

APPENDIX

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 16-4105

Charles L. Burgett

Plaintiff - Appellant

v.

Kansas City Board of Police Commissioners

Defendant

Shelia Porter; Virgil Lienhard; Kansas City Area Transportation Authority; Police
Officer Brent Cartwright

Defendants - Appellees

Patrick McInerney, in his official capacity as a member of the Board of Police Commissioners of Kansas City, Missouri, and in his individual capacity; Alvin Brooks, in his official capacity as a member of the Board of Police Commissioners of Kansas City, Missouri, and in his individual capacity; Angela Wasson-Hunt, in her official capacity as a member of the Board of Police Commissioners of Kansas City, Missouri, and in her individual capacity; Lisa Pelofsky, in her official capacity as a member of the Board of Police Commissioners of Kansas City, Missouri, and in her individual capacity; Mayor Sly James, in his official capacity as a member of the Board of Police Commissioners of Kansas City, Missouri, and in his individual capacity; Michael Rader, Current Board Commissioner, Board of Police Commissioner City of Kansas City

Defendants

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: December 26, 2017

Filed: January 19, 2018

[Unpublished]

Before BENTON, BOWMAN, and KELLY, Circuit Judges.

PER CURIAM.

Charles L. Burgett appeals the district court's¹ adverse grant of summary judgment, following remand, in his 42 U.S.C. § 1983 action arising from an incident on a Kansas City Area Transportation Authority bus. Upon careful consideration of Burgett's arguments for reversal, and de novo review of the record, see Murchison v. Rogers, 779 F.3d 882, 886-87 (8th Cir. 2015) (viewing evidence in light most favorable to nonmovant, and drawing all reasonable inferences in his favor), we agree with the district court that the remaining defendants satisfied their burden of demonstrating that there were no genuine issues of material fact for trial on Burgett's Fourth Amendment and related conspiracy claims, or on his 42 U.S.C. § 2000d claim, against them. The judgment is affirmed. See 8th Cir. R. 47B.

¹The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

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APPENDIX B

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

CHARLES L. BURGETT,	)	
	)	
Plaintiff,	)	Civil No. 13-CV-00494-W-DW
	)	
v.	)	
	)	
KANSAS CITY BOARD OF POLICE	)	
COMMISSIONERS, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is the Defendant Kansas City Police Officer Brent Cartwright's ("Cartwright") Motion for Summary Judgment (the "Motion"). See Doc. 181. The Plaintiff Charles Burgett ("Burgett") filed suggestions in opposition (Doc. 190), and Cartwright filed a reply brief (Doc. 192). The Court finds that Burgett's false arrest and false imprisonment claim fails because Cartwright had probable cause for the arrest, and that there is insufficient evidence to support Burgett's conspiracy claim. Therefore, and for the reasons set forth below, Cartwright's Motion is GRANTED and Burgett's claims against Cartwright are DISMISSED WITH PREJUDICE.

I.¹

On December 21, 2009, at approximately 9:50 p.m., Burgett boarded a Kansas City Area Transportation Authority ("KCATA") bus. Shelia Porter ("Porter") was driving the bus. After Burgett had been on the bus for over one hour, Porter called her supervisor, Virgil Lienhard

¹ The following facts are either uncontroverted by the parties or deemed uncontroverted by the Court. These facts are taken from the parties' briefs and exhibits, without further quotation or attribution unless otherwise noted. Only those facts necessary to resolve the pending Motion are discussed below.

(“Lienhard”). Lienhard responded to the call, boarded the bus, and spoke with Porter. Lienhard then asked Burgett to get off the bus, but Burgett refused.

At approximately 11:00 p.m., Cartwright and two other police officers arrived at 11th and Oak Streets on a report of a male refusing to exit a KCATA bus. The officers spoke with Lienhard, who reported that Burgett had been “riding around on the bus. And [Porter] asked him where he was getting off. He told her Pershing and Grand. He’s already been past there once. And then [Burgett] started calling [Porter] names and stuff, so I’ve asked him [to] leave the bus, and he won’t do it.” Doc. 182, p. 8. The officers then boarded the bus. Cartwright told Burgett that his “time was up” and to exit the bus. Burgett did not initially comply. Cartwright then told Burgett he could voluntarily exit or he could be “dragged off the bus.” At that point Burgett decided to voluntarily leave the bus.

