UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RALPH J. CATALDO,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil Docket No. 96-49-B-DMC***
	)	
MICHAEL ROBERTS, et al.,	)	
	)	
Defendants	)	

MEMORANDUM DECISION ON MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS EDWARD REYNOLDS AND PENOBSCOT COUNTY SHERIFF'S DEPARTMENT[1]

The plaintiff, appearing *pro se*, seeks relief pursuant to 42 U.S.C. § 1983 for the alleged deprivation of his federal rights in connection with a series of events involving him, various law enforcement personnel and a county prosecutor beginning in 1990. Of the six defendants named in the plaintiff's amended complaint, only two remain at this stage in the proceedings.[2] Those two parties, Edward Reynolds and the Penobscot County Sheriff's Department,[3] now seek summary

---

[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.

[2] The court has previously granted a motion to dismiss the complaint as to defendants Michael Roberts and Michael Morrison, and a separate dismissal motion filed by defendant Betty Lynn Truez. Docket Nos. 11 and 19 (endorsements). The complaint has never been served on defendant Daniel Truez and, accordingly, the court has dismissed all claims against him. Order of Dismissal (Docket No. 55).

[3] Citing Fed. R. Civ. P. 17(a), the Penobscot County Sheriff's Department contends that Penobscot County is the real party in interest for purposes of the plaintiff's claims. It is an issue I need not resolve because the Sheriff's Department has not sought dismissal of the complaint against it on that ground. To the extent that Penobscot County is the real party in interest, my rulings as to

(continued...)

judgment on all of the plaintiff's claims. For the reasons that follow, their motion for summary judgment is granted.

The plaintiff filed his amended complaint by order of the court, which granted him leave to proceed *in forma pauperis* but determined that the original complaint was "a prolix and confusing recitation of disparate assertions against various defendants including claims arising from illegal search and seizure; false arrest; the denial of Plaintiff's right to keep and bear arms; and the censorship of Plaintiff's mail." Order (Docket No. 3) at 1. Invoking the requirement set forth in Fed. R. Civ. P. 8(a) of a "short and plain statement" of the plaintiff's claims, the court directed the plaintiff to file an amended complaint prior to the issuance of service of process.

The amended complaint describes twelve enumerated "events:" (1) a search of the plaintiff's home, (2) his arrest in connection with a request by sheriff's deputies to search his car, (3) a backwoods confrontation with a game warden and another individual that led to the plaintiff's arrest by a sheriff's deputy, followed by the commission of perjury in order to establish the criminal charges in connection with this incident, (4) a roadside confrontation with an unidentified law enforcement official who warned the plaintiff to "plead guilty" or "worse things will happen," (5) perjury committed at the plaintiff's bail revocation hearing, (6) the failure of the plaintiff to receive a hearing in connection with a civil action the plaintiff filed in an unspecified court against the Sheriff's Department, (7) the dismissal by an unspecified court of the plaintiff's petition for post-conviction review, (8) various trial court and appellate errors, and misdeeds committed by an assistant district attorney, in connection with what was apparently state-court criminal proceedings

---

[3](...continued)
the Sheriff's Department should be construed as applying to the County as well.

against the plaintiff, (9) the existence of a continuous, ongoing official investigation of the plaintiff by unspecified parties, (10) false information supplied by the Sheriff's Department to the plaintiff in discovery, (11) improper statements made by an assistant district attorney during a criminal trial of the defendant in state court, and (12) the improper opening by the Sheriff's Department of mail received by the plaintiff from a United States Senator while the plaintiff was incarcerated at the Penobscot County Jail. The plaintiff contends that these events implicated his constitutional rights involving illegal search and seizure, due process, the privilege against self-incrimination, keeping and bearing arms, privacy, freedom of speech and the assistance of counsel. The plaintiff further contends he is entitled to relief based on violations of 18 U.S.C. § 1514, 18 U.S.C. § 1701 and 34-B M.R.S.A. § 1207.

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). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). 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 whether this burden is met, the

court must view the record in the light most favorable to the nonmoving party and "give the 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). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The Local Rules of this court require a party seeking summary judgment to provide "a short and concise statement of material facts, supported by appropriate record citations, as to which it is contended that there exists a genuine issue to be tried." Loc. R. 19(b)(1).[4] The defendants who are seeking summary judgment have filed such a statement.[5] *See* Statement of Material Fact (Docket No. 60).

---

[4] The Local Rules are being recodified effective on March 1, 1997. Thenceforth, the requirements concerning statements of material fact to be filed in connection with summary judgment motions, though unchanged in substance, will appear as Local Rule 56.

