

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NORMAN L. BERTHIAUME,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 94-86-P-C
)	
JEAN CARON, et al.,)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON
MOTION FOR SUMMARY JUDGMENT**

The motion now before the court requires a determination of whether, and to what extent, members of the Maine Board of Nursing (the "board") are immune from civil liability for having allegedly forced the plaintiff, a nurse licensed by the board, to submit to a "penile plethysmograph" test as a condition of his continued professional licensure following his criminal conviction on a federal charge of importation of obscene matter. In his complaint filed pursuant to 42 U.S.C. ' 1983 and the analogous provision of the Maine Civil Rights Act, 5 M.R.S.A. ' 4682, the plaintiff alleges violation of his rights to procedural and substantive due process as secured by the U.S. Constitution, and violation of his rights to due process and to be free from unreasonable searches as secured by the Maine Constitution. Among the eight defendants named in the complaint are members of the board, the board's executive director and an assistant state attorney general who served as legal advisor to the board. Of the six board members named in the complaint, five¹ have filed a joint motion for summary judgment, contending that they are entitled to absolute immunity or, in the alternative, that

¹ Kathi Murray, Helen Twombly, Patricia Vampatella, Donald Pray and Marie Fisher.

they are entitled to qualified immunity. The movants further contend that the actions alleged by the plaintiff do not, as a matter of law, amount to a violation of any constitutional rights. I conclude that the board members are entitled to absolute immunity from civil liability on the plaintiff's claims, and accordingly I recommend the granting of the summary judgment motion.

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. Factual Context

Viewed in the light most favorable to the plaintiff as the party against whom summary judgment is sought, the record reveals the following: At all times relevant to this proceeding, the plaintiff was licensed by the board to practice nursing in Maine. Affidavit of Norman L. Berthiaume ("Berthiaume Affidavit"), Exh. A to Plaintiff's Statement of Material Facts (Docket No. 22), at & 2. In January 1990 the U.S. Attorney charged the plaintiff with a violation of federal law as a result of allegedly having received through the mail a videotape containing child pornography. *Id.* at & 3. The plaintiff informed the board of these pending charges prior to their disposition. *Id.* at & 4; Deposition of Jean C. Caron ("Caron Deposition"), Exh. B to Plaintiff's Statement of Material Facts, at 50. On September 24, 1990 the plaintiff entered a plea of guilty in this court to a charge of violating 18 U.S.C. ' 1462, prohibiting the importation of obscene matter. Exh. 1 to Statement of Material Facts in Support of Motion for Summary Judgment by Defendants Murray, Twombly, Vampatella, Pray and Fisher ("Defendants' Statement of Material Facts") (Docket No. 16) at 1. He received a sentence of two years' probation and a fine of \$2,000. *Id.* at 2-3. As a condition of his probation, the plaintiff was required to submit to psychological counseling. *Id.* at 2.

In connection with the plaintiff's application to renew his nursing license, the board conducted an informal conference with the plaintiff and his counsel on November 8, 1990. Affidavit of Marie D. Fisher ("Fisher Affidavit"), Exh. A to Defendants' Statement of Material Facts, at & 6; Exh. 5 to Defendants' Statement of Material Facts at 2-3. The board conducted the conference in executive session, after which the panel made the following findings of fact on the record:

- a. Licensee states that this was an isolated incident. The U.S. District Court judge that sentenced Licensee apparently agreed.
- b. Licensee voluntarily began and continues in psychological counseling.

c. Court documents indicate there is no prior history of any same or similar acts by Licensee.

d. Licensee has a good work history.

e. Judge Carter stated ``I really get very clearly the picture there is no indication whatever of this person being involved in the abuse of children sexually or otherwise."

f. Licensee has voluntarily restricted his practice to adults, pending final resolution of this matter.

g. Licensee has pled guilty to importation of obscene matter in violation of Title 18, United States Code, Section 1462. Licensee was sentenced to two years probation, a \$2,000 fine and was ordered to submit to counseling.

h. Many letters of support had been submitted to the Board on behalf of Licensee.

i. Dr. Roger Ginn, Ph.D., evaluated Licensee and concluded that psychological testing did not point to any significant psychological or emotional problems which would adversely affect his functioning or suggest that he is at any risk at all to anyone in the community.

Id. Pending the outcome of the independent psychological examination, the board placed the plaintiff's license on probation and limited his practice to patients 18 years of age or older. *Id.* at 3.