Cartwright asked Lienhard if he wanted Burgett arrested for trespassing, and Lienhard affirmatively responded that he would “sign.” Cartwright arrested Burgett for violating Kansas City Municipal Ordinance Section 50-102(a), which makes it a violation to “knowingly remain[] unlawfully in or on . . . a[n] inhabitable structure or upon real property.” Burgett was transported to KCPD Headquarters, where he was booked on the trespassing charge and on an unrelated bench warrant. Burgett was released from custody on December 22, 2009.

Burgett subsequently filed this lawsuit, and asserts the following claims against Cartwright: (1) false arrest and false imprisonment; and (2) conspiracy to deprive Burgett of his constitutional rights.² Both claims are brought under 42 U.S.C. § 1983 for the alleged

² Burgett’s Third Amended Complaint asserted additional claims, but those claims have been dismissed. In his opposition brief, Burgett appears to raise a new claim for retaliation. See Doc. 190, p. 6 (arguing that “Cartwright clearly arrested Burgett based on retaliation”). The Court finds that this retaliation claim was not previously pled and is untimely. Moreover, even if this claim had been properly pled, it would be dismissed because Cartwright had probable cause for the arrest and because he is entitled to qualified immunity. After reviewing the record, and under the facts of this case, the Court finds that Burgett has not raised any claim that would avoid summary judgment.

deprivation of Burgett's rights under the Fourth and Fourteenth Amendments.³ Cartwright now moves for summary judgment on both claims, and the parties' arguments are addressed below.

II.

Summary judgment is warranted "if there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law." Othman v. City of Country Club Hills, 671 F.3d 672, 675 (8th Cir. 2012) (citing Fed. R. Civ. P. 56(a)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts, and must come forward with specific facts showing that there is a genuine issue for trial. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. banc 2011) (citations and quotations omitted). A "scintilla of evidence" is not enough to avoid summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." Gibson v. Am. Greetings Corp., 670 F.3d 844, 853 (8th Cir. 2012).

III.

A.

Burgett's first claim is brought under § 1983 for false arrest and false imprisonment.⁴ Cartwright arrested Burgett without a warrant, and a "warrantless arrest without probable cause violates the Fourth Amendment as applied to state actors by the Fourteenth Amendment." Stufflebeam v. Harris, 521 F.3d 884, 886 (8th Cir. 2008). Cartwright argues he had probable

³ "Section 1983 creates a cause of action against a person acting 'under color of any statute . . . of any State' who deprives another of a federally protected right." Carlson v. Roetzel & Andress, 552 F.3d 648, 650 (8th Cir. 2008) (quoting 42 U.S.C. § 1983). Cartwright does not dispute that he was acting under color of State law during the events at issue.

⁴ The standards for false arrest and false imprisonment are similar, and they will be referred to and analyzed as a single "false arrest" cause of action. See Wallace v. Kato, 549 U.S. 384, 388 (2007) (recognizing that "[f]alse arrest and false imprisonment overlap; the former is a species of the latter"); Zike v. Advance Am., Cash Advance Ctrs. of Missouri, Inc., 646 F.3d 504, 512 (8th Cir. 2011) (recognizing that a claim for false arrest is also known as false imprisonment) (applying Missouri law).

cause to make the arrest. If so, Burgett's arrest was "justified per se under Missouri law and therefore cannot form the basis of a false-arrest claim." Zike, 646 F.3d at 512.

Probable cause is present "when the facts and circumstances are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense." Fisher v. Wal-Mart Stores, Inc., 619 F.3d 811, 816 (8th Cir. 2010). A court must examine the "totality of the circumstances" that were available to the officer at the time of arrest. Id. These circumstances include eyewitness reports, and an officer is "generally entitled to rely on the veracity of information supplied by the victim of a crime[.]" Id. at 816-17.

