

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DENNIS W. WHEELER,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil Docket No. 96-249-P-C
)	
SCOT THOMAS, et al.,)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

The defendants, Scot Thomas, a police officer employed by the Town of South Berwick, Maine; Dana Lajoie, chief of police for the Town of South Berwick; and the Inhabitants of the Town of South Berwick, move for summary judgment on all counts of the plaintiff's complaint. The complaint asserts the following claims, each of which is raised against all three defendants unless otherwise noted: Count I, deprivation of due process under the Fifth and Fourteenth Amendments to the United States Constitution, brought under 42 U.S.C. § 1983; Count II, search and seizure violations of the Fourth and Fourteenth Amendments to the United States Constitution, brought under 42 U.S.C. § 1983; Count III, liability under 42 U.S.C. § 1983 for municipal custom or practice; Count IV, liability under 42 U.S.C. § 1983 for municipal negligence; Count V, due process violation of the Maine Constitution, brought under 5 M.R.S.A. § 4683; Count VI, search and seizure violation of the Maine Constitution, brought under 5 M.R.S.A. § 4683; Count VII, brought only against the town, alleging liability for unspecified torts for which there is insurance coverage; Count VIII,

assault and battery; Count IX, false imprisonment; Count X, malicious prosecution; Count XI, abuse of process; Count XII, intentional infliction of emotional distress; Count XIII, negligent infliction of emotional distress; and Count XIV, punitive damages against defendant Thomas only. The complaint arises out of the arrest of the plaintiff on August 17, 1994. I recommend that the court grant the motion in part and deny it in part.

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 Background

Viewed in the light most favorable to the plaintiff, the summary judgment record reveals the

following material facts: On August 17, 1994 the plaintiff was working as an independent contractor for Casualty, Life & Surety Companies, Claims Bureau, Inc. (“Claims Bureau”),¹ investigating the workers’ compensation claim of June Boston. Deposition of Dennis W. Wheeler (“Wheeler Dep.”) at 9, 12, 24; Exh.13(a), Exhibits Regarding Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment (“Plaintiff’s Exhibits”) (Docket No. 13). On that date, he was in South Berwick, Maine, following Ms. Boston. Wheeler Dep. at 12, 25-26. Ms. Boston’s brother, a social acquaintance of defendant Thomas, a South Berwick police officer, reported to Thomas that a stranger was following his sister. Deposition of Scot H. Thomas (“Thomas Dep.”) at 6, 51, 63-64. Thomas stopped the plaintiff’s vehicle as the plaintiff continued his moving surveillance of Boston, following her departure from the South Berwick post office. Wheeler Dep. at 27-29. Thomas explained that he had pulled the plaintiff over because of a complaint the police had received about the plaintiff’s surveillance of Boston. *Id.* at 32. When he asked the plaintiff if he was a “PI or something,” the plaintiff responded, “yeah, or something.” *Id.* The plaintiff wanted to identify himself further and explain what he was doing, but Thomas did not give him a chance to do so. *Id.* at 33. The plaintiff then produced a New Hampshire private detective’s license. *Id.* at 29, 33; Exh. 1 to Affidavit of Scot Thomas (“Thomas Aff.”), Exh. A to Defendants’ Statement of Uncontroverted Facts (“Defendants’ Statement”) (Docket No. 8). Because his cruiser’s radio equipment did not allow him to contact directly the agency responsible for licensing private investigators in Maine, Thomas requested that the South Berwick police dispatcher do so. Thomas Aff. ¶ 4.

The police dispatcher reported to Thomas that the Licensing and Inspection Unit of the Maine

¹ Claims Bureau is an independent company, not owned by any insurance company, that investigates insurance-related claims for insurance companies and law firms. Wheeler Dep. at 7-8.

Department of Public Safety advised that surveillance in Maine without a valid Maine private investigator's license constituted a Class D crime under 32 M.R.S.A. § 8114. *Id.* ¶¶ 4, 5. Neither the plaintiff nor Claims Bureau had a Maine private investigator's license. Wheeler Dep. at 19, 44. Thomas was also advised that defendant Lajoie, chief of police for South Berwick, directed him to bring the plaintiff in to the police station. Deposition of Dana P. Lajoie ("Lajoie Dep.") at 3, 36; Thomas Aff. ¶ 6. Thomas arrested the plaintiff, handcuffed him, and placed him in the front seat of his cruiser. Thomas Aff. ¶¶ 6, 7; Wheeler Dep. at 34-38. Thomas's police dog was in the back seat area of the cruiser, behind a steel mesh or cage, and barked at the plaintiff. Wheeler Dep. at 38; Thomas Aff. ¶ 9. When Thomas returned to the cruiser after five to ten minutes, the plaintiff complained of pain from the handcuffs. Wheeler Dep. at 39-40. Thomas checked the handcuffs, asked the plaintiff to wiggle his fingers, and left them in place. *Id.* at 40-41.

