

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

BENJAMIN J. GUILIANI,

Plaintiff

v.

TOWN OF BRIDGTON, BRIDGTON  
POLICE DEPARTMENT, BRIDGTON  
POLICE CHIEF ROBERT BELL, AND  
BRIDGTON POLICE OFFICER THOMAS  
HARRIMAN,

Defendants

Civil No. 95-316-P-C

GENE CARTER, Chief Judge

MEMORANDUM AND ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS

Plaintiff Benjamin Guiliani sues the Town of Bridgton, the Bridgton Police Department, Bridgton Police Chief Robert Bell, and Bridgton Police Officer Thomas Harriman under 42 U.S.C. § 1983, alleging numerous violations of his federal constitutional rights. See Complaint (Docket No. 1). Now before the Court is Defendants' Motion to Dismiss or for Summary Judgment (Docket No. 28). For the reasons that follow, Defendants' Motion to Dismiss will be granted.

I. STANDARD FOR MOTION TO DISMISS

In ruling on a motion to dismiss, the Court must take the material allegations of the complaint as true and construe the pleadings in the light most favorable to the plaintiff. Roeder v. Alpha Indus., Inc., 814 F.2d 22, 25 (1st Cir. 1987); Chongris

v. Board of Appeals, 811 F.2d 36, 37 (1st Cir. 1987). The motion will be granted "only if, when viewed in this manner, the pleading shows no set of facts which could entitle Plaintiff to relief." Gooley v. Mobil Oil Co., 851 F.2d 513, 514 (1st Cir. 1988). The Court, however, has "'no duty to conjure up unpled allegations' in order to bolster the plaintiffs' chances of surviving a 12(b)(6) motion to dismiss." Fleet Credit Corp. v. Sion, 893 F.2d 441, 444 (1st Cir. 1990) (quoting Gooley, 851 F.2d at 514). Plaintiff must "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." Gooley, 851 F.2d at 515.

## II. ALLEGED FACTS

In late July or early August of 1993, Plaintiff's son was arrested and charged with assault following an alleged incident of domestic violence. Deposition of Benjamin J. Guiliani, February 12, 1996, Ex. 6 ("Guiliani Deposition"). The bail commissioner set Plaintiff's son's bail at \$25,000. Guiliani Deposition at 14. At the same time, the bail commissioner set the bail of another assault suspect at \$10,000. Id. Plaintiff and his son are Mexican-American; the second assault suspect was White. Id. at 52. Because Plaintiff considered the two suspects to be otherwise similarly situated, he attributed the bail differential to discrimination on the basis of national origin. Id. at 14-15.

On or about August 4, 1993, Plaintiff called Defendant Bridgton Police Chief Bell to express his concern over the apparent discrimination and to request an internal affairs investigation. Id. at 18. Defendant Bell declined to investigate the matter, claiming that it was not the province of the police department to set bail. Affidavit of Robert Bell (Docket No. 30) ¶ 3 ("Bell Affidavit"). Defendant Bell added that he considered Plaintiff's allegations of discrimination to be "a bunch of crap." Guiliani Deposition at 17, Ex. 5. On or about August 12, 1995, Plaintiff submitted a letter to the Bridgton News that recounted his phone conversation with Defendant Bell and called for Bell's resignation. Id. Ex. 5.

On or about October 13, 1993, Mr. Leslie Kutasi provided a signed, voluntary, written statement to Defendant Officer Thomas Harriman indicating that Plaintiff had contacted Kutasi regarding an upcoming criminal trial in which Kutasi was the complainant and Plaintiff's son was a defendant. Bell Affidavit ¶ 4, Ex. A. Kutasi wrote that Plaintiff: inquired whether Kutasi planned to pursue the theft charges against his son; mentioned that he planned to "sue the Bridgton Police Department for discrimination"; and inquired whether Kutasi would "want to be involved in something like that" after reminding Kutasi that he was a State Representative. Bell Affidavit Ex. A.

Based on Kutasi's statement, Defendant Harriman completed an offense report indicating that Plaintiff was suspected of tampering with the victim of a crime. Bell Affidavit ¶ 5, Ex. B.

Defendants sent the report to the Maine Attorney General's Office, which decided not to prosecute Plaintiff. Guiliani Deposition at 33, Ex. 3. Plaintiff was never arraigned, arrested, or otherwise detained regarding the potential charges in the report. Id.

### III. DISCUSSION

To succeed in a municipal liability<sup>1</sup> claim pursuant to § 1983, a plaintiff must allege not only that a municipal officer violated the plaintiff's specific constitutional rights, but that the officer was acting pursuant to an official policy or custom of the municipality when violating those rights. Oklahoma City v. Tuttle, 471 U.S. 808, 810 (1985); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978); Santiago v. Fenton, 891 F.2d 373, 381 (1st Cir. 1989). Here, because Plaintiff fails to state any claim of violation of his rights under the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, Plaintiff's action will be dismissed, and the Court will not reach the question of whether Defendants harbor such an illegal policy or custom. Fed. R. Civ. P. 12(b)(6).

