

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

FRANK DRAUS, JR.,)	
)	
Plaintiff)	
)	
v.)	Civil No. 96-232-B
)	
TOWN OF HOULTON, ET AL.,)	
)	
Defendants)	

MEMORANDUM OF DECISION¹

The plaintiff, Frank Draus, Jr., acting *pro se*, brought a complaint pursuant to 42 U.S.C. § 1983 (1994) against the defendants, the Town of Houlton, Town Manager Allan Bean, and Town Council members Michael McLaughlin, Catherine Surran, Walter Gilpin, Paul Romanelli, Dorothy Donahue, Brian Plourde, and Ron Langworthy, alleging various violations of his constitutional rights following the Town Council's revocation of certain permits issued to Draus's club after the Council determined the club to be in violation of a municipal ordinance regulating nude dancing. The defendants have moved for a summary judgment on Draus's complaint, contending that: (1) they are entitled to absolute, quasi-judicial and/or prosecutorial immunity; (2) they are entitled to qualified immunity; (3) the material facts do not support a claim of any constitutional violation. Concluding that the defendants are entitled to a judgment as a matter of law based on the defense of qualified immunity, the Court grants the motion.

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

I. Summary Judgment

A summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is genuine, for these purposes, if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A material fact is one which has the ‘potential to affect the outcome of the suit under applicable law.’” *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record in the light most favorable to the nonmovant. *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995).

II. Background

The summary judgment record reveals the following material facts. Draus is the owner/operator of the Dance & Eat Club 63 in Houlton. At the time of the incident underlying this action, the club featured adult entertainment, including nude dance shows, pursuant to a nude activity permit that had been issued to it by the Houlton Town Council. A town ordinance regulates adult entertainment and forbids, among other things, the exposure of female genitals, pubic hair, breasts, and buttocks.² After receiving complaints that the club was violating the ordinance, the Town hired

² Chapter 10, Article X, Sec. 10-1005 of the Town of Houlton’s ordinance regulating nude activity in business establishments provides in relevant part:

B. Prohibitive [sic] Activity. No licensee shall permit live entertainment on the licensed premises, . . . when the entertainment involves:

1. the performance of acts, or simulated acts, of sexual intercourse, or any sexual acts which

a Presque Isle police officer, Larry Pelletier, to conduct an undercover investigation at the club. On July 26, 1996, Pelletier attended a nude dance performance at the club and observed what he determined to be various violations of the Town's ordinance. Pelletier subsequently filed a report with the Town's police chief. After a public hearing on the matter was conducted, at which Draus and his attorney were allowed to speak, the Town revoked two of the club's licenses. Maine law allows a town to "suspend or revoke any permits which they have issued under [] [] [28-A M.R.S.A. § 1054 (1988 & Supp. 1996)] on the grounds that the music, dancing or entertainment permitted constitutes a detriment to the public health, safety or welfare, or violates municipal ordinances or regulations." 28-A M.R.S.A. § 1054(7).

At the August 26, 1996, meeting of the Town Council, the issue whether to revoke the special amusement permit for dancing and entertainment and the nude activity permit previously issued to Draus and his club was discussed. After an initial presentation by the Town's attorney, the Council heard testimony from Officer Pelletier, who was subjected to cross-examination by Draus's attorney. Draus's attorney then presented several witnesses, including Draus himself and a number of club employees. Following such testimony, the hearing was made open for public comment. After a brief discussion of the evidence, the Council voted unanimously to revoke the club's amusement and nude

are prohibited by law;

2. the actual touching, caressing, or fondling of the breasts, buttocks, anus, or genitals, by the employee, or patron;

3. the actual or [sic] displaying of the genitals, pubic hair, or anus;

4. the permitting by any licensee of any person to remain in or upon the licensed premises who exposes to any public view any portion of said person's genitals or anus. . . .

activity permits, allowing Draus the right to reapply for the permits following a six-month period. Draus did not pursue an appeal pursuant to Maine Rule of Civil Procedure 80B following the Council's actions.