Thomas then took the plaintiff to the police station, which was not far away. *Id.* at 45-46. Upon arrival, the plaintiff asked that the handcuffs be removed because they were very tight and "still bothering" him. *Id.* at 47. Thomas responded that he would remove the handcuffs, and left the room. *Id.* When he returned, he resumed questioning the plaintiff. *Id.* The plaintiff reminded Thomas about the handcuffs, and he then removed them. *Id.* Marks from the handcuffs remained on the plaintiff's wrists for two to four days thereafter. *Id.* at 73. The plaintiff was given a citation and released on personal recognizance. *Id.* at 52; Exh. 9(a), Plaintiff's Exhibits. About an hour later he was able to retrieve his car, which had been towed to the police station, after Thomas completed an inventory of its contents. Wheeler Dep. at 53-54; Thomas Aff. ¶ 11. The plaintiff had to pay a towing charge in order to retrieve the car. Wheeler Dep. at 52. A few days after the arrest, the plaintiff was asked to return to South Berwick to be fingerprinted. Thomas Aff. ¶ 12. The plaintiff

returned for this purpose on September 20, 1994 and was fingerprinted by an officer other than Thomas. Exh. [1] to Affidavit of Dana P. Lajoie, Exh. B to Defendants' Statement; Thomas Aff. ¶ 12. The officer who took the fingerprints did so in a very forceful manner, pressing down on the plaintiff's fingers and causing him pain. Wheeler Dep. at 65.

The plaintiff was not prosecuted for the charge on which he was arrested. Exh. 34(a), Plaintiff's Exhibits. On August 23, 1994 the president of Claims Bureau wrote a letter to the attorneys in the District Attorney's Office in York, Maine objecting to the arrest and charge against the plaintiff. Exh. 13a, Plaintiff's Exhibits. By letter dated February 21, 1996 an attorney for the plaintiff informed the defendant Town of South Berwick that he intended to bring suit under 42 U.S.C. § 1983. Letter from Lee H. Bals to Town of South Berwick, attached to Affidavit of Richard B. Brown, Exh. C to Defendants' Statement. The complaint in this action was filed on August 12, 1996. Docket No. 1.

III. Analysis

A. State Law Claims

The Maine Tort Claims Act, 14 M.R.S.A. §§ 8101-8118 (the "Act"), governs tort claims against municipalities and municipal employees in Maine. 14 M.R.S.A. §§ 8103(1), 8111. Counts VII-XIII of the complaint raise tort claims against the defendant town and two of its employees. Section 8107 of the Act requires that a written notice of claim be filed with a person upon whom a summons and complaint against the municipality could be served within 180 days after a claim or cause of action permitted by the Act accrues and specifies the contents of that notice. The plaintiff does not dispute that the letter from his attorney to the town dated February 21, 1996 was untimely

under section 8107. Instead, he contends that the August 23, 1994 letter from the president of Claims Bureau to two attorneys in the District Attorney's Office constitutes substantial compliance with the notice requirement, as permitted by section 8107(4).²

However, that letter fails to meet the standard of substantial compliance with the statutory notice requirements. First, it was not served on a person upon whom a summons and complaint against the town could be served under the Maine Rules of Civil Procedure. 14 M.R.S.A. § 8107(3)(B). Maine Civil Rule 4(d)(5) provides that the town clerk, selectmen or assessors are the only proper persons to receive process on behalf of a town. The plaintiff has made no showing that the attorneys addressed in the letter held any of these positions. Next, the letter does not state that the writer is the plaintiff's representative; the time of the act complained of; the name and address of any government employee involved, or that the name of such employee is not known; the extent of the injury claimed to have been suffered; or the amount of monetary damages claimed. 14 M.R.S.A. § 8107(1)(A)-(E). This combination of deficiencies amounts to "more than mere inaccuracy of the type that would justify a finding of substantial compliance pursuant to section 8107(4)." *Pepperman v. Barrett*, 661 A.2d 1124, 1127 (Me. 1995). The state law tort claims must fail for lack of compliance with the notice provisions of the Maine Tort Claims Act.