At the informal conference, the board gave no indication to the plaintiff that there was anything unusual about the independent psychological examination it was requiring. Berthiaume Affidavit at & 14. Subsequent to the November 8 meeting, defendant Jean Caron, executive director of the board, contacted a Dr. William O'Donahue about conducting the examination of the plaintiff. Caron Deposition at 84-85. O'Donahue told Caron that a penile plethysmograph was among the tests he considered appropriate for the plaintiff. *Id.* at 87. Following this discussion, Caron consulted with two of the other defendants: Assistant Attorney General James Bivens and Betty Clark, who

was then serving as chair of the board. *Id.* at 89-90. Clark advised Caron to have O'Donahue proceed with the plethysmograph test. *Id.* at 96. Caron does not know whether Clark discussed this decision with any other members of the board, nor does Caron recall whether she herself discussed this subject with any other board members. *Id.* at 97.

Caron left the matter of arranging the examination to Bivens. *Id.* at 99. He notified the plaintiff and his counsel that the board wanted the plaintiff to submit to the plethysmograph test, and that if the plaintiff did not agree the board would seek the revocation of his nursing license. Berthiaume Affidavit at & 15. Although the plaintiff expressed reservations about the test, he eventually agreed to it. *Id.* at && 16-17.

O'Donahue conducted the test on November 29 and December 6, 1990. *Id.* at & 18. An assistant placed the plaintiff in a windowless room that contained a projector and an intercom. *Id.* at & 19. He was given a U-shaped strain gauge and told to remove his pants and underwear, to sit in a recliner chair, and to attach the gauge to his penis. *Id.* The first part of the test consisted of showing the plaintiff 30 slides containing scenes of naked women, homosexual activity, heterosexual activity and naked children. *Id.* at & 20. Each slide was shown for 90 seconds; the plaintiff was required to describe into the intercom the scenes depicted on the slides. *Id.* at & 21. Between slides, the plaintiff was required to sit in total darkness for 90 seconds. *Id.* at & 22. During the second part of the test, the plaintiff was required to sit in total darkness and listen to 30 different 90-second "scenes" played over the intercom. *Id.* at & 23. The plaintiff describes these recordings as "very graphic and explicit in detail," stating that they included descriptions of homosexual activity, adult sexual activity with children, violent sexual activity and the beating of children. *Id.* The plaintiff describes the

experience of submitting to the penile plethysmograph test as "extremely invasive, . . . shocking, humiliating, degrading and traumatizing." *Id.* at & 24.

III. Absolute Immunity

The five defendants who have sought summary judgment all contend that, as members of the nursing board, they perform a "quasi-judicial" function and therefore enjoy absolute immunity from liability for section 1983 damages. Absolute immunity from section 1983 liability is enjoyed by only a "very limited class of officials . . . whose special functions or constitutional status requires complete protection from suit." *Hafer v. Melo*, 116 L. Ed. 2d 301, 312 (1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)). As Judge Learned Hand classically stated it, to submit such individuals,

the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949). However, "officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue." *Hafer*, 116 L. Ed. 2d at 312 (citation omitted). As the Supreme Court noted in *Burns v. Reed*, 500 U.S. 478 (1991), section 1983 is written in broad terms, but the protections it affords to individual citizens who suffer actionable deprivations of constitutional rights must be read "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Id.* at 484 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)).

In *Imbler*, the Court made clear that in determining whether a particular government official is entitled to absolute immunity the focus must be on the official's function rather than on the official's title. *Imbler*, 424 U.S. at 430; *see also Butz v. Economou*, 438 U.S. 478, 508, 511 (1978) ("Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities."). Consistent with this approach, the First Circuit Court of Appeals concluded in *Bettencourt v. Board of Registration in Medicine*, 904 F.2d 772 (1st Cir. 1990), that individual members of the Massachusetts Board of Registration in Medicine were absolutely immune from section 1983 liability for having revoked a physician's license in the wake of allegations of sexual misconduct with a patient. *Id.* at 774, 784. *Bettencourt* established the following framework for evaluating section 1983 claims against members of professional licensing boards in this circuit:

Proper analysis involves answering three questions, each designed to determine how closely analogous the adjudicatory experience of a Board member is to that of a judge. First, does a Board member, like a judge, perform a traditional "adjudicatory" function, in that he decides facts, applies law, and otherwise resolves disputes on the merits (free from direct political influence)? Second, does a Board member, like a judge, decide cases sufficiently controversial that, in the absence of absolute immunity, he would be subject to numerous damages actions? Third, does a Board member, like a judge, adjudicate disputes against a backdrop of multiple safeguards designed to protect a [licensee's] constitutional rights?