In this case, the totality of circumstances would have led a reasonable officer to believe that Burgett was trespassing. Prior to the arrest, Leinhard informed Cartwright that Burgett had remained on the bus beyond his stated destination,⁵ had verbally abused the bus driver, and had not complied with Leinhard's request to exit the bus. See Borgman v. Kedley, 646 F.3d 518, 523 (8th Cir. 2011) (recognizing that "[a]rguable probable cause in a trespassing case may be based at least in part on explanations given by internal security officers").

Cartwright then boarded the bus and also asked Burgett to leave, but Burgett initially refused. See, e.g., Thompson v. City of Portland, 620 F. Supp. 482, 486 (D. Me. 1985) ("Initially, when the officers boarded the bus, informed Plaintiff who they were and asked him to leave, his verbal response and subsequent failure to leave provided probable cause for prudent and cautious officers to believe that Plaintiff was committing a criminal trespass in their presence."). After Burgett finally exited, Cartwright told Leinhard that arresting Burgett was "up

⁵ Burgett emphasizes that he paid his fare with a daily-unlimited ride pass. Third Amend. Compl., ¶ 1; Doc. 190, p. 2. Neither party has adequately explained whether this pass would allow a passenger to stay on the bus beyond his/her stated destination. Assuming, *arguendo*, that it would, probable cause still exists based on the report that Burgett verbally abused the bus driver and on Burgett's refusal to exit the bus after being asked to leave by Porter, Leinhard, and Cartwright.

to [Leinhard].” Leinhard affirmatively responded that he would “sign.” Burgett does not present evidence or facts that show Cartwright should have further investigated the situation.

The totality of these circumstances show that Cartwright had probable cause to believe that Burgett had committed the offense of trespassing. As a result, Burgett’s claim for false arrest fails as a matter of law. Zike, 646 F.3d at 512.⁶

Burgett argues that Cartwright lacked probable cause because the ordinance requires unlawful presence in a building, real property, or “inhabitable structure,” and a bus does not qualify. Although a bus does not appear to be a building or real property, neither party has adequately addressed the definition of inhabitable structure.⁷ Based on other provisions of Missouri law, and for purposes of the probable cause analysis, the Court finds that a reasonable officer could conclude that a bus is an inhabitable structure. See Mo. Rev. Stat. § 569.010(2)(b) (defining inhabitable structure as a “vehicle . . . [w]here people assemble for purposes of . . . public transportation”); United States v. James, 2016 WL 1359859, at * 3 (D. Kan. Apr. 6, 2016) (recognizing that “the Missouri statute defines an ‘inhabitable structure’ to include moveable structures”).

For all these reasons, Cartwright is entitled to summary judgment on Burgett’s § 1983 claim for false arrest and false imprisonment.

⁶ Cartwright also argues that this claim is barred by a two-year statute of limitations, but this argument is contrary to settled case law. The statute of limitations for a § 1983 claim is “that [length of time] which the State provides for personal-injury torts.” Wallace, 549 U.S. at 387. If “state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions.” Owens v. Okure, 488 U.S. 235, 249-50 (1989). Missouri has a specific two-year statute of limitations for false imprisonment, and a residual five-year statute of limitations for personal injury actions. See Mo. Rev. Stat. § 516.120(4) (residual five-year limitation for “any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated”); Mo. Rev. Stat. § 516.140 (false imprisonment; two-year limitation). Under Owens, the five-year residual limitation applies to Burgett’s false arrest claim. Burgett was released from custody on December 22, 2009, and filed his false arrest claim on February 27, 2013. Therefore, this claim was filed within five years and is not time-barred. See Sulik v. Taney Cnty., 393 F.3d 765, 767 (8th Cir. 2005).

⁷ Cartwright’s reply brief fails to even address this issue. Burgett argues, without any citation in support, that “inhabitable structure is defined as a structure in which a person lives or reside [sic] in.” Doc. 190, p. 5.

B.

Burgett's second § 1983 claim is for conspiracy. Burgett alleges that Cartwright conspired with Lienhard and Porter to violate his Fourth and Fourteenth Amendment rights.

