

that, during the incident at issue in this case, Loranger was a federal agent for the YCCTF and that therefore neither he nor the City acted under color of state law. Since defendants Loranger and the City have submitted materials outside the pleadings in support of their motion, I will treat this as a motion for summary judgment. Fed. R. Civ. P. 12(b).

In an order in this case dated January 19, 1989, this court found that the YCCTF was an arm of the State of Maine for purposes of Eleventh Amendment immunity. That question differs somewhat from the question whether, as an agent assigned to the YCCTF, Loranger's actions are attributable to the state. Nevertheless, the facts show that, although Loranger exercised to some extent both federal and state authority as an agent for an intergovernmental entity, there was sufficient state authority to satisfy ' 1983's "under color of state law" requirement.

Maine State Police officials had supervisory responsibility for the task force and had the authority to control its operations. Affidavit of Richard S. Cohen & 4. The YCCTF was governed by the standard operating procedures of the Maine State Police. *Id.* State control of the day-to-day operations of an agency with both federal and state characteristics is an important factor showing that the officers of that agency exercise state authority for purposes of ' 1983. *Johnson v. Orr*, 780 F.2d 386, 390 (3d Cir.), *cert. denied sub nom. McDaniel v. Johnson*, 479 U.S. 828 (1986). As a member of the YCCTF, Loranger was paid by the City and the State of Maine, and was sworn in both as a Special Agent of the Maine State Police and as a Special Deputy United States Marshal. March 30, 1989

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

Affidavit of David Loranger & 2. He was given legal directives by Nicholas Gess, who was both an Assistant Attorney General for the State of Maine as well as a Special Assistant United States Attorney. *Id.* On the night of the incident in this case, Loranger was executing a federal search warrant based on an affidavit signed by him in his capacity as a Special United States Deputy Marshal. *Id.* & 3 and Exhibit A. This case differs from *Askew v. Bloemker*, 548 F.2d 673, 677 (7th Cir. 1976), where local police officers employed by the state were found to have acted exclusively under federal authority because they were assigned to a federal agency. I conclude that Loranger did not act exclusively as a federal agent, and that he did act under color of state law for purposes of ' 1983.

Defendant Murray has moved to dismiss on the grounds of qualified immunity and failure to allege action under color of state law. She argues that she acted under the authority of higher ranking officials of the YCCTF, who in turn were acting under federal authority. For the reasons discussed above, for purposes of this motion I reject her argument that she was not acting under color of state law. Since Murray, along with Loranger and the City, has moved for summary judgment on the issue of qualified immunity, I will address that issue in the context of the motion for summary judgment.

II. MOTION FOR SUMMARY JUDGMENT

Defendants Loranger, the City and Murray have moved for summary judgment on the grounds that Murray and Loranger are entitled to qualified immunity and that the plaintiff has failed to support her claim that the City had a custom or policy of strip searches or that the City was grossly negligent in training its police officers with regard to strip searches. Under Fed. R. Civ. P. 56(c), the court shall grant summary judgment if there remains "no genuine issue as to any material fact" and if "the moving party is entitled to a judgment as a matter of law." All properly supported material facts set forth by the moving party will be deemed to be admitted unless properly controverted. *See McDermott v. Lehman*, 594 F. Supp. 1315, 1321 (D. Me. 1984). At the same time, however, the

record must be viewed in the light most favorable to the party opposing the motion. *Voutour v. Vitale*, 761 F.2d 812, 817 (1st Cir. 1985), *cert. denied sub nom. Saugus v. Voutour*, 474 U.S. 1100 (1986).

A. Qualified Immunity

The individual defendants argue that they are entitled to qualified immunity because they could reasonably have believed that their actions were lawful. The Supreme Court has held that "government officials performing discretionary functions, generally are shielded 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This "objective reasonableness" test is designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment"; the availability of such qualified immunity is a threshold question which should be resolved before discovery is permitted. *Id.*

Elaborating on the standard in a subsequent case, the Supreme Court explained that:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell [v. Forsyth]*, 472 U.S. 511] at 535, n.12; but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987). Pursuant to *Anderson*, the court must engage in a two-step analysis:

We first examine the law, to determine whether the right allegedly violated was "clearly established"; if so, the defendant should reasonably have known of the right. Second, we examine the defendant's conduct, to establish whether objectively it was reasonable for him to believe that his actions did not violate a "clearly established" right.

Rodriguez v. Comas, 875 F.2d 979, 981 (1st Cir. 1989). The defendants have the burden of proving their affirmative defense of qualified immunity. *Vitalone v. Curran*, 665 F. Supp. 964, 974 (D. Me. 1987).

The record shows that on the night of October 3, 1986, after a YCCTF briefing, Loranger and another agent found Daniel Guarino, a known drug trafficker, driving a vehicle accompanied by a female later identified as Karen Burns, the plaintiff. April 12, 1989 Affidavit of David Loranger && 3, 5. Loranger followed Guarino and the plaintiff, observed them stopping at the residence of Gene A. Michaud, a known cocaine dealer, and then saw Guarino and Burns enter the apartment named in the search warrant. *Id.* & 5. Just before Loranger executed the search warrant, he observed Michaud entering this apartment. *Id.* When he entered the apartment, Loranger saw `` Guarino, Burns and Michaud standing near the table facing one another; Guarino was handing Michaud money and Michaud was handing Guarino a small plastic bag of a substance that turned out to be cocaine." *Id.* & 6.

