

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

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

**RECOMMENDED DECISION ON DEFENDANTS’ MOTIONS  
FOR SUMMARY JUDGMENT**

Defendants Jean Caron, Betty B. Clark, James D. Bivins, and William T. O’Donohue have each moved separately for summary judgment on the plaintiff’s complaint against them under 42 U.S.C. § 1983 and the analogous provision of the Maine Civil Rights Act, 5 M.R.S.A. § 4682.<sup>1</sup> The plaintiff alleges violations of his rights to procedural and substantive due process as secured by the United States Constitution and violation of his rights to due process and to be free from unreasonable searches as secured by the Maine Constitution. In addition, he raises a claim of negligence against defendant O’Donohue. All of the claims arise out of a “penile plethysmograph” test to which the plaintiff alleges he was forced to submit as a condition of his continued professional licensure as a nurse following his criminal conviction on a federal charge of importation of obscene matter.

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<sup>1</sup> The court has granted the motion for summary judgment filed by five other named defendants, all members of the Maine Board of Nursing. Memorandum and Order Granting Summary Judgment, February 9, 1995 (Docket No. 41).

Defendant Caron was the executive director of the Maine Board of Nursing (the “board”) at the time of the events set forth in the Fourth Amended Complaint. Defendant Clark was the board’s chair. Defendant Bivins was an assistant attorney general who advised the board. Defendant O’Donohue is an independent psychologist who was retained by the board to evaluate the plaintiff and who administered the test at issue. Each of these defendants contends that he or she is entitled to absolute immunity or, in the alternative, qualified immunity. Each defendant also challenges the plaintiff’s claim for punitive damages. In addition, O’Donohue contends that the plaintiff is required to comply with the terms of the Maine Health Security Act, 24 M.R.S.A. § 2501 *et seq.*, in order to proceed with his negligence claim and that his failure to provide notice of claim as required by section 2903 of the Act, as well as the Act’s statute of limitations, section 2902, bar this claim, which is set forth in Count III of the Fourth Amended Complaint.

### **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 in Opposition to Defendants’ Motions for Summary Judgment (“Plaintiff’s SMF”) (Docket No. 78), ¶ 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.* ¶ 3. The plaintiff informed the board of these pending charges prior to their disposition. *Id.* ¶ 4; Deposition of Jean C. Caron (“Caron Deposition”), Joint Appendix, Volume III(B), at 50. On July 6, 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. 2 to Deposition of Norman Berthiaume (“Berthiaume Deposition”), Joint Appendix, Volume II(A). He received a sentence of two years’ probation and a fine of \$2,000. Exh. 5 to Deposition of James D. Bivins (“Bivins Deposition”), Joint Appendix, Volume III(A). As a condition of his probation, the plaintiff was required to submit to psychological counseling. *Id.*

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. Bivins

Deposition at 27-33. 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.

Exh. 5 to Statement of Material Facts in Support of Motion for Summary Judgment by Defendants Murray, Twombly, Vampatella, Pray and Fisher (Docket No. 16) at 2-3. 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, a limitation that the plaintiff had already undertaken voluntarily. *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 ¶ 14. Subsequent to the November 8 meeting, defendant Bivins, an assistant attorney general advising the board, contacted two psychologists, one of whom recommended defendant O'Donohue, a member of the faculty at the University of Maine. Bivins Deposition at 43-45; Deposition of William O'Donohue, Joint Appendix, Vol. V(A), at 41. Defendant Caron contacted defendant O'Donohue about conducting an examination of the plaintiff. Caron Deposition at 85. O'Donohue 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 defendant Bivins and thereafter with defendant Clark, who was then serving as chair of the board. *Id.* at 89-90. Clark told Caron to retain O'Donohue to perform the examination. Caron Deposition at 98; Deposition of Betty B. Clark, Joint Appendix, Vol. III(D), at 31. She knew that O'Donohue planned to use the plethysmograph test before she gave this direction to Caron. Caron Deposition at 93.