"To prove a 42 U.S.C. § 1983 conspiracy claim, a plaintiff must show: (1) that the defendant conspired with others to deprive him of constitutional rights; (2) that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and (3) that the overt act injured the plaintiff." Burton v. St. Louis Bd. of Police Comm'n, 731 F.3d 784, 798 (8th Cir. 2013). To avoid summary judgment, the plaintiff must "specifically demonstrate material facts that the defendants reached an agreement." Reasonover v. St. Louis Cnty., 447 F.3d 569, 582 (8th Cir. 2006). The plaintiff must also "show a deprivation of his constitutional rights." Draper v. City of Festus, 782 F.3d 948, 953 (8th Cir. 2015).

In this case, there is simply no evidence—direct, circumstantial, or otherwise—that Cartwright reached an agreement with anyone to deprive Burgett of his constitutional rights. Burgett only offers conclusions and speculation, but this is not enough to avoid summary judgment. See Mettler v. Whitley, 165 F.3d 1197, 1206 (8th Cir. 1999) ("Speculation and conjecture are not enough to prove a conspiracy exists."). As discussed above, there is also insufficient evidence that Burgett was deprived of his constitutional rights because Cartwright had probable cause to make the arrest. For all these reasons, Cartwright is entitled to summary judgment on Burgett's § 1983 conspiracy claim.

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IV.

For the foregoing reasons, and for the additional reasons stated by Cartwright, it is hereby ORDERED that:

- (1) Cartwright's Motion for Summary Judgment (Doc. 181) is GRANTED; and
- (2) Burgett's claims against Cartwright are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Date: July 8, 2016

/s/ Dean Whipple
Dean Whipple
United States District Judge

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

CHARLES L. BURGETT,	)	
	)	
Plaintiff,	)	Civil No. 13-CV-00494-W-DW
	)	
v.	)	
	)	
KANSAS CITY BOARD OF POLICE	)	
COMMISSIONERS, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Defendant Kansas City Area Transportation Authority (“KCATA”), Shelia Porter (“Porter”), and Virgil Lienhard’s (“Lienhard”) (collectively, the “Defendants”) Motion for Summary Judgment and Suggestions in Support (the “Motion”). See Doc. 180. The Plaintiff Charles Burgett (“Burgett”) filed suggestions in opposition (Doc. 189), and Defendants filed a reply brief (Doc. 193). As explained below, the Motion is GRANTED and Burgett’s claims against KCATA, Porter, and Lienhard are DISMISSED WITH PREJUDICE.

I.¹

A.

The KCATA is a body politic created under Mo. Rev. Stat. § 238.010, and has authority to “operate and maintain . . . passenger transportation systems and facilities[.]” Mo. Rev. Stat. § 238.010, Article III. The operation of city buses is within this authority, and the KCATA has enacted several bus policies and procedures that are relevant to this case.

¹ The following facts are either uncontroverted by the parties or deemed uncontroverted by the Court. These facts are taken from the parties’ briefs, exhibits, and from a companion Order that resolves Defendant Brent Cartwright’s motion for summary judgment, without further quotation or attribution unless otherwise noted.

The first policy concerns passengers who remain on the bus at the end of a route. This policy, titled "Permissible Loopriding," states that:

"On many bus routes through downtown and at outer-ends-of-lines, buses complete loops that facilitate the changing direction. Also, many bus routes have extended headways (time between buses on a line). To provide the best service to KCATA's passengers, bus operators should always allow passengers affected by these dynamics to board prior to the ends-of-the-line, even if their intended destinations are in the opposite direction. When the bus arrives at the end-of-the-line, and a passenger is still onboard, the bus operator should ask that passenger his/her intended destination, invite them to remain onboard, and let them know when the bus will be departing the end-of-the-line. If the passenger refuses to volunteer his/her intended destination, the bus operator should call #8 for assistance[.]"

The second policy, titled "Unruly Passengers," provides in part that:

"On a rare occasion, you may be in a situation where you will need to handle an unruly passenger. For example, someone may be bothering other passengers or causing a disturbance. Some general guidelines apply for handling unruly passengers.