Id. at 783 (citations omitted). These questions were answered in the affirmative in connection with the Massachusetts board and the license revocation at issue. *Id.*; *cf. Ramirez v. Oklahoma Dept. of*

Mental Health, 1994 WL 663598 (10th Cir., Nov. 28, 1994) at *7 (decisionmakers in internal agency disciplinary proceeding not absolutely immune; process lacked objectivity and impartiality because the hearing officer was plaintiff's supervisor and because plaintiff was disciplined without benefit of statutory administrative remedies). In undertaking the *Bettencourt* analysis, function thoroughly eclipses form; even a school bus driver may enjoy section 1983 absolute immunity if the driver was acting at the time in a role functionally comparable to that of a prosecutor or a judge. *See Penney v. Town of Middleton*, 1994 U.S. Dist. LEXIS 16698 (D.N.H., Nov. 21, 1994) at *26.

Maine's Board of Nursing consists by statute of nine members, all appointed to five-year terms by the governor, five of whom must be professional nurses, two of whom must be licensed practical nurses and two of whom must be representatives of the public. 32 M.R.S.A. ' ' 2151-52. Among the board's responsibilities is the examination, licensing and renewal of licenses of qualified applicants. 32 M.R.S.A. ' ' 2153(7) (repealed 1993), 2153-A(7). These two sections of Title 32, the former applicable during the times at issue in this proceeding, contain a provision designed to insulate the board from executive authority in the exercise of its licensing powers.² The board is also vested with certain disciplinary authority concerning its licensees. *See* 32 M.R.S.A. ' 2105-A. Specifically the version of section 2105-A in effect during the times at issue in this proceeding provided that,

² "The commissioner [of professional and financial regulation] shall act as a liaison between the board and the Governor. The commissioner shall not have the authority to exercise or interfere with the exercise of discretionary, regulatory or licensing authority granted by statute to the board." ' 2153(10-A); *see also* ' 2153-A (last sentence, to same effect).

[t]he board shall investigate a complaint, on its own motion or on receipt of a written complaint filed with the board, regarding noncompliance with or violation of [the statutory provisions governing licensed nurses] or of any rules adopted by the board. Investigation may include a hearing before the board to determine whether grounds exist for suspension, revocation or denial of a license.

* * *

If, in the opinion of the board, the factual basis of the complaint is or may be true, and it is of sufficient gravity to warrant further action, the board may request an informal conference with the licensee. . . . The conference shall be conducted in executive session of the board, . . . unless otherwise requested by the licensee. . . .

If the board finds that the factual basis of the complaint is true and is of sufficient gravity to warrant further action, it may take any of the following actions it deems appropriate:

* * *

B. With the consent of the licensee, enter into a consent agreement which fixes the period and terms of probation best adapted to protect the public health and safety and to rehabilitate or educate the licensee. A consent agreement may be used to terminate a complaint investigation, if entered into by the board, the licensee and the Attorney General's office;

* * *

D. If the board concludes that modification or nonrenewal of the license might be in order, hold an adjudicatory hearing in accordance with the provisions of the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter IV; or

E. If the board concludes that suspension or revocation of the license is in order, file a complaint in the Administrative Court in accordance with Title 4, chapter 25.

Former ' 2105-A(1-A) (repealed and replaced by P.L. 1993, ch. 600, ' A-116).

Thus, like the board members in *Bettencourt*, members of the Maine Board of Nursing have a role that is "functionally comparable" to that of a judge: they weigh evidence, make factual and

legal determinations, choose sanctions, write opinions explaining their decisions, serve a set term and, once appointed, do not serve at the whim of the executive. *Bettencourt*, 904 F.2d at 783. Secondly, the act of revoking a nurse's license is "likely to stimulate a litigious reaction from the disappointed [licensee], making the need for absolute immunity apparent." *Id.* And, the governing statute provides enough procedural safeguards, i.e., recourse to formal administrative proceedings in the event that a licensee does not reach a consent agreement with the board, with the ultimate authority to revoke a license vested in the Administrative Court, to "indicate that enough checks on malicious action by Board members exist to warrant a grant of absolute immunity for the Board members' actions in their adjudicatory capacities." *Id.*

The plaintiff contends that none of the above is applicable because, in ordering him to undergo penile plethysmography, the board was acting in an investigatory capacity rather than a judicial or quasi-judicial one, and that the functional approach outlined in *Imbler* and subsequent cases therefore points the court away from absolute immunity in the circumstances of this case. To support this contention, the plaintiff relies principally on three circuit court of appeals cases involving the question of absolute immunity for prosecutors. In *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992), *cert. denied*, 123 L. Ed. 2d 269 (1993), the Seventh Circuit refused to hold absolutely immune from section 1983 liability prosecutors who failed to disclose exculpatory evidence discovered after the plaintiffs were convicted of murder but while their direct criminal appeals were pending. *Id.* at 365, 367. In *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992), the Third Circuit held that a prosecutor could assert absolute immunity for initiating criminal charges against the plaintiff, but was entitled only to qualified immunity in connection with witness interviews conducted prior to filing charges and in connection with statements made to the news

media. *Id.* at 1464, 1466. And, in *Mancini v. Lester*, 630 F.2d 990 (3d Cir. 1980), the Third Circuit remanded the question of absolute immunity back to the district court for application of the functional test in a case involving prosecutors who allegedly violated the civil rights of an investigator when they forced him to resign from his post. *Id.* at 991, 993-94.