[5] The plaintiff has moved to strike the moving parties' factual statement. *See* OBJECTION: to Statement of Material Fact filed in Support of Penobscot County Defendants Motion for Summary Judgment and Counter Motion to Strike the Statement (Docket No. 69). According to the plaintiff, this document is "misrepresentative, misleading, false in some instance's [sic] and generally an attempt to mislead the Court." *Id*. at 10. These allegations are unsupported and therefore not worthy of credence. The motion is denied. The plaintiff has also moved for sanctions against the attorneys representing Reynolds and the Sheriff's Department. *See* Motion for Sanctions and Refer[r]al to the Maine Bar Asso[ciation]" (Docket No. 76). That motion is also denied for want of any basis in the record whatsoever.

Local Rule 19(b)(2) requires a non-moving party to file a corresponding statement, "supported by appropriate record citations, as to which it contended that there exists a genuine issue to be tried." The rule goes on to warn that all properly supported material facts asserted in the moving party's factual statement will be deemed to be admitted "unless properly controverted by the statement required to be served by the opposing party." The Local Rules are applied to *pro se* litigants in the same fashion as parties represented by counsel in this district. *Fournier v. Joyce*, 753 F. Supp. 989, 991 n.4 (D. Me. 1990); *Soiett v. Turnage*, 708 F. Supp. 429, 430 n.1 (D. Me. 1989). When a party opposing a summary judgment motion fails to meet the Local Rule 19(b) requirement to controvert in proper fashion factual assertions made by the moving party, summary judgment *will* be granted if the uncontroverted factual assertions justify such a result. *McDermott v. Lehman*, 594 F. Supp. 1315, 1321 (D. Me. 1984).

As part of his opposition to the summary judgment motion, the plaintiff has filed a pleading captioned "OBJECTION: to Statement of Material Fact filed in Support of Penobscot County Defendants Motion for Summary Judgment and Counter Motion to Strike the Statement" (Docket No. 69). I deem this to be the plaintiff's factual statement required by Local Rule 19(b)(2). The statement is deficient in that it is not "supported by appropriate record citations" as required by the Local Rule. Pursuant to the authorities cited above, this deficiency would in itself justify the court's accepting as true all factual assertions made by the moving parties. I delve further into the plaintiff's submissions, however, if only to erase completely any doubts about the fairness and propriety of granting the pending summary judgment motion.

The plaintiff has executed and filed three declarations with his opposition. They appear as Docket Nos. 70, 71 and 72. The declaration that appears as Docket No. 71 relates to an ongoing

discovery dispute. As discussed, *infra*, my decision on the summary judgment motion turns on the merits of the plaintiff's claims against the moving parties. The assertions appearing in Docket No. 71 are therefore not material. The declaration that appears as Docket No. 72 is simply the plaintiff's explanation that certain documents he wishes the court to consider appear as copies, in some instances because he is not in possession of the originals. The declaration that appears as Docket No. 70 relates directly to the issues on which the pending summary judgment motion turn. In my recitation of the factual context below, I address the specifics of this declaration's nearly complete failure to controvert the moving parties' material allegations. It suffices to observe here that the declaration appearing as Docket No. 70 is insufficient because it is almost entirely conclusory in nature.

I also note that the plaintiff has appended a declaration to his memorandum in opposition to the summary judgment motion, thus seeking to verify any factual assertions made therein. *See* Objection to Motion for Summary Judgment as Filed by defendant Reynolds with Incorporated Motion to DENY with an Incorporated Memorandum of Law in Support ("Plaintiff's Memorandum") (Docket No. 68) at 52. Leaving aside the propriety of attempting to develop a summary judgment record in that fashion, I simply note that I have carefully reviewed this memorandum and find no material allegations in it that go beyond the conclusory and the speculative. The plaintiff further seeks to incorporate into the summary judgment record by reference the documents he appended to his motion for default judgment (Docket No. 26).[6] I have

[6] The plaintiff makes the same request as to documents appended to his Motion to Vacate State Conviction (Docket No. 51). The court has previously stricken this motion as frivolous and I therefore do not consider any of the material appended to it. Likewise, the plaintiff refers the court to exhibits he has designated "C-" and "C-2." Plaintiff's Memorandum at 38. I take this to be a (continued...)

carefully reviewed each of these documents and find none of them to be material to the issues upon which the pending summary judgment motion turns.

Finally, the plaintiff invokes Local Rule 19(d) in moving to strike the Supplemental Affidavit of Ivy L. Frignoca, which Edwards and the Sheriff's Department submitted with their reply memorandum. Local Rule 19(d) requires that such a reply memorandum "be strictly confined to replying to new matter raised in the objection or opposing memorandum." I agree with the plaintiff that Local Rule 19 does not contemplate the filing by a party seeking summary judgment of additional factual material beyond its initial submission. Frignoca is one of the attorneys representing Edwards and the Sheriff's Department; her supplemental affidavit relates to the parties' ongoing discovery dispute. As discussed, *infra*, the result of the pending summary judgment motion does not turn on the dispute, and I therefore deem the motion to strike the Supplemental Frignoca Affidavit as moot.