1. If there is a misunderstanding, give the passenger the benefit of the doubt the first time. If the passenger is bothering other passengers or causing a disturbance, ask them to stop.
2. If your efforts are not successful, call the Dispatcher and do as instructed."

The third policy, titled "Problems with Passengers," states that "[i]f the passenger chooses to be uncooperative, abusive or threatening, make a service stop, open the doors, and request that the passenger either comply with your directive or exit the bus. Always give the passenger a choice. If the passenger refuses to comply, do not engage. Instead, contact the dispatcher immediately for assistance and instruction."

The fourth policy is titled "Police Assistance." It provides in part that "An operator should not request police assistance unless they are prepared to sign a formal complaint. In most cases the police cannot eject a passenger unless an arrest is made and is supported by a formal signed complaint."

B.

On December 21, 2009, at approximately 9:50 p.m., Burgett, a black male, boarded a KCATA bus at 74th and Broadway. Porter, a black female, was driving the bus. Lienhard, a white male, was acting as road supervisor for the KCATA. After Burgett had been on the bus for over one hour, Porter called Lienhard. Lienhard responded to the call, boarded the bus, and spoke with Porter. Lienhard then asked Burgett to get off the bus, but Burgett refused.

At approximately 11:00 p.m., Cartwright and two other police officers arrived at 11th and Oak Streets on a report of a male refusing to exit a KCATA bus. The officers spoke with Lienhard, who reported that Burgett had been “riding around on the bus. And [Porter] asked him where he was getting off. He told her Pershing and Grand. He’s already been past there once. And then [Burgett] started calling [Porter] names and stuff, so I’ve asked him [to] leave the bus, and he won’t do it.” See Doc. 182, p. 8. The officers then boarded the bus. Cartwright told Burgett that his “time was up” and to exit the bus. Burgett did not initially comply. Cartwright then told Burgett he could voluntarily exit or he could be “dragged off the bus.” At that point Burgett decided to voluntarily leave the bus.

Cartwright asked Lienhard if he wanted Burgett arrested for trespassing, and Lienhard affirmatively responded that he would “sign.” Cartwright arrested Burgett for violating Kansas City Municipal Ordinance Section 50-102(a), which makes it a violation to “knowingly remain[] unlawfully in or on . . . a[n] inhabitable structure or upon real property.” Burgett was transported to KCPD Headquarters, where he was booked on the trespassing charge and on an unrelated bench warrant. Burgett was released from custody on December 22, 2009.

Burgett subsequently filed this lawsuit. Burgett argues he had a daily-unlimited ride pass and was thus entitled to ride the bus regardless of his destination. Burgett also claims that Porter

told him he could not “ride around,” but allowed a white passenger to do so. Burgett alleges that “Porter and Leinhard, based on racial animus against Black Males, instigated the false arrest and false imprisonment of him by conspiring and agreeing with each other and with Cartwright.” See Doc. 189, p. 1.

Burgett’s pending claims are: (1) a claim under 42 U.S.C. § 1983 against Porter and Leinhard for their instigation and/or participation in his alleged false arrest and false imprisonment;² (2) a § 1983 claim against Porter and Leinhard for conspiring with each other and/or Cartwright to deprive Burgett of his constitutional rights under the Fourth and Fourteenth Amendments; and (3) a discrimination claim under 42 U.S.C. § 2000d against the KCATA. The Defendants now move for summary judgment on all claims, and the parties’ arguments are addressed below.

II.

Summary judgment is warranted “if there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law.” Othman v. City of Country Club Hills, 671 F.3d 672, 675 (8th Cir. 2012) (citing Fed. R. Civ. P. 56(a)). The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts, and must come forward with specific facts showing that there is a genuine issue for trial. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. banc 2011) (citations and quotations omitted). A “scintilla of evidence” is not enough to avoid

² “Section 1983 creates a cause of action against a person acting ‘under color of any statute . . . of any State’ who deprives another of a federally protected right.” Carlson v. Roetzel & Andress, 552 F.3d 648, 650 (8th Cir. 2008) (quoting 42 U.S.C. § 1983). The Defendants do not dispute that they were acting under color of State law during the events at issue.

summary judgment; “there must be evidence on which the jury could reasonably find for the plaintiff.” Gibson v. Am. Greetings Corp., 670 F.3d 844, 853 (8th Cir. 2012).