Loranger noted that Burns was present at this drug transaction, but he does not recall what, if anything, she was doing other than witnessing the transaction. Deposition of David A. Loranger pp. 28, 48. The officers found cocaine on the floor near the kitchen table where Guarino, Burns and Michaud were standing. *Id.* at 30-31. Some hashish and drug paraphernalia were also found at the apartment. *Id.* at 33. Guarino and Michaud were strip searched. *Id.* at 36. Another individual, an elderly man, was found in the apartment but was not suspected of being involved with the drug transactions. *Id.* p. 31.

On the night of October 3, 1986, defendant Murray was requested by her superiors at York County Jail to assist the YCCTF in case female suspects were involved. Affidavit of York County Deputy Sheriff Priscilla Murray & 4. She was ordered to report to Guarino's apartment where

someone in authority instructed her to strip search the plaintiff. *Id.* §§ 6-7. Murray brought the plaintiff into a room where no one else was present, instructed the plaintiff to remove her clothing and bend over, and then inspected the plaintiff and her clothing. *Id.* § 8. She did not examine any body cavities and did not touch the plaintiff except for running her fingers through her hair. *Id.*

The plaintiff states that Loranger requested Murray's presence at the apartment. Affidavit of Karen Burns § 4. Loranger states that he did not recall calling or discussing calling a female officer to the scene, Deposition of David A. Loranger pp. 34, 38-39, and that he did not recall Murray or any female deputy being at the scene, *Id.* Sergeant Marchessault, who supervised and was present at the raid on Guarino's apartment, stated that he did not order Murray to search the plaintiff and that he did not recall anyone else doing so. Deposition of Steven P. Marchessault pp. 8-9. Murray states that she cannot identify the person who instructed her to strip search the plaintiff. Affidavit of York County Deputy Sheriff Priscilla Murray § 7.

The only fact in dispute is the identity of the individual who authorized the strip search of the plaintiff. Nevertheless, this factual question is not material to the issue of qualified immunity in this case. The state of mind of the person who ordered the strip search and the actual basis for the decision to strip search the plaintiff are immaterial; the only relevant inquiry is whether an officer at the scene could reasonably have believed that the strip search was lawful.

The plaintiff's Fourth Amendment right to be free from unreasonable searches was clearly established at the time of this search. *See Blackburn v. Snow*, 771 F.2d 556, 569 (1st Cir. 1985). A search is generally reasonable if done pursuant to a warrant issued upon probable cause; without such a warrant, the determination of the reasonableness of a search requires "balancing the need to search against the invasion which the search entails." *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967). Although they are not *per se*

unreasonable, strip searches clearly constitute a severe interference with a person's privacy interests. *Blackburn*, 771 F.2d at 564. See also *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (inmates can be strip searched after contact visits without particularized suspicion). It is settled law that, without a valid warrant, strip searches of unincarcerated persons must be based on at least particularized suspicion. *Blackburn*, 771 F.2d at 567.

The plaintiff claims that the search warrant issued to defendant Loranger did not establish probable cause to search her, and that there was no independent probable cause or exceptional circumstance to justify searching her. The search warrant authorized the search of "20 Staples Street, Old Orchard Beach, Maine and [] all persons found thereat" for property related to illegal drug dealing. Exhibit B to March 30, 1989 Affidavit of David Loranger. It is clearly established law that, "[w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause . . . to search the premises where the person may happen to be." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). Warrants describing the persons to be searched only by their location in a particular place are generally not valid except where the affidavit in support of the warrant shows "that it is probable anyone in the described place when the warrant is executed is involved in the criminal activity in such a way as to have evidence thereof on his person." 2 W. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.5(e) at p. 231 (1987). For example, a warrant authorizing the search of all persons within a particular apartment was valid where the affidavit supporting the warrant showed that the apartment was small, that persons known to be drug traffickers frequently went in and out of it, and that the occupant was observed selling drugs to others in the apartment. *Commonwealth v. Smith*, 370 Mass. 335, 348 N.E.2d 101, cert. denied sub nom. *Smith v. Massachusetts*, 429 U.S. 944 (1976).

Here the search warrant was supported by the affidavit of defendant Loranger, which described controlled drug purchases by an informant from Daniel A. Guarino at Guarino's apartment located at 20 Staples Street, Old Orchard Beach. Exhibit A to March 30, 1989 Affidavit of David Loranger. The affidavit gave no particular information as to any criminal activity in the Guarino residence by anyone other than Guarino and the informant, and thus did not establish that it was probable that all persons found in the apartment would have contraband on them. Indeed, it was apparent to Loranger that an elderly man residing in the apartment was not involved with the activities of Guarino or the others in the apartment. Deposition of David A. Loranger p. 31. I conclude that, under clearly established law, it was unreasonable for the individual defendants to have relied on this warrant in searching the plaintiff.