Each of the cases cited by the plaintiff is distinguishable. In *Houston*, the Seventh Circuit noted that prosecutors enjoy absolute immunity for gathering information and evidence in furtherance of a decision to initiate a prosecution. *Houston*, 978 F.2d at 367. But the prosecutors in *Houston* were conducting a continuing investigation of two people who already stood convicted of the crimes that were the focus of the investigation, and, significantly, these investigators were not involved in the actual prosecution of the appeal. *Id.* The court therefore concluded that the investigation being conducted by the prosecutors was indistinguishable from the kind of investigative work done by police, to which only qualified immunity applies. *Id.*; see also *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994). Thus *Houston* does not stand for the proposition that absolute immunity is inapplicable to prosecutors who are conducting an investigation, but teaches that a court considering the immunity question must look to the *purpose* of the investigation. The Supreme Court made this point last year in *Buckley v. Fitzsimmons*, 125 L. Ed. 2d 209 (1993), noting that for purposes of determining absolute immunity

[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for clues and corroboration that might give him probable cause to recommend that a subject be arrested, on the other hand.

Id. at 226 (no absolute immunity for alleged fabrication of evidence prior to establishment of probable cause to initiate criminal proceedings). Here, in conducting their investigation of the plaintiff, the board's actions do not at all resemble general detective work. Rather, the board was gathering facts that it regarded as relevant to a pending quasi-judicial proceeding, i.e., the plaintiff's application to renew his nursing license.

Kulwicki draws a distinction between the act of bringing criminal charges, a "core prosecutorial function" to which absolute immunity applies, and "[m]erely investigative evidence-gathering," to which only qualified immunity attaches. *Kulwicki*, 969 F.2d at 1464, 1465. Acknowledging that "[t]he line between quasi-judicial and investigative activity is far from clear," the Third Circuit affirmed the trial court's determination that only absolute immunity applied to investigative activities conducted by a prosecutor prior to the bringing of formal criminal charges. *Id.* at 1465, 1466. In so doing, however, the appeals panel stressed that it does not view the filing of a criminal complaint "as a foolproof measure of the commencement of 'quasi-judicial' activity." *Id.* at 1466. For present purposes, it suffices to note that the board here had already commenced proceedings to determine whether the plaintiff's nursing license should be renewed. Thus, the board's investigative activity is analogous to that of a prosecutor who has already filed criminal charges.

The third case cited by the plaintiff is equally unavailing to his cause. A former lieutenant detective in a county prosecutor's office filed a section 1983 complaint alleging that the county prosecutor and a deputy state attorney general violated his civil rights when they forced him to resign as a result of false allegations made by his ex wife. *Mancini*, 630 F.2d at 990-91. The Third Circuit did not determine whether absolute immunity applied, but remanded the case, holding the trial court

had failed to apply the functional test set forth in *Imbler* to the alleged wrongs of the prosecutors. *Id.* at 993-94. Noting, however, that the defendant prosecutors had threatened the plaintiff with firing if he did not submit to a polygraph test, that they refused to permit him to take a medically-recommended leave of absence, that they never advised him of his constitutional rights and that no criminal charges were ever brought, the appeals court suggested that "[t]hese factors appear to point to the exercise by the defendants here of functions in the administrative/investigative area." *Id.* at 994. In other words, the prosecutors were acting essentially as personnel managers, ostensibly seeking to ensure the integrity of the prosecutorial process itself. Thus, while there is a superficial resemblance between allegedly coercing an employee to take a polygraph test and allegedly coercing a licensee to submit to a penile plethysmograph test, the analogy breaks down upon consideration of the contrasting functions of the prosecutors in *Mancini* and the board members here.³

