint a second time.

FURTHER ORDERED that Magistrate Judge Crews' Recommendation Re: Motion for Judgment on the Pleadings [Dkt. 36] is ACCEPTED AND ADOPTED; accordingly, it is

FURTHER ORDERED that Defendant's Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c), ECF No. 36, is GRANTED; it is

FURTHER ORDERED that Defendant's Motion to Strike Plaintiff's Reply to Defendant's Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c), ECF No. 46, is FOUND AS MOOT; it is

FURTHER ORDERED that Defendant's Motion for Summary Judgment, ECF No. 61, is GRANTED; it is

FURTHER ORDERED that Plaintiff's claims and this case are DISMISSED WITH PREJUDICE; it is

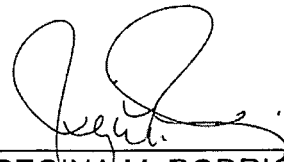
FURTHER ORDERED that Defendant's Partially Unopposed Motions to Modify Scheduling Order, ECF Nos. 58, 60, are FOUND AS MOOT; and it is

FURTHER ORDERED that a copy of this Order shall be sent to the following:

Norman A. Mallory
P.O. Box 683
Fort Collins, CO 80522

DATED: March 28, 2022

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Regina M. Rodriguez', is written over a horizontal line.

REGINA M. RODRIGUEZ
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**
U.S. Magistrate Judge S. Kato Crews

Civil Action No. 1:21-cv-00133-RMR-SKC

NORMAN A. MALLORY;

Plaintiff,

v.

ROCKY MOUNTAIN HUMAN SERVICES SSVFT,

Defendant.

**RECOMMENDATION RE:
MOTION FOR JUDGMENT ON THE PLEADINGS [DKT. 36]**

This Recommendation addresses Defendant's Motion for Judgement on the Pleadings ("Motion"). [Dkt. 36.] The presiding District Judge referred the Motion to the Magistrate Judge. [Dkt. 37.] The Court has reviewed the related briefing and the entire record. No hearing is necessary. For the reasons stated herein, the Court recommends the Motion be GRANTED.

BACKGROUND¹

¹ The Court accepts the well-pleaded facts as true and views the allegations in the light most favorable to the non-movant. *Casanova v. Ulibarri*, 595 F.3d 1120, 1124-25 (10th Cir. 2010). Moreover, because Plaintiff is *pro se*, the Court liberally construes his pleadings and other papers, without acting as his advocate. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)).

Plaintiff Norman A. Mallory is a Black veteran. [Dkt. 6, p.4.] He served in the United States Marine Corps from 1971 through 1973, before being honorably discharged. [*Id.* at ¶3.] He brings this civil suit against Defendant Rocky Mountain Human Services (“RMHS”) alleging it discriminated against him based on his race when he applied for, and was denied, “access to [its] veteran COVID-19 relief program.” [Dkt. 6, p.4.]

Defendant administers a coronavirus relief program through its Supportive Services for Veteran Families.² [*Id.* at ¶1.] The program assists qualifying veterans with housing, schooling, and transportation. [*Id.* p.4.] Plaintiff alleges he applied for COVID-19 relief services through the program, and despite qualifying, Defendant either denied or failed to process his application. [*Id.* at p.4]

Plaintiff alleges he completed, or tried to complete, an “intake application” over the phone with Defendant on November 9, 13, 18, and December 2, and 4.³ [*Id.* at ¶5.] Attempting to construe the *pro se* Amended Complaint liberally, Plaintiff seems to allege either that he applied for COVID-relief services during each phone call and was denied services each time, or he tried to apply each time but Defendant failed to

² Plaintiff refers to “SSVFT” in the Amended Complaint. In its Answer Defendant clarifies the program title and “SSVF” acronym. [Dkt. 14, ¶1.] The Court utilizes “SSVF” throughout.

³ The Amended Complaint does not specify the applicable year. Because the Amended Complaint was filed in January 2021 and the allegations pertain to COVID-19 relief, the Court liberally construes the calls to have occurred in 2020.

process or complete his applications. [See, e.g., *Id.* at ¶¶8-9.] Plaintiff alleges because Defendant failed to provide him COVID-19 relief, he was homeless from Thanksgiving through the new year. [*Id.* at ¶11.] He seeks monetary damages in the amount of \$5,000,000. [*Id.* at 6.]