Nevertheless, the individual defendants may be entitled to qualified immunity if they reasonably could have believed that they had probable cause to search the plaintiff without a warrant. Mere presence in a place where drug transactions are taking place is not sufficient reason for a strip search. *See Ybarra v. Illinois*, 444 U.S. at 91. There is no evidence that the officers saw the plaintiff engage in any drug transaction. They did observe her riding in a car with Guarino and stopping at the residence of a known drug dealer earlier that evening, April 12, 1989 Affidavit of David Loranger & 5, and they did see her witnessing a drug transaction between Michaud and Guarino in the apartment, Deposition of David A. Loranger pp. 28, 48. However, Loranger had information prior to the search of Guarino's apartment that Guarino's girlfriend was involved in purchasing and using cocaine and selling marijuana. *Id.* p. 51. Although he did not know the name of this girlfriend at the time, according to Loranger she was subsequently identified as the plaintiff. *Id.*

The defendants argue that, on the night of the search, Loranger could reasonably have inferred from seeing the plaintiff in the car and the apartment with Guarino that she was the girlfriend

suspected of drug trafficking. Based on this information and the fact that drug users and dealers often hide contraband on their persons, the defendants contend that probable cause existed to suspect the plaintiff of hiding contraband on her person.

Officers are entitled to qualified immunity if the existence of probable cause for a search is merely questionable; officers will be liable for a warrantless search only if there *clearly* was no probable cause at the time the search was conducted. *See Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir. 1985). In this case, Loranger could reasonably infer that the plaintiff was Guarino's girlfriend, who was suspected of drug trafficking, and that her known drug involvement and presence at this drug transaction made it probable that she might be hiding contraband on her person. Therefore, I conclude that he is entitled to qualified immunity.

The record does not show that Murray personally had information indicating that probable cause existed to search the plaintiff. Nevertheless, she is entitled to assume that the officer who directed her to perform the search had specific information showing that probable cause existed. *See United States v. Hensley*, 469 U.S. 221, 229-33 (1985); *Whiteley v. Warden*, 401 U.S. 560, 568 (1971); *United States v. Ferreira*, 821 F.2d 1, 5 (1st Cir. 1987). Consequently, Murray is also entitled to qualified immunity.

B. Claims Against the City

A municipality can only be held liable under § 1983 if a "custom or policy" exists condoning the violation. *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). The plaintiff argues that the City was grossly negligent by failing to provide adequate training and policies regarding strip searches. A policy of inadequate training for police officers can give rise to liability where the inadequacy amounts to a "deliberate indifference" to the public's rights and where a close

relationship exists between the inadequacy of the training and the injury. *Canton v. Harris*, 109 S. Ct. 1197, 1204-06 (1989).

The record contains a statement by the Chief of Police for the City detailing the training received by the City police officers and stating that the City has no policy or guidelines for strip searches in particular. Affidavit of Richard Nason && 2-5. However, attached to an amended final pre-trial memorandum, the defendants have submitted a copy of rules promulgated by the Maine Attorney General's Office regarding strip searches, and in this memorandum the defendants state that Loranger believes these rules were given to him as part of his training for the YCCTF. These cannot be considered in support of the motion for summary judgment because, in addition to their late submission, the rules are not authenticated or supported by any affidavit linking the rules to the defendants in any way. The record also shows that at the YCCTF briefing on October 3, 1986 Loranger was told that strip searches of persons at the scene would be conducted, and he understood that this was customary procedure for the raids planned at that briefing. Deposition of David A. Loranger p. 34, 41. The City's Chief of Police states that he has no reason to believe the City police department has ever conducted a strip search and that the standard operating procedure is to transport prisoners to the county jail to be searched. Affidavit of Richard Nason & 4.

The plaintiff has the burden of proving the City inadequately trained its officers and that this caused her injury. In this case, as discussed above, the individual defendants acted reasonably, regardless of the City's policies or training concerning strip searches. Therefore, the plaintiff has not shown that the City's training, even if inadequate, rose to the level of deliberate indifference to her rights or that any City policy or custom caused her any injury.

IV. CONCLUSION

For the foregoing reasons, I recommend that the defendants' motions to dismiss be **DENIED**, and that the defendants' motion for summary judgment be **GRANTED** with respect to the ' 1983 claims against the individual defendants and the City. If my recommendation is accepted, no federal claim against the defendants will remain and the only basis for jurisdiction will be pendent-party jurisdiction. The statutes conferring federal jurisdiction in this case, 28 U.S.C. ' ' 1331 and 1343, do not indicate an affirmative intent to permit pendent-party jurisdiction. *See Finley v. United States*, 109 S. Ct. 2003, 2006-07 (1989). Therefore, this court will have no basis for asserting continuing jurisdiction over the defendants and I recommend that the state law claims against them be **DISMISSED**.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after 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.

Dated at Portland, Maine this 7th day of August, 1989.

David M. Cohen
United States Magistrate