³ Moreover, it is far from clear that the cases involving prosecutorial immunity would be directly applicable to the instant proceeding. Although the function of prosecutor as advocate for the state, and the function of a licensing board as a factfinder and decisionmaker, have both been described as "quasi-judicial," *see, e.g., Kulwicki*, 969 F.2d at 1466; *Bettencourt*, 904 F.2d at 784, and the common law immunities of judges and prosecutors spring from common policy considerations, *Imbler*, 424 U.S. at 422-23, they are historically distinct from one another. Judicial immunity "has roots extending to the earliest days of the common law." *Id.* at 423 n.20 (citations omitted). The principle that a prosecutor should be immune from civil liability based on a decision to pursue

criminal charges against a citizen is less than a century old. *Id.* at 422-23. *Imbler* requires a ``considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.* at 421. It is possible that such an inquiry would lead to the conclusion that absolute immunity would not shield a prosecutor who forced someone to submit to penile plethysmography before instituting criminal proceedings, but absolute immunity would shield a licensing board that took the same action prior to instituting formal license revocation proceedings.

There may be reasons to doubt the efficacy of using penile plethysmography to determine whether a nurse's psychological health would place his patients in jeopardy. *See Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1993) (suggesting that the test is "degrading," noting the absence of evidence as to its reliability and, in the absence of evidence that a less intrusive means would produce the relevant information, determining that a reasonable factfinder could conclude that plethysmography violates substantive due process). But there is no doubt that in seeking to make that determination, the board was acting in the manner of a judicial factfinder rather than in the manner of a prosecutor conducting a criminal investigation, let alone a prosecutor exercising administrative or investigatory functions. The procedural context makes this obvious: At the informal investigation stage, the plaintiff was free to reject the board's request that he submit to the test and, if necessary, seek to demonstrate his fitness to practice nursing via the formal administrative process and ultimately in the state court system. It is the existence of these procedural safeguards that undergirds absolute immunity for judicial functions.

In *Watts v. Burkhardt*, 978 F.2d 269 (6th Cir. 1992), the Sixth Circuit applied the same test articulated by the First Circuit in *Bettencourt* and determined that members of a professional licensing board were absolutely immune from section 1983 liability for giving a physician a choice between voluntarily relinquishing his authority to handle controlled substances and facing formal suspension of his license to practice medicine. *Id.* at 271, 277. The Sixth Circuit was satisfied, in light of the procedural safeguards that would have protected the plaintiff had he chosen to force the board to seek formal revocation, that the board was entitled to absolute immunity for "performing a quasi-judicial act designed, on its face, to protect the public on a matter clearly within the board's competence." *Id.* The same reasoning applies to the instant case; the proceedings to which the

plaintiff was subjected, though informal, were quasi-judicial. The individual members of the board are therefore absolutely immune from section 1983 liability.

IV. The Maine Civil Rights Act

Count II of the plaintiff's complaint alleges violations of the Maine Constitution and sets out a cause of action pursuant to the Maine Civil Rights Act. *See* 5 M.R.S.A. ' 4682 (authorizing private actions for state civil rights violations). Although the five defendants who seek summary judgment presumably do so concerning all counts (including the claim in Count III for punitive damages), they do not discuss the question of immunity in the context of the state law claim. The plaintiff also omits any discussion of this issue.

The Maine Civil Rights Act ``was patterned after 42 U.S.C. ' 1983." *Grenier v. Kennebec County*, 733 F. Supp. 455, 458 n.6 (D. Me. 1990); *Jenness v. Nickerson*, 637 A.2d 1152, 1158 (Me. 1994). Accordingly, the same qualified immunity analysis applies under both the state and federal civil rights statutes. *Hegarty v. Somerset County*, 848 F. Supp. 257, 269 (D. Me. 1994); *Jenness*, 637 A.2d at 1159. Maine law has long provided that judges and members of licensing boards are absolutely immune from liability for civil damages. *See Richards v. Ellis*, 233 A.2d 37, 39 (Me. 1967). Nothing implicit or explicit in the Maine Civil Rights Act alters Judge Hand's maxim, explicitly adopted by the Law Court, that it is ``better to leave unredressed the wrongs done by dishonest [public] officers than to subject those who try to do their duty to the constant dread of retaliation." *Id.* at 40 (quoting *Gregoire*, 177 F.2d at 581). Therefore, I conclude that the same absolute immunity analysis applies under both section 1983 and the Maine Civil Rights Act, and,

accordingly, that the defendant board members are absolutely immune from state civil rights liability as well.

V. Conclusion

Because I have concluded that the board members are absolutely immune from liability on the plaintiff's complaint, it is not necessary to consider the movants' contentions that they are also entitled to qualified immunity, and that the plaintiff has failed to come forward with evidence of a cognizable constitutional violation. In light of the absolute immunity enjoyed by the board members, I recommend that the summary judgment motion be **GRANTED**.

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) 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 20th day of December, 1994.

***David M. Cohen
United States Magistrate Judge***