The defendants do not address the plaintiff's claims under the Maine Constitution and the

² That subsection provides, in relevant part:

No claim or action shall be commenced against a governmental entity or employee in the Superior Court unless the foregoing notice provisions are substantially complied with. A claim filed under this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is shown that the governmental entity was in fact prejudiced thereby.

Maine Civil Rights Act, 5 M.R.S.A. §§ 4681-85,³ found in Counts V and VI of the complaint, separately from their discussion of the state tort claims. The Tort Claims Act notice requirement applies to all claims against a government entity. 14 M.R.S.A. §§ 8103, 8107(1). The requirements of the Act extend to claims raised under the state constitution. *McPherson v. Auger*, 842 F. Supp. 25, 28 (D. Me. 1994). Whether the Maine Civil Rights Act effectively waives the immunity granted by the Tort Claims Act is a question not yet resolved by the Maine Law Court. *McLain v. Milligan*, 847 F. Supp. 970, 974 n.5 (D. Me. 1994). In the circumstances here, this court need not predict how the Law Court would resolve that question. To the extent that Counts V and VI raise claims under the Civil Rights Act, that Act was patterned after 42 U.S.C. § 1983, and the analysis of the plaintiff's federal claims which follows will address those claims as well. *See Jenness v. Nickerson*, 637 A.2d 1152, 1159 (Me. 1994).

B. Federal Claims

Counts I-IV of the complaint raise claims under federal law. All allegations concerning probable cause for the stop and arrest and the use of excessive force in carrying out the arrest are properly assessed under the Fourth and Fourteenth Amendments, *McPherson*, 842 F. Supp. at 27, n.1 (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)), which is the ground asserted in Count II of the complaint. Invoking *Graham*, the defendants seek summary judgment or dismissal on Counts I, III and IV on this basis. However, those counts do not allege only the lack of probable cause and the use of excessive force. While entitled "Due Process," Count I of the complaint alleges

³ The complaint cites 5 M.R.S.A. § 4683, which deals with attorney fees, rather than section 4682, which establishes the private cause of action that the plaintiff wishes to pursue.

interference with the plaintiff's rights of liberty and property and his right to equal protection, as well as his right to due process. Count III is entitled "Municipal Liability (Custom & Practice)" and Count IV is entitled "Municipal Liability (Negligence)."⁴

Counts III and IV are duplicative. There is one cause of action available under section 1983 against a municipality for negligent failure to properly train and supervise its police officers, which requires as one of its elements the existence of a municipal custom or policy that was the cause of the deprivation of constitutional rights. *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1233 (D. Me. 1996). Therefore, Count III, alleging the existence of such a custom or policy, and Count IV, alleging negligent failure to train and supervise, assert the same cause of action. Indeed, since Counts I and II purport to be asserted against the town as well, and the only way to establish section 1983 liability against the town under the circumstances alleged by the plaintiff is through the "custom or policy" route, there appears to be no real need for either Count III or Count IV. However, in order to maintain the explicit allegation of the claim against the town apparently sought by the plaintiff, I recommend that summary judgment for the defendants be entered only on Count IV.

Some initial discussion of the additional claims raised in Count I is appropriate before proceeding to the substance of the section 1983 claims. Paragraph 28 of the complaint alleges a violation of the plaintiff's exercise or enjoyment of his right to equal protection of the laws. The Equal Protection Clause provides individuals with the "right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). The plaintiff has made no factual allegations to support such a claim and summary judgment

⁴ Counts III and IV assert demands for relief against all three defendants. However, neither raises a claim, by title or by specific pleading, against either of the individual defendants, and summary judgment for Thomas and Lajoie on those counts is therefore appropriate.

for the defendants on that aspect of Count I is therefore appropriate. *Ellis v. Meade*, 887 F. Supp. 324, 329 & n.6 (D. Me. 1995). There is no indication in the complaint or in the summary judgment materials provided by the plaintiff that the claims in Count I based on his liberty and property rights differ in any significant way from his search and seizure claims raised in Count II. Therefore, under *McPherson*, it appears that the defendants are entitled to summary judgment on the remainder of Count I as well. For the same reasons, summary judgment for the defendants should also be entered on Count V, which raises similar claims based on the state constitution.⁵

On the remaining allegations, the defendants have raised a defense of qualified immunity. The existence of qualified immunity is a question of law and qualified immunity claims are to be resolved before trial where possible. *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691, 694 (1st Cir. 1994). The plaintiff asserts that there was no probable cause for his arrest, that excessive force was used in connection with his arrest, and that he was unlawfully deprived of his property, his car, albeit for a relatively short period of time. The summary judgment record allows the court to resolve the issues of probable cause and deprivation of property, but there are disputed questions of material fact as to the issue of excessive force which make summary judgment as to that claim inappropriate.