Caron left the matter of arranging the examination to Bivins. Caron Deposition at 99. Bivins notified the plaintiff and his counsel that O'Donohue would perform the examination and that the examination would include the plethysmograph test. Berthiaume Affidavit ¶ 15; Bivins Deposition at 61. Although the plaintiff expressed reservations about the test, he eventually agreed to it. Berthiaume Affidavit ¶¶ 16-17. Defendants Caron and Bivins were aware of these reservations by or soon after November 21, 1990. Caron Deposition at 101; Exh. 14 & 65 to Deposition of Robert Hirshon, Joint Appendix, Volume IV(A).

O'Donohue conducted the test on November 29 and December 6, 1990. Berthiaume Affidavit ¶ 18. An assistant placed the plaintiff in a windowless room that contained a projector and an intercom. *Id.* ¶ 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.* ¶ 20. Each slide was shown for 90 seconds; the plaintiff was required to describe into the intercom the scenes depicted on the slides. *Id.* ¶ 21. Between slides, the plaintiff was required to sit in total darkness for 90 seconds. *Id.* ¶ 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.* ¶ 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.* ¶ 24.

On December 13, 1990 the board voted to renew the plaintiff’s nursing license on a probationary status for two years. Draft Minutes of Maine State Board of Nursing, Exh. 22 to Caron Deposition. The conditions of the probation include that the plaintiff receive independent psychological evaluation and counseling at his expense, that he limit his practice to patients 18 years of age and older, and that he disclose the contents of his consent agreement with the board to his employers or supervisors. Exh. 25 to Berthiaume Deposition, Joint Appendix, Vol. II(C), at 3. On February 8, 1991 the plaintiff entered into a consent agreement with the board reflecting these and other conditions. *Id.*

### **III. Count III**

Count III of the Fourth Amended Complaint asserts a claim of negligence against defendant

O'Donohue only, alleging that he breached "a duty to exercise that degree of skill, care, and diligence exercised by psychologists in the administration of psychological tests and in the evaluation of the results of those tests." Fourth Amended Complaint ¶¶ 52-53. None of the allegations in the Fourth Amended Complaint concerns any damages arising out of the evaluation of the results of the plethysmograph test, which is the only test mentioned in the Fourth Amended Complaint. Therefore, analysis of this count will focus on the administration of that test alone.

O'Donohue has moved for summary judgment on this count on the grounds that this claim is covered by the Maine Health Security Act (the "Act"); that the plaintiff has failed to comply with the section of that Act requiring service of a notice of claim, which triggers review of the claim in a pre-litigation screening process, 24 M.R.S.A. § 2903; and that the claim is barred by the Act's three-year statute of limitations, 24 M.R.S.A. § 2902. The plaintiff has not responded to O'Donohue's motion on this count. Pursuant to this court's Local Rule 19(c), he must be deemed to have waived objection. Thus, all material facts set forth in O'Donohue's Statement of Material Facts (Docket No. 67) relevant to this count, if supported by appropriate record citations, will be deemed to be admitted. Local Rule 19(b)(2); *Winters v. F.D.I.C.*, 812 F. Supp. 1, 2 (D. Me. 1992).

The Act defines the term "health care practitioner" to include psychologists, 24 M.R.S.A. § 2502(1-A), and an "action for professional negligence" as, *inter alia*, any action for damages for injury against any health care practitioner, § 2502(6). Actions for professional negligence must be commenced within three years after the cause of action accrues. 24 M.R.S.A. § 2902. A cause of action accrues on the date of the act or omission giving rise to the injury. *Id.* The plethysmograph test took place on November 29 and December 6, 1990. The plaintiff moved for leave to add O'Donohue as a defendant in this action on January 27, 1995. Plaintiff's Motion to Amend Third

Amended Complaint (Docket No. 40). By that time, the three-year limitation period of section 2903 had already expired for any claims of professional negligence arising out of the plethysmograph test. O'Donohue is therefore entitled to summary judgment on Count III of the Fourth Amended Complaint.

