

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

MELISSA IRENE FERRIS,            )  
  )  
                  Plaintiff                    )  
  )  
v.    )     Civil No. 98-0201-B  
  )  
KENNEBEC COUNTY, et al.,        )  
  )  
                  Defendants                )

***RECOMMENDED DECISION***

Plaintiff was a pretrial detainee at the Kennebec County Jail at the time the events leading to this Complaint occurred. Plaintiff alleges that she was pregnant at the time she was first incarcerated at the jail. She claims that jail officials placed her in a particularly small, unventilated, cell despite her protestations that she was claustrophobic. She further claims that they ignored her pleas for medical assistance when Plaintiff thought she was suffering a miscarriage, and thereafter refused to provide sanitary napkins or appropriate medical care. Plaintiff’s Complaint asserts causes of action arising under 42 U.S.C. section 1983, as well as state common law.

The individual Kennebec County Defendants<sup>1</sup> move for summary judgment on Plaintiff’s federal cause of action in Count I of the Amended Complaint both on the

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<sup>1</sup> The “Kennebec County Defendants” include, in addition to the County, Corrections Officer Gustafson and Corrections Sergeant Bellavance.

basis of qualified immunity and on the merits of Plaintiff's claims. They seek judgment on Plaintiff's state claims on the basis of discretionary function immunity under the Maine Tort Claims Act, 14 M.R.S.A. sec. 8111, and on the merits of those claims. Defendant Kennebec County seeks judgment on Count VII of the Amended Complaint, which states a claim both under Section 1983 and for vicarious liability for the actions of the individual Defendants relative to the state tort claims.<sup>2</sup>

### *Discussion*

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). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1<sup>st</sup> Cir. 1993). "A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'" *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico*, 160 F.3d 839, 841-42 (1<sup>st</sup>

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<sup>2</sup> Count VIII states a cause of action against Defendant Allied Resources for Correctional Health, which Defendant is not a party to this Motion for Summary Judgment.

Cir. 1998) (quoting *National Amusements v. Town of Dedham*, 43 F.3d 731, 735 (1<sup>st</sup> Cir. 1995)).

### ***I. Section 1983 Claim.***

The Court will first address Defendants' argument that they are entitled to qualified immunity, which 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 (1<sup>st</sup> 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, the Court must determine whether the right asserted by Plaintiff was clearly established at the time of the contested events. *Id.* at 1373. Here there is no dispute that Plaintiff, as a pretrial detainee, was entitled to be free from "punishment." *Bell v. Wolfish*, 441 U.S.

520, 535 (1979). This constitutes a clearly established right. However, we must go one step further and determine whether the specific contours of the right were sufficiently established. *Anderson*, 483 U.S. at 640. It is clear that Defendants are entitled to impose conditions or restrictions upon pretrial detainees consistent with their need to maintain an orderly and secure institution, and insuring the detainee's presence at trial. *Bell*, 441 U.S. at 537. It is also clear, however, that conditions or restrictions imposed for the purpose of punishment are unconstitutional in this setting. *Id.* at 538. Further, to the extent Plaintiff rests her claim on a failure to provide medical care, it is clear that she is at least entitled to be free from deliberate indifference on the part of prison officials to her serious medical needs. *Gaudreault v. Municipality of Salem, Mass.*, 923 F.2d 203, 208 (1<sup>st</sup> Cir. 1990).

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 will address this question separately for each of the two bases upon which Plaintiff's Section 1983 claim might rest.

**A. *Due Process.***

In this case, the Court is satisfied that Plaintiff has offered evidence sufficient to permit a jury to conclude that these officers could not have reasonably believed their actions satisfied due process requirements. Plaintiff has presented evidence that the conditions about which she complains were imposed for no reason other than to punish her. Specifically, she has presented her own testimony to the effect that Defendant Gustafson told her “she was a good actress” when she was hyperventilating due to her claustrophobia in the observation cell, and that Defendant Gustafson indicated she would be moved to a bigger room when she calmed down and stopped “acting out.” When Plaintiff was returned to the observation cell during her second night at the jail, Defendant Gustafson made references to Plaintiff “not learning her lesson,” and not knowing how to behave, and Defendant told her she would stay in the observation cell until she could “learn to control herself.”