It is not necessary to reach the issue of qualified immunity with regard to probable cause for the arrest itself, because a violation of the plaintiff's constitutional rights could not have occurred in that context. "Probable cause exists when facts and circumstances within the arresting officer's

⁵ Article I, § 1 of the Maine constitution declares the rights of all persons to enjoy and defend life and liberty and to acquire, possess and protect property. Article I, § 19 of the Maine constitution merely requires that every person have redress for injuries and that justice be available freely and without delay. Nothing presented by the plaintiff in the summary judgment record suggests any deprivation of his section 19 rights.

knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution and prudence in the belief that the defendant is committing or has committed a crime.” *Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir. 1985) (quoting *State v. Lemire*, 424 A.2d 1135, 1138 (1981)). The plaintiff contends that probable cause to arrest him did not exist because he “willingly and truthfully provided information to explain his surveillance of June Boston.” Plaintiff’s Objection and Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment (Docket No. 13) (“Plaintiff’s Objection”) at 14. The only details concerning this information supplied by the plaintiff in his Statement of Material Facts (Docket No. 14) is that he gave Thomas his official identification indicating that he was an agent of Claims Bureau and tried unsuccessfully to provide additional information. The plaintiff argues that he was exempt from the statutory licensing requirement for private investigators because he was an “insurance investigator,” within the meaning of 32 M.R.S.A. § 8104(2)(H), and that “[a]ccordingly, Defendant had no reason to believe that Plaintiff had committed a crime.” Plaintiff’s Objection at 14 n.6. However, the plaintiff’s conclusion does not follow from his premise.

There is nothing in the summary judgment record to suggest that Thomas, or a reasonable person in Thomas’s position, should have known that Claims Bureau was an insurance company. In fact, it was not. Wheeler Dep. at 7-8. Thomas asked for and received information from the agency responsible for licensing private detectives, which was the term used on the identification presented by the plaintiff, Exh. 2 to Wheeler Dep., that indicated that what the plaintiff was doing constituted a Class D crime. The undisputed evidence is that when Thomas spoke with this individual himself after making the arrest and before releasing the plaintiff, he was told that a person conducting an investigation on behalf of an insurance company but not actually employed by an insurance

company, like the plaintiff, was not an insurance investigator for the purposes of the statutory exemption. Thomas Aff. ¶ 10. Thus, even if the plaintiff's claim that he was an insurance investigator had been conveyed to the licensing agency before the arrest was made, the information supplied would have been that the plaintiff was committing a crime. This was reasonably trustworthy information. Thomas had observed the plaintiff's activity, which a reasonable person under the circumstances would have believed constituted a crime. It is not merely what the arrestee says to the arresting officer to explain his activity that provides the basis for analysis of probable cause. Under the totality of the circumstances, Thomas had probable cause to make the arrest. Because the plaintiff could not be arrested without some provision for custody of his car, there is also no violation of his constitutional property rights.

The way in which Thomas effected the arrest is another matter. The fact that Thomas had probable cause to arrest the plaintiff does not immunize him from claims that the use of handcuffs was unnecessary or that the handcuffs were applied with excessive force. The defendants assert that it was the unwritten standard practice of the South Berwick police department to use handcuffs when an arrestee is transported to the police station, Affidavit of Dana P. Lajoie, Exh. B to Defendants' Statement, at ¶ 3, and that the fact that the plaintiff could not be transported in the back of Thomas's cruiser due to the modifications made for transport of the police dog meant that he had to be handcuffed for the officer's safety, Thomas Aff. ¶ 7. Neither of these assertions establishes that no Fourth Amendment violation occurred, as a matter of law.

The summary judgment record does not present evidence indicating that any of the considerations used to evaluate the use of force in making an arrest under the Fourth Amendment required Thomas to handcuff the plaintiff, or to leave the handcuffs in place and unadjusted after the

plaintiff complained of pain, or that they required the fingerprinting officer to cause the plaintiff pain. These considerations include: the nature of the crime committed, its severity, the threat of danger to the officer and society, and whether the suspect is actively resisting arrest or attempting to evade arrest. *Comfort*, 924 F. Supp. at 1228. This was a minor and nonviolent crime. There is no evidence that the plaintiff presented any danger to Thomas or to society or that he was resisting arrest.