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<sup>1</sup>Suits against municipal officers in their official capacity should be treated as suits against the municipality. See Hafer v. Melo, 502 U.S. 21, 25 (1991). Because Plaintiff has sued the municipal officer Defendants only in their official capacity (and has sued the municipality as well), this Court will treat the suit as one against the municipality. Guiliani Deposition at 61.

A. Eighth and Ninth Amendment Claims

Plaintiff's claims that he suffered violations of his Eighth and Ninth Amendment rights may be treated together. First, the protections of the Eighth Amendment are not implicated absent an allegation of incarceration following a conviction. Ingraham v. Wright, 430 U.S. 651, 671-72 (1977). Here, because Plaintiff has made no such allegation, he states no claim under the Eighth Amendment. Second, the Ninth Amendment does not provide an independent source of rights for the violation of which liability may be imposed under § 1983. Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992); Strandberg v. City of Helena, 791 F.2d 744, 748 (9th Cir. 1986). Therefore, Plaintiff's Ninth Amendment claim will also be dismissed.

B. First and Fourteenth Amendment Claims

Plaintiff's claims under the First and Fourteenth Amendments are both predicated on Defendants' conduct of completing an offense report against Plaintiff based on Kutasi's signed, voluntary statement and referring the report to the Maine Attorney General's Office, thus allegedly harming Plaintiff's reputation. To the extent that Defendants undertook that conduct with the motive to retaliate against Plaintiff for publicly criticizing Defendants, Plaintiff alleges a violation of his rights under the First Amendment. Broderick v. Roache, 996 F.2d 1294, 1297 n.5 (1st Cir. 1993). To the extent that Defendants

undertook that conduct with the motive to discriminate against Plaintiff based on his Mexican-American national origin, Plaintiff alleges a violation of his rights under the Equal Protection Clause of the Fourteenth Amendment. Alexis v. McDonald's Restaurants of Massachusetts, Inc., 67 F.3d 341, 354 (1st Cir. 1995). This Court will not reach the question of whether Defendants acted with either of these illegal motives because Defendants' conduct does not constitute a legally cognizable harm regardless of the motives attendant to it.

Plaintiff has not alleged that Defendants' conduct violates any interest protected by state laws, such as those prohibiting malicious prosecution or defamation. Nor has Plaintiff alleged that Defendants' conduct violates any "liberty" or "property" interest protected by the Due Process Clause of the Fourteenth Amendment. See Paul v. Davis, 424 U.S. 693, 700 (1976) (interest in reputation alone, apart from a more tangible interest such as employment, constitutes neither "liberty" nor "property" interest under Fourteenth Amendment); Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 32 (1st Cir. 1996). Nor can this Court uncover any legal authority supporting the proposition that police officers' merely referring an offense report based on a sworn citizen complaint to a prosecutors' office constitutes conduct (regardless of the state of mind with which it is undertaken) that is actionable under § 1983 when no detention, arrest, arraignment, or prosecution results. Cf. Boschette v. Bach, 914 F. Supp. 769 (D.P.R. 1995) (dismissing malicious prosecution

claim based on police report because district attorney neither filed charges nor prosecuted plaintiff); Nicholson v. Moran, 835 F. Supp. 695, 696 & n.9 (D.R.I. 1993) (finding no First Amendment retaliatory conduct when "[n]o punishment or other significant action resulted from the charge alone.").

In this case, Defendants have not detained, arrested, arraigned, or prosecuted Plaintiff. Defendants have merely completed an offense report based on a citizen complaint against Plaintiff and submitted it to the Maine Attorney General, who did not pursue it further. Plaintiff only alleges (without evidentiary support) that Defendants' conduct has harmed his reputation.<sup>2</sup> Because Plaintiff has not shown that harm to be actionable under § 1983, he has failed to state a claim upon which relief can be granted. Therefore, Plaintiff's First and Fourteenth Amendment Claims will also be dismissed.

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<sup>2</sup>Plaintiff has not claimed that the alleged reputational harm caused him to lose his elected position as a member of the school board. Nor has Plaintiff claimed that it caused him to lose a bid for reelection to that position. Instead, Plaintiff has claimed only that he decided not to run for reelection to the school board or for election to the state legislature based in part on his surmise that the alleged reputational harm would lower his chances for success. Guiliani Deposition at 40. This Court does not find that such an attenuated link between Plaintiff's alleged reputational harm and his nominally-paid, elected position of part-time employment renders that harm actionable under Paul or its progeny.

IV. CONCLUSION

Accordingly, it is ORDERED that Defendants' Motion to Dismiss Plaintiff's claims alleging violations of his rights under the First, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution be, and it is hereby, GRANTED and Plaintiff's Complaint is hereby DISMISSED.

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GENE CARTER  
Chief Judge

Dated at Portland, Maine this 31<sup>st</sup> day of May, 1996.