UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MARK S. HIDER,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil No. 94-54-P-DMC**
	)	
CITY OF PORTLAND, et al.,	)	
	)	
Defendants	)	

MEMORANDUM DECISION ON
CROSS MOTIONS FOR SUMMARY JUDGMENT[1]

This action arises out of a 1990 determination made by defendant Michael Chitwood, chief of police for the defendant City of Portland, denying the plaintiff's application for a permit to carry a concealed weapon. Appearing *pro se*, the plaintiff alleges, pursuant to 42 U.S.C. ' 1983, that the defendants violated his rights as secured by the Second, Eighth and Fourteenth Amendments to the U.S. Constitution. Additionally, the plaintiff has appended state-law claims alleging violation of the Maine Civil Rights Act, 5 M.R.S.A. ' 4681 *et seq*., as well as negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and defamation. Both the plaintiff and the defendants have filed motions for summary judgment. For the reasons that follow, I conclude that the plaintiff's motion should be denied, that the defendants' motion should be granted in part, and that the plaintiff's pendent state-law claims should be dismissed.

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[1] Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

I. Summary Judgment Standards

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 party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and ``give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). ``Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id*. at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2). A fact is ``material" if it may affect the outcome of the case; a dispute is ``genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. Facts and Procedural History

The essential facts are not in dispute. On November 14, 1989 an officer of the Portland Police Department stopped a motor vehicle driven by the plaintiff because it was allegedly exceeding the posted speed limit. In the course of the traffic stop and in response to the officer's inquiry whether there were any weapons in the car, the plaintiff peaceably relinquished control of a gun for which he had no valid permit. He was then arrested on charges of carrying a loaded firearm in a

motor vehicle, 12 M.R.S.A. ' 7406(8)(C), and carrying a concealed weapon, 25 M.R.S.A. ' 2001. Incident to the arrest, the officer searched the plaintiff and discovered a knife in his coat pocket.

The plaintiff contends that he had previously been issued a permit to carry a concealed weapon and that, at the time of his arrest, he was unaware that the permit had expired. On the day following his arrest, the plaintiff applied to the Portland Police Department for a new permit to carry a concealed weapon. *See* 25 M.R.S.A. '' 2002(9), 2003 (authorizing chiefs of police to issue concealed weapons permits when designated by municipality as ``issuing authority"). Chief Chitwood denied the application on November 27, 1989. His stated reason for doing so was that the plaintiff lacked the required good moral character, in light of the pending criminal charges described above. The plaintiff then filed an action in the Maine Superior Court to challenge the administrative determination of the police department. The Superior Court vacated the determination made by Chief Chitwood and remanded the matter to the police department, noting that the district attorney had agreed not to pursue the criminal charges against the plaintiff and that, therefore, the factual basis for Chief Chitwood's denial of the application had ``evaporated." *See* Exh. D to Defendants' Statement of Material Facts (Docket No. 14) at 2. Thereafter, the plaintiff renewed his application for a concealed weapons permit and the application was again denied. The stated reason for the chief's second denial was that the plaintiff had failed to demonstrate good moral character, as required by section 2003.

The plaintiff then sought judicial review for a second time, the Superior Court affirmed the decision of the police chief, and the plaintiff appealed to the Law Court. *See Hider v. Chief of Police, City of Portland*, 628 A.2d 158 (Me. 1993). The Law Court held that the police department was not collaterally estopped from denying the permit application based on the conduct that had been

the basis for the criminal charges brought against the plaintiff, notwithstanding the Superior Court's determination that the criminal proceedings had ``evaporated" and were therefore not a proper basis for denying the plaintiff's original application. *Id*. at 160. The Law Court further determined that Chief Chitwood had not abused his discretion or otherwise acted illegally in his second denial of a concealed weapons permit to the plaintiff, based on the plaintiff's conduct at the time of his arrest.

> In view of the fact that Hider was driving his car with a loaded firearm for which he had no permit, and that he had a knife concealed on his person, which was not discovered by the arresting officer until he did a pat-down search, we conclude that the Chief's determination was neither arbitrary nor unreasonable.

Id. at 161. Noting that 25 M.R.S.A. ' 2005 provides that, if a person holding a permit to carry a concealed weapon is convicted of carrying a second concealed weapon without a permit, the issuing authority is required to revoke the valid permit, the court concluded that ``it was reasonable for the Chief to consider Hider's violation of the permit requirements in denying his application for a permit." *Id*.

The plaintiff thereafter filed his complaint with this court.

III. *Res Judicata*

The defendants contend that the plaintiff's claims are barred by the doctrines of *res judicata* and collateral estoppel. Their position is that all issues, including constitutional ones, related to the denial of the plaintiff's request for a concealed weapons permit should have been litigated in the state court proceeding that culminated in the Law Court's *Hider* decision. The plaintiff contends that *res judicata* and collateral estoppel do not apply because (1) the present action involves Chief Chitwood

in his personal rather than official capacity, (2) the issues raised in the present proceeding were not litigated in the state court, thus making collateral estoppel inappropriate, (3) ``[j]ust because the Law Court decides and rules does not mean it is right," (4) there was no opportunity in the state court proceeding, which was an appeal of an administrative ruling brought pursuant to M.R. Civ. P. 80B, to raise a section 1983 claim, and (5) none of the operative facts at issue here were before the state court in *Hider*. Memorandum of Law in Support of Plaintiff's Response in Opposition to Defendant's Response and Motion for Summary Judgment (Docket No. 15) at 8-10.

It is well established that a federal court in a section 1983 action must give full preclusive effect to state court judgments adjudicating both issues and claims. *Willhauck v. Halpin*, 953 F.2d 689, 704 (1st Cir. 1991). In such a proceeding, this court must accord the same preclusive effect to the state court judgment, both as to claims and as to issues previously adjudicated, as would be given in the state courts of this district. *Id*. at 704-705 (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 83-84 (1984)). Thus, Maine law determines whether the plaintiff is barred from relitigating an issue previously presented in the state court (issue preclusion), or from raising a claim that could have been presented in the state proceeding (claim preclusion). *Willhauck*, 953 F.2d at 705 (citing *Migra*

in that action in his capacity as the grantee of a certain real estate parcel, and appeared in the subsequent proceeding in a distinctly different capacity as administrator of an estate. *Lander*, 65 Me. at 27, 29.

The plaintiff does not contend that there is insufficient privity between Chief Chitwood, as he appeared in his official capacity in *Hider*, and the defendant City of Portland in the present suit. Indeed, ``in official-capacity suits, privity exists between government entities and their employees." *Brown*, 628 A.2d at 128 (citation omitted). Accordingly, I conclude that, for purposes of the doctrine of *res judicata*, there is privity between the parties in *Hider* and the parties to the instant proceeding. The remaining contentions on this issue relate to whether the matters presented for decision now were, or could have been, litigated in the prior action. Once again,