III. Discussion

The defendants contend that they are immune from suit because they are entitled to the defenses of absolute or qualified immunity. In the alternative, they contend that they are entitled to a judgment on the plaintiff's complaint because they did not, as a matter of law, violate his constitutional rights. In response to the motion, the plaintiff contends that the defendants are not entitled to any defenses and that there is a genuine issue as to whether there was sufficient evidence before the Town Council to support the revocation of his permits. Without responding in great detail to the defendants' contentions with respect to their immunity from suit, the plaintiff realleges numerous constitutional violations that were set forth in his complaint. Even construing Draus's *pro se* opposition papers liberally, as it must, *Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24, 27 (1st Cir. 1980) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)), the Court concludes that the defendants are immune from suit pursuant to the doctrine of qualified immunity,³ and, thus, are entitled to a judgment as a matter of law on the plaintiff's complaint.

³ When, as here, a town board engages in the application of an existing statutory scheme, its actions are not legislative but administrative in nature, thus entitling the board members only to qualified immunity. *Maybee v. Town of Newfield*, 789 F. Supp. 86, 91 (N.D. N.Y. 1992) (citing *Kinderhill Farm Breeding Assocs. v. Appel*, 450 F. Supp. 134, 136 (S.D. N.Y. 1978)). Because the Court concludes that the defendants are immune from suit pursuant to the doctrine of qualified immunity, it does not address the defendants' claims to absolute immunity. *See Zar v. South Dakota Bd. of Examiners of Psychologists*, 976 F.2d 459, 464 (8th Cir. 1992); *McCabe v. Caleel*, 739 F. Supp. 387, 392 (N.D. Ill. 1990) (courts did not reach defendants' arguments regarding absolute immunity because cases could be decided on grounds of qualified immunity).

"Qualified immunity shields public officials performing discretionary functions 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Singer v. State of Maine*, 49 F.3d 837, 844 (1st Cir. 1995) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The rights alleged to have been violated must have been clearly established at the time of the alleged violation, . . . and '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "The qualified immunity analysis focuses on the objective reasonableness of the defendant's actions. [T]he relevant question is whether a reasonable official could have believed his actions were lawful in light of clearly established law and the information the official possessed at the time of his allegedly unlawful conduct. In *Mitchell v. Forsyth*, . . . the Supreme Court characterized the qualified immunity defense as an entitlement to *immunity from suit* rather than a mere defense to liability . . ." *Id.* (citations and internal quotations omitted).

Applying the above principles to the case at bar, the Court first must determine whether Draus possessed "clearly established" constitutional rights which were abrogated by the Town Council through its action rescinding the permits. If so, the Court must determine whether a reasonable official would have understood that what they were doing in revoking the permits violated such rights. Draus alleges violations of his First, Fifth, Eighth, and Fourteenth Amendment rights. Three of these claims are easily resolved; the other two will be addressed by the Court in turn.

A. Eighth Amendment, Substantive Due Process, and Equal Protection claims

Draus contends that the Town violated his Eighth Amendment right to be free from cruel and unusual punishment and his Fourteenth Amendment⁴ rights to substantive due process and equal protection of the laws when it revoked his permits. These claims are without merit.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. This right typically concerns "the treatment a prisoner receives in prison and the conditions under which he is confined" *Helling v. McKinney*, 509 U.S. 25, 31 (1993). Draus, of course, has not been the subject of any criminal investigation, nor has he been incarcerated in this matter. Although he alleges that the revocation of his permits constituted an excessive penalty, such a claim does not implicate the Eighth Amendment. His Eighth Amendment rights thus were not "clearly established" for purposes of this inquiry, and the defendants are entitled to qualified immunity on this claim.

Draus's substantive due process claim also is without basis. A substantive due process violation obtains only when state action is "egregiously unacceptable, outrageous, or conscience-shocking." *Santiago de Castro v. Morales Medina*, 943 F.2d 129, 131 (1st Cir. 1991) (quoting *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991)). "[I]t is only when some basic and fundamental principle has been transgressed that 'the constitutional line has been crossed.'" *Id.* (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414

⁴ The Fourteenth Amendment to the United States Constitution provides in relevant part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

U.S. 1033 (1973)). There is no support in the record for Draus's claim to raise a genuine issue on either a theory of some violation of a specific property or liberty interest, or under the theory that the Council's actions "shocks the conscience." *Id.* (citing *Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir. 1991)).