#### **IV. Absolute Immunity**

##### **A. Defendant Clark**

Defendant Clark was the chair of the board at the time of the events giving rise to this action. Clark contends that, as a member of the nursing board, she performed a “quasi-judicial” function and therefore enjoys 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*, 502 U.S. 21, 29 (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*, 502 U.S. at 29 (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 Dep’t of Mental Health*, 41 F.3d 584, 591-92 (10th Cir. 1994) (decision makers 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*, 888 F. Supp. 332, 343 (D.N.H. 1994).

Maine's Board of Nursing consists by statute of nine members, all appointed to five-year terms by the governor. 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.<sup>2</sup> 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

[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

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<sup>2</sup> "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).

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, Clark was acting in an administrative or 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 asserts that no complaint was pending against him. As the applicable statutory language makes clear, the board may only hold an informal conference if a complaint exists. 32 M.R.S.A. § 2105-A(1-A). However, there is no requirement of a formal written complaint and the board may raise the issue on its own. *Id.* The process, once begun, may include a hearing to consider suspension or revocation of the license. *Id.* The board was acting in this case on its own motion, after the plaintiff notified them of the charges against him and his subsequent conviction.

The plaintiff’s attempt to distinguish this case from those in which absolute immunity attaches based on Clark’s alleged investigatory role is unavailing. This distinction was rejected by the First Circuit in *Wang v. New Hampshire Bd. of Registration in Medicine*, 55 F.3d 698, 701 (1st Cir. 1995), in which a physician whose license was revoked brought an action under section 1983 against the members of the Board of Registration in Medicine and its counsel. Wang attempted to distinguish *Bettencourt* “on the ground that the New Hampshire Board assumed an ‘inquisitorial or investigative role’ in this case by instigating and prosecuting the charges against him.” *Id.* “[T]he

attempted distinction is without legal significance. State officials performing prosecutorial functions -- including their decisions to initiate administrative proceedings aimed at legal sanctions -- are entitled to absolute immunity as well.” *Id.* Absolute immunity is available even if the board members acted “maliciously and corruptly.” *Id.* at 702 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

The plaintiff attempts to distinguish *Bettencourt* and *Wang* on the grounds that formal adjudicatory proceedings had taken place in those case, while here only informal proceedings had taken place at the time he was asked to undergo plethysmography testing. That focus is too narrow. If the plaintiff had not chosen to resolve the proceedings before the board by a consent agreement at the stage of informal proceedings, he was entitled to invoke formal adjudicatory proceedings. It is the existence of the safeguards inherent in those proceedings, and their availability to the licensee, that provides the basis for absolute immunity. The licensee may not deprive the board members of that immunity merely by choosing to resolve by agreement the issue raised by his conduct before the stage of formal proceedings is reached. Nothing in *Scott v. Central Maine Power Co.*, 709 F. Supp. 1176 (D. Me. 1989), requires otherwise. The plaintiff’s reliance on this court’s reference in *Scott* to *Ward v. Johnson*, 690 F.2d 1098, 1105 (4th Cir. 1982), as the observation of “one commentator,” 709 F. Supp. at 1182, is misplaced. In fact, *Scott* supports the result I reach here. “The pendency of formal charges is a less significant consideration in determining whether [the defendant] was entitled to absolute immunity than is the fact that an *adjudicatory proceeding had been initiated.*” 709 F. Supp. at 1191 (emphasis in original). Here, the informal conference was the first step in an adjudicatory proceeding authorized in the governing statute.

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 Clark'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.

It was the absence of most of those safeguards, as well as the fact that the members of the prison disciplinary committee at issue were not independent of prison management, that distinguishes *Cleavinger v. Saxner*, 474 U. S. 193 (1985), upon which the plaintiff relies to argue that Clark is entitled only to qualified immunity. Specifically, the Court said:

We do not perceive the discipline committee's function as a "classic" adjudicatory one . . . . Surely, the members of the committee, unlike a federal or state judge, are not "independent"; to say that they are is to ignore reality. They are not professional hearing officers, as are administrative law judges. They are, instead, prison officials, albeit no longer of the rank and file, temporarily diverted from their usual duties. They are employees of the Bureau of Prisons and they are direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. They thus are under obvious pressure to resolve a disciplinary dispute in

favor of the institution and their fellow employee.