III.

A.

Burgett’s first § 1983 claim is brought against Porter and Leinhard for false arrest and false imprisonment.³ Burgett argues that “Porter initiated the false arrest and imprisonment of Burgett by calling Leinhard and telling him fabrications about Burgett. Leinhard supported Porters’ [sic] falsehoods regarding Burgett without any proof and arrived at an understanding and conspired in calling the police on Burgett.” Doc. 189, p. 6. Porter and Leinhard argue that this claim should be dismissed on the basis of qualified immunity.⁴

“In § 1983 actions, qualified immunity shields government officials from suit unless their conduct violated a clearly established right of which a reasonable official would have known.” Hollingsworth v. City of St. Ann, 800 F.3d 985, 989 (8th Cir. 2015). “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” Id. The issue “is whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional.” Ellison v. Leshner, 796 F.3d 910, 914 (8th Cir. 2015) (citations and quotations omitted). Qualified immunity is broad; it “protects all but the plainly incompetent or those who knowingly violate the law.” Id.

³ The standards for false arrest and false imprisonment are similar, and they will be referred to and analyzed as a single “false arrest” cause of action. See Wallace v. Kato, 549 U.S. 384, 388 (2007) (recognizing that “[f]alse arrest and false imprisonment overlap; the former is a species of the latter”); Zike v. Advance Am., Cash Advance Ctrs. of Missouri, Inc., 646 F.3d 504, 512 (8th Cir. 2011) (recognizing that a claim for false arrest is also known as false imprisonment) (applying Missouri law).

⁴ Porter and Leinhard also argue that the false arrest claim is barred by a two-year statute of limitations. The Court rejected the same argument made by Cartwright, and rejects Porter and Leinhard’s argument for similar reasons.

The Court first addresses Porter's claim to qualified immunity. As stated above, KCATA has a policy titled "Permissible Loopriding." Under certain circumstances, this policy allows passengers to remain on the bus at the end-of-the-line. See Doc. 180-4 (providing that loopriding is permissible for passengers "affected by [certain] dynamics"). If a passenger refuses to provide his intended destination at the end-of-the-line, the bus driver is instructed to call for assistance. Id. Porter believes that the policy "allows for passengers to ride a route one time in its entirety per payment of the fare or swipe of a bus pass. Upon finishing one full route, passengers are required to exit the bus." See Doc. 180-11, p. 3 (Porter interrogatory response).

On the night in question, Porter believed Burgett was violating the loopriding policy because he stayed on the bus after it had reached the beginning of the route at 3rd and Grand. See Doc. 180-11, p. 1. Porter then asked Burgett for his destination, and this led to a verbal disagreement between the two. Porter allegedly shouted that Burgett could not just "ride around" on the bus, and Burgett responded that he had a daily-unlimited ride pass. See Doc. 189, p. 3, at ¶ 14. This verbal exchange concluded with Porter telling Burgett to exit the bus. Burgett refused, and Porter thus called Leinhard for assistance.

These facts do not show that Porter "violated a clearly established right of which a reasonable official would have known." Hollingsworth, 800 F.3d at 989. Instead, the record shows that Porter was attempting to enforce KCATA's policies on loopriding and/or disruptive/uncooperative passengers. Even assuming, *arguendo*, that Porter misapplied these policies to Burgett, the record does not show that she was "plainly incompetent" or "knowingly violate[d] the law." Ellison, 796 F.3d at 914; Amrine v. Brooks, 522 F.3d 823, 831 (8th Cir. 2008) (recognizing that qualified immunity "provides ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law"). Porter is

therefore entitled to qualified immunity for her conduct that allegedly led to Burgett's false arrest.