---

[6](...continued)
reference to documents labeled C-1 and C-2, which are appended to a pleading that the court has previously stricken as frivolous and scandalous. *See* Docket No. 54 (endorsement). Accordingly, I do not consider either of these documents as well. Finally, the plaintiff asks the court to consider documents he has labeled E-1 through E-3. These documents are appended to the plaintiff's Request for Filing of Supportive Documentary Evidence for Purposes of Future Motions and Appellate Record (Docket No. 58). I have previously denied the plaintiff's motion to file these documents in such a manner. Nevertheless, I have reviewed these documents and find none of them to be material to the issues upon which the summary judgment turns.

III. Factual Context

In light of the foregoing, the summary judgment record reveals the following:

At all times relevant to the allegations in the complaint, defendant Edward Reynolds was the Sheriff of Penobscot County. Affidavit of Edward J. Reynolds ("Reynolds Aff.") (Docket No. 66) at ¶ 1. He took office on January 1, 1985. *Id.* As sheriff, Reynolds is aware of all customs, practices and policies of the Penobscot County Sheriff's Department.[7] *Id*. at ¶ 3. One of Reynolds' official duties is administering the Penobscot County Jail, a task he has delegated to a jail administrator.[8] *Id*. at ¶ 4. Reynolds reviews all policies and procedures developed by the jail administrator, as well as the disposition of all inmate grievances. *Id*.

Reynolds is aware of no custom, policy or procedure at the Penobscot County Jail that involves the opening of inmate mail that is identified as "legal mail."[9] *Id*. at 5. It is unlikely that

---

[7] The plaintiff seeks to controvert this assertion with his declaration that "[d]efendant has not supplied requested internal memoranda concerning investigation of plaintiff or any memoranda dealing [with] the plaintiff. Therefore, the knowledge attested to is in question." Unsworn Declaration (Docket No. 70) at ¶ 3. This statement does not suffice to controvert the moving parties' assertion.

[8] The plaintiff seeks to controvert this assertion with his declaration that the jail administrator "was not the supervising officer at the time of the alleged seizure of the plaintiffs [sic] mail" but was "an intermediate officer (lieutenant)." Unsworn Declaration (Docket No. 70) at ¶ 4. This does not successfully controvert the material assertion, which is that Reynolds was at all relevant times aware of any customs, policies and procedures at the jail although he has delegated responsibility for its daily operation to the jail administrator.

[9] The plaintiff seeks to controvert this assertion with his declaration that "before the cited event occurred a federal inspection of the jail took place after the plaintiff contacted the Senate. Also, the envelope is marked 'The Official Business' of the United States Senate. Jail regulations do not superceed [sic] the Official Government Business of the U.S. Senate." Unsworn Declaration (Docket No. 70) at ¶ 5. The fact that a jail inspection took place after jail officials opened a letter addressed to the plaintiff by a senator is simply not germaine to the question of whether a custom, policy or procedure existed concerning the opening of such mail.

anyone on Reynolds' staff would consider a letter from a United States Senator as "legal mail" requiring special treatment because such correspondence is not between an inmate and the inmate's attorney. *Id*. at 6. Reynolds is aware of no custom, policy or procedure at the Penobscot County Jail that involves conducting illegal searches, improperly detaining suspects and/or questioning them without providing *Miranda* warnings, falsely arresting citizens, harassing citizens or portraying a member of the public in a false light for the purpose of harming that person's reputation, or providing false information in connection with discovery in litigation. *Id*. at ¶ 7.

III. Discussion

The statute under which this action proceeds reads in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. It is well established that a unit of local government is a "person" within the meaning of section 1983 and therefore amenable to suit thereunder. *Monell v. New York City Dept. of Social Servs*., 436 U.S. 658, 690 (1978). However, such a governmental entity cannot be liable to suit under section 1983 purely because it employs one who commits the constitutional tort set forth in the statute. *Id*. at 691. In other words, there is no *respondeat superior* liability under section 1983. *Id*. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id*. at 694; *see also Canton v. Harris*, 489 U.S. 378, 389 (1989) (permitting section 1983 liability premised on failure to train, but

only where such failure reflects deliberate or conscious choice by government entity).