Draus also fails to satisfy the requirements for making out an equal protection claim. Liability for violating equal protection rights in connection with selective enforcement of lawful local regulations depends on proof that (1) the claimant, compared with others similarly situated, was selectively treated, and (2) that selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure him. *Rubinovitz v. Rogato*, 60 F.3d 906, 910 (1st Cir. 1995) (citation omitted). Not only has Draus failed to satisfy the first prong of the above standard--he is the only Houlton permit holder of a nude activity permit and thus belongs to no class of individuals--he cannot demonstrate that his treatment was based on impermissible considerations.

Thus, the defendants are entitled to the defense of qualified immunity on all of the above claims because none of Draus's constitutional rights were clearly established for purposes of the inquiry.

B. First Amendment claim

Draus contends that the ordinance is an impermissible restriction on his First Amendment⁵ rights, and thus is unconstitutional. It is well settled that states and local municipalities may regulate

⁵ The First Amendment to the United States Constitution made applicable to the states by the Fourteenth Amendment prohibits, *inter alia*, the passage of any law abridging the freedom of speech or the right of people peaceably to assemble.

U.S. Const. amend. I.

nude dancing in business establishments that sell alcohol. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976); *California v. LaRue*, 409 U.S. 109 (1972); *Gabriele v. Town of Old Orchard Beach*, 420 A.2d 252 (Me. 1980). Although the Supreme Court has recognized that nude dancing is "expressive conduct within the outer perimeters of the First Amendment," *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 566 (1991) (upholding, by plurality, an Indiana statute banning public nudity even though it affected expressive activities such as nude dancing), it also has held that "the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power." *LaRue*, 409 U.S. at 114. Such police power encompasses "the authority to provide for the public health, safety, and morals." *Barnes*, 501 U.S. at 569. "When a regulation does not impinge upon a 'fundamental right,' the state need only articulate a rational basis for the exercise of police power, *see Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), and to date, the Supreme Court has not recognized a fundamental right to unrestrained nude dancing in all settings." *Dodger's Bar & Grill v. Johnson Cty. Bd. of Com'rs*, 32 F.3d 1436, 1441 (10th Cir. 1994) (holding, *inter alia*, that evidence of inappropriate intimate contact between nude dancers and patrons at club, combined with fears of residents about their personal safety, provided rational basis to justify county regulation under its police power of nude dancing in drinking establishments). Moreover, the Supreme Court has held that "the absolute power of the states to wholly ban the sale of liquor within its boundaries conferred by the Twenty-first Amendment⁶ include[] [s] the broad power to regulate the time, place, and

⁶ The Twenty-first Amendment to the United States Constitution provides in pertinent part:

The transportation or importation into any State, territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

manner in which liquor may be sold." *Proctor v. County of Penobscot*, 651 A.2d 355, 357 (Me. 1994) (county ordinance prohibiting liquor licensee from permitting entertainment on premises involving display of genitals or buttocks did not violate First Amendment) (citing *New York Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981)); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (state's power under Twenty-first Amendment outweighs any First Amendment interest in nude dancing).

The Court considers Draus's challenge to the constitutionality of the ordinance with the following factors in mind: (1) whether the regulation is within the constitutional power of the government; (2) whether the regulation furthers an important or substantial governmental interest; (3) whether that interest is unrelated to the suppression of free expression; and (4) whether the restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Barnes*, 501 U.S. at 567 (citing *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968)).