Burgett's arguments to the contrary are not persuasive. Burgett summarily alleges that Porter "harass[ed] him because he was a Black Man." Doc. 189, p. 3. A conclusory claim of discrimination is not enough to create a genuine issue of material fact. Thomas v. Corwin, 483 F.3d 516, 527 (8th Cir. 2007) (stating that a party's own conclusions are insufficient to defeat summary judgment). Additionally, Porter and Burgett are members of the same protected class. This undermines any inference of discrimination. See Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1337 (8th Cir. 1996) (noting in age discrimination case that decision-maker was older than the plaintiff); Askari v. L.A. Fitness Int'l, LLC, 2010 WL 3938320, at * 5 (D. Minn. Oct. 5, 2010) (recognizing the "difficult burden of establishing discrimination when the decision-maker is a member of the same protected class as the plaintiff").⁵

Burgett also argues that even if he was riding around, his daily-unlimited ride pass allowed him to do so. Third Amend. Compl., ¶ 1; Doc. 190, p. 2. The parties have not adequately explained the interplay between such a pass and the loopriding policy. As discussed above, however, Porter had a reasonable belief that Burgett was impermissibly riding around and/or being disruptive. Consequently, Burgett's § 1983 false arrest/imprisonment claim against Porter is dismissed on the basis of qualified immunity.

⁵ As stated above, Porter and Burgett are both black, and there is no evidence of gender or other discrimination. In support of his racial discrimination claim, Burgett alleges that Porter told "a similarly situated white male passenger that he could 'ride around,' and [the white passenger] was not arrested." Doc. 189, p. 9. According to Porter, however, the white passenger "had just missed the stop [he needed] and [she] allowed him to ride the bus back to that stop because he was from out of town and unfamiliar with Kansas City or the Metro." Doc. 180-11, p. 4-5; Doc. 193, p. 4. Burgett has not offered evidence that disputes this fact, and provides no facts to establish that he was actually "similarly situated" with the other passenger. For example, Burgett's opposition brief does not show that he also missed his stop because of unfamiliarity with the area, or that the other passenger also had a verbal dispute with Porter.

Leinhard is also entitled to qualified immunity. As discussed above, Leinhard responded to Porter's call for assistance, boarded the bus, and spoke with Porter. Based on his conversation with Porter, Leinhard understood that Burgett: (1) had "already been past [his purported stop] once," (2) called Porter names, and (3) refused to exit the bus. See Doc. 182, p. 8, at ¶ 8. Lienhard also asked Burgett to leave, but Burgett refused. Leinhard then called the police for assistance, explained to the officers his understanding of the facts, and subsequently signed a document so that Burgett could be arrested for trespassing.

Under these facts, and for similar reasons as Porter, Leinhard did not act incompetently or knowingly violate the law. Consequently, Burgett's § 1983 false arrest/imprisonment claim against Leinhard is dismissed on the basis of qualified immunity.

B.

Burgett also asserts a § 1983 conspiracy claim against Porter and Leinhard. "To prove a 42 U.S.C. § 1983 conspiracy claim, a plaintiff must show: (1) that the defendant conspired with others to deprive him of constitutional rights; (2) that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and (3) that the overt act injured the plaintiff." Burton v. St. Louis Bd. of Police Comm'n, 731 F.3d 784, 798 (8th Cir. 2013). To avoid summary judgment, the plaintiff must "specifically demonstrate material facts that the defendants reached an agreement." Reasonover v. St. Louis Cnty., 447 F.3d 569, 582 (8th Cir. 2006). The plaintiff must also "show a deprivation of his constitutional rights." Draper v. City of Festus, 782 F.3d 948, 953 (8th Cir. 2015).

The record in this case does not support a conspiracy claim. Burgett speculates that there was a conspiracy, but has not presented sufficient evidence—direct, circumstantial, or otherwise—that Porter or Leinhard reached an agreement with each other or anyone else to

deprive Burgett of his constitutional rights. Mettler v. Whitley, 165 F.3d 1197, 1206 (8th Cir. 1999) (“Speculation and conjecture are not enough to prove a conspiracy exists.”).