At the final pretrial conference I conducted on February 20, the plaintiff made clear that he is suing Reynolds in his official capacity as Penobscot County Sheriff. In those circumstances, Reynolds' potential section 1983 liability is also subject to the "custom or policy" limitations described in *Monell*. *Reid v. New Hampshire*, 56 F.3d 332, 338 (1st Cir. 1995) (citation omitted).[10]

Invoking the foregoing principles, the defendants contend they are entitled to summary judgment because nothing in the complaint identifies Reynolds as one who personally committed a constitutional tort, and the summary judgment record is devoid of evidence concerning a custom or usage of the Sheriff's Department -- thus precluding liability for the Department or Reynolds in his official capacity. I agree.

Many of the allegations in the amended complaint simply do not implicate Reynolds or the

[10] Were Edwards being sued in connection with his role as a supervisor of others who committed a constitutional tort, his "own acts or omissions" would have to form the basis of liability, merely negligent supervision would not suffice, and his supervisory activities would have to "amount to a reckless or callous indifference to the constitutional rights of others." *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 91-92 (1st Cir. 1994) (citations omitted). Both the summary judgment record and, indeed, the complaint itself, are devoid of allegations concerning the supervisory activities of Edwards. Thus, to the extent that the plaintiff endeavors to pursue a claim based on supervisory liability, the moving parties are entitled to summary judgment based on the non-existence of any trialworthy issues as to such a claim.

Department. Of those that do, given the state of the summary judgment record, the court cannot do anything other than credit Reynolds' sworn assertion that no custom, policy or practice exists concerning any of the wrongs alleged by the plaintiff. *See, e.g., St. Hilaire v. City of Laconia*, 71 F.3d 20, 29 (1st Cir. 1995) (summary judgment in favor of municipalities appropriate where record revealed "no evidence" of custom or usage), *cert. denied*, 135 L.Ed.2d 1038 (1996); *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 16-17 (1st Cir. 1995) (similar; no direct evidence of improper investigatory methods or practices employed by police department). In an appropriate case, a sworn statement from a supervisory official, to the effect that no applicable custom or policy exists, would not be sufficient to defeat a section 1983 claim against a governmental entity. This is because a custom can be so widespread that policymaking officials are deemed to have constructive knowledge of it. *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989) (citations omitted). But there must be some evidentiary basis for drawing such an inference. *Bordanaro* is an illustrative example. In that case, involving police brutality, there was sworn evidence from police officers of a longstanding departmental practice of breaking down doors without a warrant when making an arrest. *Id*. Further, the incident in question involved the entire night watch of a municipal police force, from which a factfinder could rationally infer that a departmental "norm" existed to account for "such unanimity of action." *Id*.

The only possible custom, policy or practice of which even a completely plaintiff-favorable view of the record would plausibly support an inference is a policy, as alleged by the plaintiff, of opening mail addressed to inmates at the Penobscot County Jail from United States senators. This is ultimately not helpful to the plaintiff because the Constitution would simply not be implicated

by such a practice. The Supreme Court has made clear that what the Constitution requires in this regard is that an inmate be present when officials open mail addressed to the inmate from his *attorney*, and that the prison officials not read the mail once they determine no contraband is enclosed. *Wolff v. McDonnell*, 418 U.S. 539, 575-77 (1974) (stressing that no general First Amendment right to receipt of uncensored mail in prison has been recognized, and holding that other constitutional rights protected by opening mail from attorney in inmate's presence).[11]

Since the section 1983 liability of Reynolds and the Sheriff's Department turns on the existence of a custom, policy or practice that violates the plaintiff's federal rights, and since the summary judgment record demonstrates the lack of such a custom, policy or practice, these two defendants have demonstrated their entitlement to judgment as a matter of law. It is therefore not necessary to address their other contentions relating to the plaintiff's compliance with either Rule 8(a) or the court's order of November 20, 1996 directing the plaintiff to respond to certain then-outstanding discovery requests. I express no views as to the merits of these positions.

IV. Conclusion

For the foregoing reasons, the motion of defendants Reynolds and Penobscot County

---

[11] The three statutes the plaintiff invokes in support of his section 1983 claim are also unavailing. 18 U.S.C. § 1514 permits a United States district court to grant an application from the government for a temporary restraining order prohibiting the harassment of a victim and/or a witness in a federal criminal case. No plausible reading of the amended complaint, or anything in the summary judgment record, provides a basis for determining that this statute is applicable here. 18 U.S.C. § 1701 authorizes the federal criminal prosecution of persons who obstruct the mail. It secures no rights to the plaintiff and therefore cannot form the basis of a section 1983 claim. Finally, 34-B M.R.S.A. § 1207 is a state statute and, thus, not properly the basis for a claim under section 1983, which covers only federally-secured rights.

Sheriff's Department is **GRANTED** as to all claims pending against them.

Dated this 26th day of February, 1997.

_____

David M. Cohen
United States Magistrate Judge