Applying these factors to the case at bar, the Court determines that the ordinance is a permissible restriction on First Amendment speech, and therefore is constitutional. First, as discussed above, the regulation itself certainly is within the constitutional power of the Town. *See LaRue*, 409 U.S. at 114; 28-A M.R.S.A. § 1054(11)(A). Second, it furthers a substantial governmental interest, namely, regulating the method and location of exotic dancing in the interests of order and morality. Responding to citizen complaints regarding nude activity in various liquor establishments, the Town sought to address health and safety concerns by enacting the ordinance. In particular, the Town was mindful of the undesirable secondary effects such activity may bring

U.S. Const. amend. XXI.

about such as increased crime, abuse of women and children, decreased property values, and deterioration of residential neighborhoods. Such governmental interests are substantial and permissible aims of the regulation. *See Barnes*, 501 U.S. at 569, 583; *Dodger's Bar & Grill*, 32 F.3d at 1441. Third, the interest is unrelated to the suppression of free expression. Although the interest at stake affects free expression, the intent of regulating nude dancing as a means of combating the secondary effects listed above "is not at all inherently related to expression." *Barnes*, 501 U.S. at 560. Fourth and finally, the restriction is no greater than is essential for the furtherance of the interest. Dancers at Draus's club were not, after all, forbidden from engaging in exotic performances, but only from exposing certain parts of their bodies. Although "[d]ropping the final stitch is prohibited, [] the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message." *Barnes*, 501 U.S. at 587.

The Court thus determines that the ordinance is not unconstitutional because it restricts First Amendment rights in a permissible manner. The Town has adequately articulated a rational basis for the exercise of its police powers. Draus's First Amendment rights likewise have not been infringed. The Court thus determines that the defendants are entitled to qualified immunity on this claim.

C. Procedural due process claim

Finally, Draus's procedural due process claim fails to satisfy the second prong of the qualified immunity inquiry; namely, although Draus may have possessed a clearly established property right in his permits, the record reveals that he received all the process that was due him by the defendants.

"The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty or property without due process of law." *Cotnoir v. University of*

Maine Systems, 35 F.3d 6, 10 (1st Cir. 1994) (citing *Board of Regents v. Roth*, 408 U.S. 564, 569-570 (1972)). "To avoid summary judgment on a procedural due process claim, [] [the plaintiff] must show (1) that it had a property interest defined by state law; and (2) that defendants, acting under color of state law, deprived it of that interest without adequate process." *Licari v. Ferruzzi*, 22 F.3d 344, 347 (1st Cir. 1994) (citation omitted).

Draus contends that the Town Council was biased and improperly influenced by hearsay evidence at the time it considered whether to revoke his entertainment and nude activity permits. He contends that the Town violated his right to due process of law by not presenting its findings and by not giving him sufficient or timely notice. The Court is unable to find sufficient record evidence to substantiate such claims, however. Assuming that Draus had a protected property interest in his permits, *Licari*, 22 F.3d at 347, he cannot prevail on the issue whether the Town abrogated such a right because he was afforded adequate process. Indeed, the record reflects that Draus was given timely notice by letter of the hearing, as well as an opportunity at the hearing to present, through his attorney and his and other witnesses' testimony, evidence in support of his position. The Council did announce its findings at the close of the hearing, and accordingly revoked Draus's permits after determining that he and his business had violated the ordinance. Moreover, contrary to his contention, as a matter of law Draus could have pursued an appeal from the Town Council's actions in state court. *See* M.R. Civ. P. 80B.

The Court finds that such procedures, balancing as they did the Town's interest against Draus's interest, were adequate. The Court reaches this conclusion after considering, as well, the risk of an erroneous deprivation and the value of additional safeguards. *Licari*, 22 F.3d at 347 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Thus, although Draus may have possessed a

clearly established property right in the permits, that right was not abrogated by the defendants; they are entitled to the defense of qualified immunity here, as well.

D. Municipal liability

Finally, the Court determines that no municipal liability may be found to exist in this matter. Draus has presented no evidence of any conduct on the part of the Town to support a showing of "deliberate indifference" on its part to his rights. *See, e.g., Canton v. Harris*, 489 U.S. 378, 389 & n.8 (1989). Because the Court has found no liability on the part of the individual named defendants, no liability on the part of the Town of Houlton exists. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)).

IV. Conclusion

For the foregoing reasons, the Court concludes that Draus either did not possess any clearly established constitutional rights, or, even if he did, that such rights were not abrogated by the Town Council through its action rescinding the permits. The defendants thus are entitled to the defense of qualified immunity on all of the plaintiff's claims. Accordingly, the defendants' motion for a summary judgment on the plaintiff's complaint is **GRANTED**.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated this 22d day of May, 1997.