Plaintiff alleges he was treated differently because of his race and color. [*Id.* at 4.] He explains there are no Black veterans in Defendant's Northern Colorado COVID-19 relief program, and he alleges Defendant "plan[s] to keep it that way." [*Id.*] Plaintiff alleges his constitutional rights were violated "under state action which provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal right to satisfy the under-color-of-law element." [*Id.*] He also claims race discrimination was the motivating factor in Defendant denying him access to this program. [*Id.*]

Plaintiff filed his Complaint identifying Title VII of the Civil Rights Act of 1964 as the basis for his claims. [See generally, Dkt. 1.] Subsequently, Magistrate Judge Gallagher issued an order directing Plaintiff to amend his complaint because he had failed to allege an employer-employee relationship. [Dkt. 5, pp.2-3.] Judge Gallagher also told Plaintiff to use the District's Employment Discrimination Complaint form if the action related to an employer-employee dispute. [*Id.* at 3.] In addition, Judge Gallagher liberally construed Plaintiff's complaint to allege a constitutional right to equal protection under 42 U.S.C. § 1983. [*Id.*] His order explains that a plaintiff

asserting a Section 1983 claim must show he was deprived of a federal right through conduct that is “fairly attributable to the State.” [*Id.*]

Plaintiff filed his Amended Complaint on February 11, 2021. [Dkt. 6.] The Amended Complaint expressly states this matter does not involve an employer-employee dispute but instead relates to a “public accommodation.” [*Id.* at 4.] Defendant filed its answer and now seeks judgment on the pleadings arguing the Amended Complaint fails to state either a Title VII or Section 1983 claim. [Dkt. 36.]

LEGAL PRINCIPLES

A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) may be filed “after the pleadings are closed.” *Tuttle v. Nationwide Affinity Ins. Co. of Am.*, No. 19-cv-00526-NYW, 2019 WL 2208513, at *2 (D. Colo. May 22, 2019). Defendant answered asserting no counterclaims, and therefore, the pleadings are closed. *See Maniaci v. Georgetown Univ.*, 510 F.Supp.2d 50, 60 (D.D.C. 2007) (“Pleadings are closed if no counter or cross claims are at issue when a complaint and an answer have been filed.”).

The Court analyzes motions for judgment on the pleadings under Fed. R. Civ. P. 12(c) according to the same standards as a motion under Rule 12(b)(6). *Fisher v. Shamburg*, 624 F.2d 156, 161 (10th Cir. 1980). But the court considers a broader factual record when evaluating a Rule 12(c) motion; the court is not limited to the well-pleaded allegations contained in the complaint but instead considers the

complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case. *Tuttle*, 2019 WL 2208513, at *2.

Under Rule 12(b)(6), a court may dismiss a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). The *Twombly-Iqbal* pleading standard requires that courts take a two-prong approach to evaluating the sufficiency of a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007).

The first prong requires the court to identify which allegations “are not entitled to the assumption of truth” because, for example, they state legal conclusions or are mere “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Iqbal*, 556 U.S. at 678. The second prong requires the court to assume the truth of the well-pleaded factual allegations “and then determine whether they plausibly give rise to an entitlement to relief.” *Id.* at 679. “Accordingly, in examining a complaint under Rule 12(b)(6), [courts] will disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable.” *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012).

To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Iqbal*,

556 U.S. at 678 (internal quotation marks omitted). A claim is plausible when the plaintiff “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This standard requires more than the sheer possibility that a defendant has acted unlawfully. *Id.* If the allegations “are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs ‘have not nudged their claims across the line from conceivable to plausible.’” *Robbins v. Oklahoma*, 519 F.3d 1242, (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). The standard is a liberal one, and “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely.” *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009).

DISCUSSION

Defendant argues the Amended Complaint should be dismissed because Plaintiff fails to state a Title VII claim and does not plausibly allege a Section 1983 claim. The Court agrees and recommends the Motion be granted.

1. Title VII

Congress enacted Title VII to prohibit discriminatory employment practices based on race, color, religion, sex, or national origin. *Tafoya v. Adams*, 612 F. Supp. 1097, 1098 (D. Colo. 1985). To maintain a Title VII claim, there must be an employment relationship between the parties. *Cannizzo v. Lab Corp. of Am.*, No. 07-

CV-01214-WDM-KLM, 2008 WL 68846, at *3 (D. Colo. Jan 3, 2008). Here, Plaintiff alleges Title VII prohibits discrimination in public places and makes race discrimination illegal. [Dkt. 6, p. 4.] And he expressly denies an employer-employee relationship between he and Defendant. [*Id.*] Moreover, Plaintiff did not file his Amended Complaint on the District's Employment Discrimination Complaint form as Judge Gallagher directed, lending further support to the fact that Plaintiff did not intend to file a Title VII claim. Accordingly, because the Amended Complaint fails to allege the requisite employer-employee relationship for a Title VII claim, the Court recommends granting the Motion as to this claim.