For the reasons discussed throughout, there is also insufficient evidence that Burgett was deprived of his constitutional rights. Instead, the record shows that Porter and Leinhard did not act unlawfully and that they are entitled to qualified immunity. The record also shows that Cartwright had probable cause to arrest Burgett. Consequently, Porter and Leinhard are entitled to summary judgment on Burgett’s § 1983 conspiracy claim.⁶

IV.

Burgett’s final claim is for race discrimination against the KCATA under Title VI of the Civil Rights Act of 1964. See 42 U.S.C. § 2000d. “To establish a prima facie case of discrimination under Title VI, the plaintiff must show (1) that the defendant is receiving federal funds, (2) that the plaintiff was discriminated against, and (3) the plaintiff’s race, color, or national origin was the motive for the discriminatory conduct.” Rodgers v. Univ. of Missouri Bd. of Curators, 56 F. Supp. 3d 1037, 1047 (E.D. Mo. 2014) (citations and quotations omitted). “Title VI prohibits only intentional discrimination. Proof of disparate impact is not sufficient.” Mumid v. Abraham Lincoln High Sch., 618 F.3d 789, 794 (8th Cir. 2010).

For many of the reasons discussed above, Burgett has failed to establish a prima facie case of discrimination under Title VI. Burgett failed to present direct or indirect evidence of intentional discrimination, and failed to present direct or indirect evidence that his race, color, or national origin was the motive for such discrimination. Burgett has also not shown that KCATA engaged in any pattern, practice, or policy of discrimination. Burgett only offers speculation and

⁶ In his opposition brief, Burgett appears to assert a retaliation claim. This claim was not previously pled in the Third Amended Complaint, Burgett did not seek leave to add it, and the Court finds it is untimely. Moreover, even if a retaliation claim had been properly pled, it would be dismissed for the reasons discussed throughout this Order. After reviewing the record, and under the facts of this case, the Court finds that Burgett has not raised any claim that would avoid summary judgment.

conclusions, and that is not enough to avoid summary judgment.⁷ Smith v. Int'l Paper Co., 523 F.3d 845, 848 (8th Cir. 2008) (recognizing that a plaintiff “must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor”).

V.

For the foregoing reasons, and for the additional reasons stated by the Defendants, it is hereby ORDERED that:

- (1) Defendant KCATA, Shelia Porter, and Virgil Lienhard’s Motion for Summary Judgment (Doc. 180) is GRANTED; and
- (2) Burgett’s claims against the KCATA, Porter, and Lienhard are DISMISSED WITH PREJUDICE; and
- (3) the Clerk of Court is directed to terminate any pending motions, and to then mark this case as closed.

IT IS SO ORDERED.

Date: July 8, 2016

/s/ Dean Whipple
Dean Whipple
United States District Judge

⁷ Burgett raises a spoliation argument in which he alleges “KCATA intentionally destroyed the tape recording of the incident.” Doc. 189, p. 6. It appears that Porter and Burgett’s interaction on the bus was recorded. In a letter dated December 26, 2009, Burgett requested that KCATA provide him a copy of the video. KCATA received this letter on December 29, 2009. See Doc. 189-2, p. 11. According to KCATA, the “onboard video and audio footage on all buses, including footage of the December 21, 2009, incident at issue . . . was only available for six days. Because Plaintiff’s request was not received until eight (8) days after the incident, the video was no longer available for preservation.” Doc. 193, p. 7-8; see also Doc. 180-14, p. 34-35. After reviewing the record, the Court finds that a spoliation sanction is not warranted. The video appears to have been destroyed pursuant to a retention policy, and there is no evidence of intentional destruction to suppress the truth.

20a

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 16-4105

Charles L. Burgett

Appellant

v.

Kansas City Board of Police Commissioners

Shelia Porter, et al.

Appellees

Patrick McInerney, in his official capacity as a member of the Board of Police Commissioners of
Kansas City, Missouri, and in his individual capacity, et al.

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:13-cv-00494-DW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is
also denied.

March 14, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans