

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NORMAN DICKINSON,)
)
 Plaintiff)
)
 v.) Civil No. 97-0206-P
)
 MICHAEL J. CHITWOOD, et al.,)
)
 Defendants)

RECOMMENDED DECISION

This action arises from Plaintiff's release from prison in January 1997, and the notification provided to Plaintiff's prospective neighbors of his plan to reside nearby by the police chiefs of the cities of Portland and Lewiston, Defendants Chitwood and Kelly, respectively. Plaintiff asserts violations of his right to equal protection, his due process rights, and his right to privacy against the cities, as well as the individual Defendants.¹

Pending before the Court are Defendants' Motions for Summary Judgment, filed separately on behalf of the "Lewiston Defendants" and the "Portland Defendants." Plaintiff has withdrawn his own Motion for Summary Judgment, but has objected to these Motions, which are now ready for resolution.

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). "A material fact is one which has the 'potential to affect the outcome

¹ Plaintiff's oral motion to dismiss the other two original individual Defendants was granted by the Court during the final pretrial conference held in this matter on January 30, 1998.

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 on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993). However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

Statement of Facts

The undisputed facts are as follows. Plaintiff was convicted following a jury trial of kidnapping and robbing two women in April of 1990. In 1996, a Superior Court Justice imposed upon Plaintiff as a condition of release a requirement that Plaintiff could not freely leave his home without supervision. In response to the condition, Plaintiff wrote a letter to the Justice, stating:

I feel your honor is setting me up for failure...I have never heard of a court restricting the freedom of a person who is on probation...I feel your [sic] restricting me to my home for five years is going to be the spark that sets the bomb off. I just feel sorry for the innocent people who will have to suffer from that reprocutation [sic]. And if this happens, you, Justice Cole will have to live with the fact that you caused it.

In September 1996, Plaintiff wrote a letter to television news reporter Kim Block in which he stated:

I watch you and Felicia Knight everyday at 5:30 and 6:00. I'll be back on the streets of Portland on January 26, 1997. I'll be meaner than ever. I pity anyone who gets in my way.

On January 24, 1997, the state released Plaintiff from prison. While Plaintiff awaited placement at an apartment at 54 Montreal St. in Portland, the Chief of Police of Portland, Defendant Chitwood, learned of the intended placement and notified the media. Defendant Chitwood ordered officers to go door to door in the neighborhood and notify them about Plaintiff's placement in the community. Over the next several days Defendant Chitwood admits making the following statements about Plaintiff:

1. "He's a criminal, the community has to be concerned about and people have a right to know he is here."
2. "I think it is important for people to know where this guy is because of his dangerous demeanor."
3. "He may be anti-social and scary, but there is nothing to indicate that this guy is mentally ill."
4. "If [Plaintiff] relocated anywhere in Portland the Police Department will again notify the neighbors."

In addition, the Portland newspapers attributed several other statements about Plaintiff to Defendant Chitwood. The papers reported that Defendant Chitwood said he publicized Plaintiff's arrival because the state "drop-kicked" him into Portland. The newspapers also reported Defendant Chitwood stating that Plaintiff was "doomed to failure," that Plaintiff represented a danger because he received no treatment, and ultimately, that he was glad Plaintiff left Portland (to go to a pre-release facility in Bangor).

On January 29, 1997, the state transferred Plaintiff to a pre-release facility in Bangor. On February 5, 1997, Plaintiff smashed the television in his room against the wall. The state placed

Plaintiff on probationary hold, but nevertheless continued to make plans to transfer Plaintiff from the facility in Bangor to an apartment building in Lewiston. Michael Kelly, the police chief of Lewiston, was notified of the state's plans to place Plaintiff at the apartment upon his release, then planned for April 17, 1997.

Kelly expressed his concern to state officials and began to inform residents about Plaintiff's arrival. On April 11, 1997, the *Portland Herald Press* printed a story quoting Defendant Kelly. Defendant Kelly admits to making the following statements:

I have deep, deep concerns about this... This man is like a time bomb. He says he feels sorry for the people he is going to hurt. Now he's going to be our problem. Why is Lewiston the dumping ground? Why?

The newspaper also reported that Defendant Kelly said he was concerned about Plaintiff's arrival and that he had to notify residents.

Plaintiff remained at the pre-release center in Bangor on probationary hold into April 1997. On April 10, 1997, the state sentenced Plaintiff to a seventy-one day prison sentence for smashing his television against the wall in February. Plaintiff reported to the Cumberland County Jail. The state never placed Plaintiff in Lewiston.

Between July 9, and August 12, 1997, the Division of Community Corrections filed three separate motions seeking to revoke Plaintiff's probationary status, all alleging probation violations occurring at the Cumberland County Jail. Plaintiff was sentenced to an additional three year prison sentence for committing the violations.

I. The Individual Defendants.

Both Defendants Chitwood and Kelly assert that they are entitled to qualified immunity with respect to Plaintiff's claims. Qualified immunity shields government officers "from civil damages

liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'" *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). This doctrine provides for the "inevitable reality that 'law enforcement officials will in some cases reasonably but mistakenly conclude that [their conduct] is [constitutional], and . . . that . . . those officials -- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable.'" *Id.* (quoting *Anderson*, 483 U.S. at 641). The inquiry regarding qualified immunity "takes place prior to trial, on motion for summary judgment . . . and requires no fact finding, only a ruling of law strictly for resolution by the court." *Id.* at 1373-74.

The qualified immunity inquiry has two prongs. First we must determine whether the right asserted by Plaintiffs was clearly established at the time of the contested events. *Id.* at 1373. It is at this point Plaintiff's claims encounter difficulty. Although there is no dispute that the constitution prohibits cruel and unusual punishment, for example, the Court must go one step further and determine whether the specific contours of the right were sufficiently established such that Defendants could understand how the law would be applied to their actions *in this case*. *Anderson*, 483 U.S. at 640. In the context of summary judgment, the second prong in our qualified immunity inquiry is whether, viewing facts in a light most favorable to plaintiff, "an *objectively* reasonable officer, similarly situated, *could have believed* that the challenged . . . conduct did *not* violate" that clearly established right. *Hegarty*, 53 F.3d at 1373. (emphasis in original).

The Court concludes that Defendants are entitled to qualified immunity regardless of which constitutional right Plaintiff invokes. The Court will examine each right in turn.

A. Equal Protection. Plaintiff alleges he was treated differently than other similarly situated probationers. While this may be true, the Court is hard-pressed to discern on what classification Plaintiff believes this different treatment is based. Certainly the classification is not clearly "suspect" such that Defendants' actions are entitled to a heightened level of scrutiny. *See Beauchamp v. Murphy*, 37 F.3d 700, 707 (1st Cir. 1994) (finding classification between prison escapees and other fugitives not "suspect" for purposes of equal protection analysis). Accordingly, Defendants' actions are evaluated in terms of whether one can imagine a "legitimate basis" to support them. *Id.* Given Plaintiff's indications that he continued to pose a danger to society, it is easy to imagine such a basis. Accordingly, Defendants could certainly have believed their actions did not violate Plaintiff's right to equal protection under the laws.

B. Due Process. This Court has found no case law from the United States Supreme Court or the First Circuit Court of Appeals that addresses the question whether address notification implicates a liberty interest sufficient to give rise to the need for due process, let alone whether notification in the circumstances present in this case violates the due process clause. *See, e.g., E.B. v. Verniero*, 119 F.3d 1077, 1105 (3rd Cir. 1997), *cert. denied*, *W.P. v. Verniero*, 66 U.S.L.W. 3399, and *Verniero v. W.P.*, 66 U.S.L.W. 3459 (U.S. February 23, 1998) (Nos. 97-887 & 97-1074) (finding a liberty interest under the New Jersey Constitution, and therefore not reaching the federal constitutional question). Accordingly, due process law in this context is not clearly established, and Defendants are entitled to qualified immunity on this claim as well.

C. Right to Privacy.

Plaintiff cites a case from the Third Circuit Court of Appeals that found names and addresses fell within an exemption to the Freedom of Information Act, and were therefore protected from

disclosure absent a determination that "the public interest for disclosure" outweighed "the potential invasion of individual privacy." *Wine Hobby, Inc. v. United States*, 502 F.2d 133, 136 (3rd Cir. 1974). This case, however, sets no precedent in this Circuit, where courts have held that there is no clearly established right to privacy in the dissemination of a psychiatric report, *Borucki v. Ryan*, 827 F.2d 836 (1st Cir. 1987), or a personnel file, *Hansen v. Lamontagne*, 808 F. Supp. 89 (D.N.H. 1992). Even as late as April 1997, the very time in which Defendants are alleged to have violated Plaintiff's right to privacy, the First Circuit was still merely suggesting that *if* such a right existed, its scope "has not extended beyond prohibiting profligate disclosure of medical, financial, and other intimately personal data." *Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174, 183 (1st Cir. 1997) (citing *Borucki*, 827 F.2d at 841 n.8 (collecting cases)). Defendants may not be charged with violating clearly established law in April 1997 by disclosing Plaintiff's proposed address to anyone.

II. The municipal Defendants.

Plaintiff concedes that the municipal Defendants may not be held liable solely on the basis of their status as employers of the individual Defendants. There is no *respondeat superior* liability under section 1983. *Monell v. Department of Soc. Serv.*, 436 U.S. 658, 691 (1978). Rather, Plaintiff asserts that Defendants' actions constitute a "custom or policy" of the municipalities sufficient to give rise to liability under section 1983. *See Silva v. Worden*, 130 F.3d 26, 32 (1st Cir. 1997) ("A municipality may be held liable for acts taken pursuant to a 'policy' by at least two methods . . . [one of which is] from the decisions 'of those officials whose acts may fairly be said to be those of the municipality'" (citation omitted)). The Court need not address, however, whether chiefs of police in the State of Maine "'possess[] final authority to establish municipal policy'" with respect to the public dissemination of probationers' addresses. *Id.* (quoting *Pembaur v. Cincinnati*, 475 U.S. 469,

481 (1986). In order for Plaintiff to prevail on this claim, the custom or policy must be one of "deliberate indifference" to Plaintiff's constitutional rights. *Foley v. City of Lowell*, 948 F.2d 10, 14 (1st Cir. 1991). In light of the Court's conclusion that none of the constitutional rights Plaintiff seeks to invoke, nor any others the Court can imagine, were clearly established at the time of Defendants' actions, Plaintiff cannot show deliberate indifference to those rights. The municipal Defendants are entitled to summary judgment as well.

Conclusion

For the foregoing reasons, I hereby recommend Defendants' Motions for Summary Judgment be GRANTED as to Plaintiff's federal claims. To the extent Plaintiff purports to state claims arising under state law, I recommend the Complaint be DISMISSED. *Astrowsky v. First Portland Mort. Corp.*, 887 F. Supp. 332, 337 (D. Me. 1995).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on March 6, 1998.