Plaintiff has also presented testimony that Defendants Bellavance and Gustafson watched her use the toilet after she asked for privacy, and refused her requests for medical assistance and sanitary pads, saying she was “insane” and “crazy” and would remain in the observation cell until she behaved.<sup>3</sup> The next

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<sup>3</sup> Defendant Bellavance’s alleged participation in this conduct is not as clear. The Court nevertheless concludes that Plaintiff has presented sufficient evidence of her involvement for purposes of this Motion for Summary Judgment.

morning, after Plaintiff spent the night asking the officers to verify that she had suffered a miscarriage, Defendant Gustafson told another officer to ignore her, that she had been “acting out” all night. The Court concludes that Defendants could not reasonably have believed this conduct comported with Plaintiff’s rights under the due process clause. Summary judgment is therefore not appropriate on Defendants’ claim for qualified immunity on Plaintiff’s due process claims. Similarly, this evidence is sufficient to withstand summary judgment on the merits of Plaintiff’s due process claims against these individual Defendants.

***B. Medical Care.***

Plaintiff’s claim for inadequate medical attention also arises under the due process clause, although the standard is the same in this Circuit as for convicted prisoners. *McNally v. Prison Health Serv.*, 28 F. Supp. 2d 671, 673 (D. Me. 1998) (citations omitted). Specifically, Plaintiff must present evidence that Defendants were deliberately indifferent to her serious medical needs. “Deliberate indifference” means that Defendants intended to inflict pain, or were reckless in the sense that they had “actual knowledge of impending harm, easily preventable,” and still failed to act. *DesRosiers v. Moran*, 949 F.2d 15, 19 (1<sup>st</sup> Cir. 1991) (citations omitted). The evidence in this case is that Defendants were told Plaintiff was not having a miscarriage by the nurse who examined her. Their refusal to believe Plaintiff’s

protestations to the contrary does not amount to a failure to act in the face of a known risk. At a minimum, the Court concludes that Defendants could reasonably have believed their failure to call for further medical care was not a violation of Plaintiff's rights. They are therefore entitled to qualified immunity to the extent Plaintiff's due process claim is grounded on an alleged deliberate indifference to her serious medical need.<sup>4</sup>

**C. *Municipal Liability.***

Plaintiff asserts that Defendant Kennebec County may be held liable for failing to have a policy regarding pregnant inmates, and for failing to train with respect to policies that were in place. The Court concludes, however, that Plaintiff's evidence does not support this theory.

Even assuming the individual Defendants failed to provide proper bedding, sanitary supplies, and information about medical care because they received no training about these policies, and there is no evidence to that effect, Plaintiff must still show that the failure to train was “a deliberate choice” by county decisionmakers. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (quoting *Pembaur v. Cincinnati*,

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<sup>4</sup> As noted, however, Plaintiff will proceed on her due process claim, and may of course present evidence about Defendants' responses to her requests for medical care in that context. The effect of a specific ruling on this alleged basis for her claim will be to prevent argument and jury instructions on the “deliberate indifference to a serious medical need” standard.

475 U.S. 469, 483-83 (1986)). “Only where a municipality’s failure to train its employees in a relevant respect evidences a ‘deliberate indifference’ to the rights of its inhabitants can such a shortcoming be properly thought of as a city ‘policy or custom’ that is actionable under § 1983.” *Id.*

Nor does the Court find that the failure to have a policy regarding pregnant detainees amounts to deliberate indifference on the part of the county officials. First, there is no dispute that there is a policy directing officers to contact the independent medical contractor, Defendant Allied Resources for Correctional Health, or to call 911, when necessary. Second, Plaintiff has presented no evidence that a separate policy is necessary to prevent pregnant inmates from receiving inappropriate care. *See, Fowles v. Stearns*, 886 F. Supp. 894, 898-899 (D. Me. 1995) (finding relevant the lack of evidence establishing a connection between the alleged use of force and the failure of the county to have a use-of-force policy). Defendant Kennebec County is entitled to judgment as a matter of law on Plaintiff’s section 1983 claim.

## ***II. Maine Civil Rights Act claim.***

Plaintiff’s allegation in Count I of the Amended Complaint reads as follows:

27. All Defendants’ conduct as described above violated the Plaintiff’s rights, as a citizen and a pretrial detainee, to Due Process, Equal Protection, and protection from cruel and unusual punishment under the Maine and United States Constitutions.

Amended Comp. (Nov. 20, 1998). The Kennebec County Defendants read this paragraph to set forth a claim solely under 42 U.S.C. section 1983, which provides a private right of action for violations of federal rights by state actors. Plaintiff now asserts that Count I includes a claim under the Maine Civil Rights Act, 5 M.R.S.A. section 4682 [“MCRA”]. The Court disagrees. The Maine Civil Rights Act provides redress only for constitutional violations accomplished by “physical force or violence against a person, damage or destruction of property or trespass on property” or by the threat of same. 5 M.R.S.A. § 4681. The case cited by Plaintiff in support of the proposition that the Act requires only “threats, intimidation or coercion” was analyzing the statute as it existed prior to a 1991 amendment. *Phelps v. President and Trustee of Colby Coll.*, 595 A.2d 403 (Me. 1991). In the absence of language referencing either the standard for liability under the Act or the Act itself, the Court will not read the Complaint to assert a cause of action under the MCRA.

### ***III. State tort claims against the individual Defendants.***

Defendants assert that they are immune from liability on Plaintiff’s state tort claims under the discretionary immunity provisions of the Maine Tort Claims Act. 14 M.R.S.A. § 8111. That section provides that a government employee is immune from liability for:

Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule, or resolve under which the discretionary function or duties performed is valid.

14 M.R.S.A. § 8111(1)(C). This section has been interpreted to protect the employee from liability for even intentional conduct, as long as the conduct does not ““exceed[], as a matter of law, the scope of any discretion he could have possessed in his official capacity.”” *Maguire v. Municipality of Old Orchard Beach*, 783 F. Supp. 1475, 1487 (D. Me. 1992) (quoting *Polley v. Atwell*, 581 A.2d 410, 413-14 (Me. 1990)).

Plaintiff appears to concede that the actions for which she seeks to impose liability involved discretionary functions. She asserts, however, that Defendants’ conduct exceeded the scope of any discretion they could have had, because the conduct was “wanton or oppressive,” or taken in bad faith. The Court disagrees. The exceptions to immunity to which Plaintiff refers do not, in the Court’s view, apply to the facts of this case.

First, the “wanton or oppressive” language originated in a state statute providing for a private right of action by persons aggrieved by a warrantless arrest conducted in a wanton or oppressive manner, or detained longer than necessary to procure a warrant. 15 M.R.S.A. § 704. The Maine Law Court has yet to decide whether that right of action has survived the enactment of the Maine Tort Claims Act.

*Creamer v. Sceviour*, 652 A.2d 110, 115 (1995). There is no need to anticipate the resolution of that issue here however, as this is not a case involving a warrantless arrest.

Second, the “bad faith” exception applies, not to discretionary acts falling within the immunity of subsection (C), but only to intentional acts within the scope of employment for which subsection (E) provides immunity. *Dall v. Caron*, 628 A.2d 117, 119 (Me. 1993); *see, also, Webb v. Haas*, 665 A.2d 1005, 1009 (Me. 1995) (“[t]he act provides governmental employees with immunity for performing *either* discretionary functions *or* intentional acts or omissions within the scope of employment, unless such actions were in bad faith” (emphasis added)). This exception also does not apply to these facts, which involve discretionary acts.