2. Section 1983

To state a claim under Section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (overruled in part on other grounds, *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986)); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978)). Acting under color of state law requires the defendant in a Section 1983 action have exercised power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *West*, 487 U.S. at 48 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). To constitute state action, “the deprivation must

be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible,” and “the party charged with the deprivation must be a person who may fairly be said to be a state actor.” *Id.* State employment is generally sufficient to render the defendant a state actor. *Id.* Thus, generally, a public employee acts under color of state law while acting in their official capacity or while exercising their responsibilities under state law. *Id.*

Regarding his Section 1983 claim, Plaintiff alleges, “I feel my constitutional rights were in violation under state action which provides for a federal cause of action against any person who, acting under color of state law, deprives another of his federal right to satisfy the under-the-color-of-state-law element.” Unfortunately, this is the type of “threadbare” recitation of the elements of a claim that the Court cannot consider in determining whether Plaintiff alleged a plausible Section 1983 claim. *Iqbal*, 556 U.S. at 678. The Amended Complaint consists of two pages of what Plaintiff calls “supporting facts.” [Dkt. 6, pp. 4-5.] Instead of facts, however, the narrative primarily consists of legal conclusions which the Court may not consider.

At best, when liberally construed, the Amended Complaint could be read as attempting to assert an equal protection claim. *See Brown v. Berthoud Fire Protection District*, No. 12-cv-03028-REB-KLM, 2013 WL 6152407, at *5 (D. Colo. Nov. 22, 2013) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) “The Equal Protection Clause prohibits the government from treating similarly situated

individuals differently.”) [*See Id.* ¶7 (he was “eligible for the Rocky Mountain Human Services SSVFT [*sic*] program which offer [*sic*] a COVID-19 relief program and [he was] treated unjustly and differently from other white veterans.”).] But even then, it fails to identify a person acting under state law responsible for the alleged deprivation. It is well-established a complaint which fails to allege facts showing a private person participated in the underlying conduct is insufficient to state a Section 1983 claim against the private entity, here this Defendant. *Douglas v. Miller*, 864 F.Supp.2d 1205, 1217 (W.D. Okla. 2012).

To be sure, Plaintiff fails to allege Defendant is a state entity or actor, let alone that it represents the state in some capacity. And Section 1983 does not impose liability in the absence of action taken under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970); *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (“[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how . . . wrongful.”); *Douglas*, 864 F. Supp.2d at 1217 (“Because § 1983 is designed to protect individuals from violations of their rights by state actors, the only proper defendants in a § 1983 claim are those who represent the state in some capacity”).

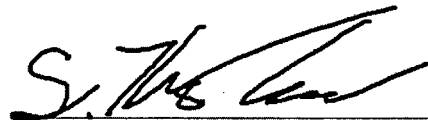
Finally, because Plaintiff failed to provide arguments supporting his Section 1983 claim in his Response, the Court deems this claim abandoned in any event. *See Poole v. Southwestern Bell Telephone L.P.*, 86 Fed.App’x 372, 374 (10th Cir.2003)

(deeming claims abandoned because the plaintiff did not oppose defendant's argument to dismiss them in response to a motion to dismiss).

For these reasons, the Court recommends GRANTING the Motion.

DATED: February 25, 2022.

BY THE COURT:

A handwritten signature in black ink, appearing to read "S. Kato Crews", is written over a horizontal line.

S. Kato Crews
United States Magistrate Judge

WEST DIRECT OIL

Norman Mallory
PO Box 683
Fort Collins, CO 80522
United States

Date: April 10, 2020

Dear Norman Mallory:

I regret to inform you that you are being laid off from your position as a Parts Runner effective April 10, 2020. This layoff should be considered permanent.

As a laid off employee, there are several issues you will need to be aware of. You will receive information in the mail in the next few weeks on continuation under COBRA of any health care benefits in which you are enrolled. If you have any questions regarding your health benefits and transition to COBRA you can contact me.

Attached to this letter you will also find a 401k termination form. You will be able to rollover or withdraw your funds minus any applicable fees and taxes. Once you decide you should submit your 401k application to me to get processed.

Please also notice enclosed is the unemployment information for the State of Colorado.

The following company property must be returned by April 10, 2020:

- Passwords

Pay

In accordance with company policy and relevant state laws, your final paycheck is included with this letter. You are being paid all hours owed up to Date. Benefits are scheduled to end Date.

To ensure you receive documents and notices from the company, please contact us if your address changes. If you have any questions, please call me at.

Sincerely yours,

~Tabitha

Tabitha Hernandez
Human Resource
Tabitha.hernandez@westdirectoil.com
Cell (720) 483-6499

Copy: Personnel File

CERTIFICATE OF COMPLIANCE

No. 07-

Norman A. Mallory

Petitioner(s)

v.

Rocky Mountain Human Services

(SSVFT) Veteran Services

Respondent(s)

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 833 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 28th, 2023

Norman Mallory

Subscribed and sworn before me in the
County of Larimer, State of Colorado,
this 28th day of February, 2023.

[Signature]
(Notary Official Signature)