\* \* \*

Under the Bureau's disciplinary policy in effect at the time of respondents' hearings, few of the procedural safeguards contained in the Administrative Procedure Act under consideration in *Butz* were present.

474 U.S. at 203-04, 206 (citations omitted). Clearly, the prison disciplinary committee in *Cleavinger* is not analogous to the Maine Board of Nursing.

While determination of a claim of qualified immunity may require resolution of issues of fact, as noted in *Harrington*, 977 F.2d at 45, another case upon which the plaintiff relies, that is not true in this analysis of the availability of absolute immunity. See *Wang*, 55 F.3d at 701-02 (no discussion of possible issues of fact in review of dismissal); *Bettencourt*, 904 F.2d at 781-85 (same).

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 plaintiff offers no reason to treat Clark differently from the other members of the board in this respect. She is therefore absolutely immune from section 1982 liability.

Count II of the Fourth Amended 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). Clark points out that the Maine Civil Rights Act was patterned after section 1983, *Grenier v. Kennebec County*, 733 F. Supp. 455, 458 n.6 (D. Me. 1990), and argues that the same considerations of absolute immunity apply to the state law claim, citing *Richards v. Ellis*, 233 A.2d 37, 40-41 (Me. 1967). The plaintiff omits any discussion of this issue. The same qualified immunity analysis applies under both the state and the federal civil rights statutes. *Hegarty v. Somerset County*, 848 F. Supp. 257, 269 (D. Me. 1994); *Jenness v. Nickerson*, 637 A.2d 1152, 1159 (Me. 1994). There is no reason to think that the same absolute immunity analysis should not apply under both statutes as well. Accordingly, Clark is also absolutely immune from state civil rights liability.

### **B. Defendant Caron**

Defendant Caron served as executive director of the board during the relevant time period. She had no voting power and did not vote on any decision of the board involving the plaintiff. Caron Deposition at 26. She argues that she is entitled to the same absolute immunity that applies to members of the board. The plaintiff responds that the very fact that Caron is not a member of the board, but merely an employee, prohibits her from invoking immunity. Plaintiff's Objection to Defendants' Motions for Summary Judgment with Incorporated Memorandum of Law ("Plaintiff's Objection") (Docket No. 77) at 27.

However, in *Bettencourt* the First Circuit extended the immunity it found applicable to board

members to board employees or staff members. 904 F.2d at 785. *See also Kutilek v. Gannon*, 766 F. Supp. 967, 972-73 (D. Kan. 1991) (executive director of medical registration board entitled to absolute immunity for actions taken pursuant to board's instructions); *Connolly v. Beckett*, 863 F. Supp. 1379, 1382-83 (D. Colo. 1994) (program administrator of Colorado Board of Medical Examiners, same). It would be incongruous indeed to find that an employee who carries out the decision of a licensing board may bear personal liability for that act when the members of the board who made the decision and directed the action have absolute immunity. The plaintiff understandably offers no authority for this position. It requires no further analysis to conclude that Caron is entitled to summary judgment.

### **C. Defendant Bivins**

Defendant Bivins was at all relevant times an assistant attorney general for the state of Maine who advised the board with respect to the plaintiff's license. Bivins Deposition at 4-6, 8. Bivins asserts that he is entitled to the same absolute immunity applicable to members of the board and, in addition, that he is protected by 32 M.R.S.A. § 2108-A, which provides immunity for any person acting in good faith in assisting the board in carrying out its duties. The plaintiff does not suggest any basis for treating Bivins differently from board members with regard to absolute immunity.

The First Circuit in both *Bettencourt* and *Wang* extended the absolute immunity applicable to board members to include the legal counsel who advised the boards. *Bettencourt*, 904 F.2d at 785; *Wang*, 55 F.3d at 701-02. Having found that absolute immunity bars the plaintiff's claims against the members of the board, I must also conclude that defendant Bivins enjoys the same protection.