Further, the Court finds that Plaintiff has not alleged conduct that clearly exceeded the scope of these officers’ discretion under the circumstances. The officers’ decision not to call for medical assistance for Plaintiff’s complaints about a miscarriage when the nurse had already examined Plaintiff and reported that she was not having a miscarriage does not rise to that level. The allegations about placement within the jail and the officers’ ability to view Plaintiff using the toilet likewise do not suffice, inasmuch as the evidence shows that the Defendants were instructed by medical personnel to monitor Plaintiff’s condition, and the cell in which

Plaintiff was housed is specifically designated an “observation cell,” and is visible from the intake desk. The individual Defendants are entitled to judgment as a matter of law on Plaintiff’s state tort claims on the basis of discretionary function immunity.

#### ***IV. State tort claims against Kennebec County.***

##### **A. Immunity.**

Defendant Kennebec County asserts that it is entitled to judgment as a matter of law because there is no vicarious municipal liability under the Maine Tort Claims Act. However, the case cited by Defendant in support of this position deals, not with municipal liability, but with individual supervisory liability. *Fournier v. Joyce*, 753 F. Supp. 989 (D. Me. 1990).

Indeed, Defendant Kennebec County may well be immune from suit under the Maine Tort Claims Act. It is Defendant’s burden under the Act, however, to show that it has not acquired liability insurance to cover Plaintiff’s claims. *Maguire*, 783 F. Supp. at 1489. Defendant has made no attempt to do so in this Motion for Summary Judgment. For this reason, judgment is not appropriate for Defendant Kennebec County on the basis of sovereign immunity.

**B. Substantive Liability.**

**1. Negligent and Intentional Infliction of Emotional Distress.**

The Court is satisfied that Plaintiff has presented sufficient evidence, as set forth previously, to proceed on both her claims for negligent and intentional infliction of emotional distress against Defendant Kennebec County. Plaintiff's claim for negligent infliction of emotional distress requires that she present evidence establishing each of the traditional elements of negligence. *Devine v. Roche Biomedical Lab.*, 637 A.2d 441 (Me. 1994). The Court has no difficulty finding that Plaintiff has established a violation of the duty of care by the individual employees of Defendant Kennebec County. Specifically, the Court finds as a matter of law that the conduct Plaintiff describes "is sufficiently likely to result in" emotional distress on the part of pretrial detainees at the jail. *Cameron v. Pepin*, 610 A.2d 279, 282 (Me. 1992).

Defendant argues that Plaintiff has not met her burden on her claim of intentional infliction of emotional distress because the circumstances she describes are not so severe that "a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the event." *Rowe v. Bennett*, 514 A.2d 802, 805 (Me. 1986) (citation and quotations omitted in original). Viewing the facts as described previously in the light most

favorable to Plaintiff, the Court finds a factual dispute in this regard sufficient to present the issue to the jury.

**2. Defamation.**

Defendant cites several reasons why it believes Plaintiff has not met her burden on her claim for defamation. The first is that Plaintiff does not have sufficient evidence of defamatory statements. It is indeed Plaintiff's burden to come forth with such evidence. *Bakal v. Weare*, 583 A.2d 1028, 1029 (Me. 1990). Plaintiff has made no attempt to explain how any of Defendants' alleged statements fit within the elements of a claim for defamation. Summary judgment is appropriate on this claim.

**3. Invasion of Privacy.**

Defendant does not move for summary judgment on the merits of Plaintiff's claim for invasion of privacy.

***Conclusion***

For the foregoing reasons, I hereby recommend as to Defendants Gustafson and Bellevance's Motion for Summary Judgment that it be:

1. DENIED as to Count I; and
2. GRANTED as to Counts II, III, IV, V and VI.

I further recommend that Defendant Kennebec County's Motion for Summary Judgment on Count VII be GRANTED with respect to the Section 1983 claim, and

GRANTED with respect to the claim for vicarious liability for defamation, and DENIED with respect to the claims for vicarious liability for negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and invasion of privacy.

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.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on: November 15, 1999