### **D. Defendant O'Donohue**

Defendant O'Donohue was retained by the board to perform an independent psychological evaluation of the plaintiff. Clark Deposition at 26, 28, 31. He conducted the penile plethysmographic examination that is at issue here. Berthiaume Affidavit ¶ 18. He asserts that he is entitled to absolute immunity, because he was performing a quasi-judicial function when he conducted the test. The plaintiff responds that O'Donohue was not a member of the board, not entitled to participate in any adjudicatory function and therefore not entitled to immunity. He also states that "It is undisputed that Defendant O'Donohue was acting on behalf of the Board in matters related to Plaintiff." Plaintiff's Objection at 27-28.

Neither *Bettencourt* nor *Wang* addresses the issue of absolute immunity for a defendant in O'Donohue's position.<sup>3</sup> O'Donohue relies on *Kutilek*, in which the court extended to a physician retained by the Kansas State Board of Healing Arts to render expert opinions after reviewing evidence and interviewing the licensee the absolute immunity available to members of the board. 766 F. Supp. at 973. He also cites *Bass v. Attardi*, 868 F.2d 45, 50-51 (3d Cir. 1989), in which a consultant to the planning board, which had absolute immunity, was held entitled to absolute immunity as an agent of the board.

In general, experts appointed by courts to conduct examinations of individuals enjoy absolute immunity against claims arising out of those examinations. *E.g.*, *Moses v. Parwatikar*, 813 F.2d 891, 892 (8th Cir.), *cert. denied* 484 U.S. 832 (1987); *Akbarnia v. Deming*, 845 F. Supp. 788, 790-91 (D. Kan. 1994), *aff'd* 49 F.3d 1482 (10th Cir. 1995) (psychologist, under state law). *See also Frazier*

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<sup>3</sup> O'Donohue's assertion that *Bettencourt* extends absolute immunity to board advisors and consultants, Defendant William O'Donohue's Motion for Summary Judgment with Incorporated Memorandum of Law (Docket No. 66) at 4, is incorrect. *Bettencourt* limits its discussion to board staff members, who included in that case the board's general counsel, its executive director, and the chief of its disciplinary unit. 904 F.2d at 775, n.2.

*v. Bailey*, 957 F.2d 920, 932 (1st Cir. 1992) (psychologist absolutely immune from claims arising out of communications preliminary to litigation under Massachusetts law). O’Donohue is an expert appointed by the board to conduct an examination of the plaintiff in the exercise of the board’s quasi-judicial functions.

As to the experts retained by courts, it is not the fact that the expert himself is not a judge, prosecutor or witness that controls; it is the fact that he performs a function “essential to the judicial process.” *Moses*, 813 F.2d at 892. Similarly, it is not the fact that O’Donohue himself is not a member of the board, or that he did not testify in a formal proceeding before the board (because the plaintiff chose not to invoke a formal proceeding), that should govern. If O’Donohue in his testing of the plaintiff was performing a function essential to the board’s quasi-judicial process, then he should be entitled to absolute immunity. In this regard, the question is not whether any particular test that O’Donohue chose to give to the plaintiff was itself essential to the board’s process, but only whether O’Donohue’s role was essential to that process. I conclude that it was. The board’s ordering an independent psychological evaluation of the plaintiff under the circumstances of this case was well within the its authority and, once ordered, the examination was an essential part of the board’s exercise of that authority. Indeed, the plaintiff admits that O’Donohue was acting on behalf of the board. Therefore, O’Donohue is entitled to absolute immunity.

#### **V. Count IV**

Because the defendants are entitled to summary judgment on the plaintiff’s substantive claims, they are also entitled to summary judgment on the claim for punitive damages set forth in Count IV of the Fourth Amended Complaint. *Tait v. Royal Ins. Co.*, 913 F. Supp. 621, 629 (D. Me.

1996).

## VI. Conclusion

For the foregoing reasons, I recommend that the defendants' motions for summary judgment 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 this 14th day of January, 1997.*

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*David M. Cohen  
United States Magistrate Judge*