The parties agree that analysis of a claim of qualified immunity involves two steps. First, the court must consider whether the right allegedly violated was clearly established at the time of the incident. If so, the court must determine whether a reasonable officer under the circumstances present at the time of the incident could have believed that the challenged action was lawful in light of the information he possessed. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *McLain*, 847 F. Supp. at 974-75. The Fourth Amendment protects against the use of excessive force by police officers carrying out an arrest, and this right is unquestionably an “established right” for the purposes of qualified immunity analysis. *Comfort*, 924 F. Supp. at 1228. The standard for the second element of the test is one of objective reasonableness. *Anderson*, 483 U.S. at 641. This standard is “comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present.” *Roy*, 42 F.3d at 695. But, accepting the plaintiff’s version of what transpired on the morning in question, there were no exigent circumstances, emergency conditions, or indications of potential danger. When the use of excessive force in effecting an arrest is at issue, the question is whether the officer’s actions were “objectively reasonable in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation.” *Dean v. City of Worcester*, 924 F.2d 364, 367 (1st Cir. 1991) (quoting *Graham*, 490 U.S. at 397).

The plaintiff first asserts that the act of handcuffing him amounted to the use of excessive force. In the context of qualified immunity, handcuffing an arrestee is not *per se* reasonable under the Fourth Amendment standard established in *Graham. Soares v. State of Connecticut*, 8 F.3d 917, 921 (2d Cir. 1993). However, “there is still no clear authority on whether and under what circumstances, if any, a person has a constitutional right not to be handcuffed in the course of an arrest.” *Id.* at 922. Thus, because Thomas did not violate the plaintiff’s “clearly established” right in this regard, he enjoys qualified immunity as to the use of handcuffs. *Anderson*, 483 U.S. at 639.

The result of the qualified immunity inquiry differs as to the assertions concerning the pain caused by the tight handcuffs and the fingerprinting procedure. If credited, the plaintiff’s evidence could be found to establish that Thomas’s use of force in applying the handcuffs and refusing to loosen them at the plaintiff’s request constituted the use of excessive force. *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993). If the force used in handcuffing the plaintiff caused injury and exceeded the force necessary to effect the arrest, a jury could conclude that an objectively reasonable officer would not view such use of force as constitutional. *Id.*; *McPherson*, 842 F. Supp. at 30. A similar analysis applies to the fingerprinting claim. Therefore, the defendants’ assertion of qualified immunity as to these two claims must be rejected.

Summary judgment on these claims is thus precluded, even at the risk that the factfinder will later choose not to credit the plaintiff’s account and thus that the defendants may ultimately be immune from section 1983 liability. “[W]hen only a fact finder’s determination of the conflicting evidence as to the underlying historical facts will permit resolution of the immunity issue[,] summary judgment ceases to be an appropriate vehicle.” *Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991).

The plaintiff makes clear in his memorandum that his only basis for asserting liability under

section 1983 against defendants Lajoie and the Town of South Berwick is that which is recognized in *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978). “[L]ocal governments, like every other § 1983 ‘person,’ by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decisionmaking channels.” *Id.* at 690-91. Similarly, a supervisor may be liable under section 1983 when his training or supervision of another reflects a “reckless or callous indifference to the constitutional rights of others.” *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 92 (1st Cir. 1994). However, neither a municipality nor a supervisor can be held liable on a *respondeat superior* theory. *Monell*, 436 U.S. at 691; *Febus-Rodriguez*, 14 F.3d at 91.

The evidence presented by the plaintiff, if accepted by the factfinder, takes the municipality and its police chief beyond the realm of *respondeat superior*. In 1991 a private investigating firm known as Carl E. Buchanan & Associates investigated allegations of misconduct by the members of the South Berwick Police Department at the direction of the Select Citizen’s Committee on Police Misconduct, a group formed by the town council. Exhs. 27, 81, Plaintiff’s Exhibits. At issue were 29 separate allegations of police misconduct. *Id.*, Exh. 110. Thomas was implicated in several of the allegations. *Id.*, Exh. 83, 86, 89, 90, 94, 95. Buchanan & Associates presented its findings to the “Select Citizens Committee.” *Id.*, Exh. 27 at 1. As a result of the report, the committee recommended, *inter alia*, that the town manager seek the resignation of defendant Lajoie as South Berwick’s police chief. *Id.* ¶ 1. The committee concluded that it was “obvious that the supervisory control [in the South Berwick police department] was severely lacking.” *Id.* The report also recommended that the town manager and police chief update the department’s standard operating

procedures and strictly enforce the updated procedures; the report called on the town council and town manager to “establish and provide for sensitivity and public relations training for all Police Officers.” *Id.* ¶¶ 3-4. Finally, the report recommended that the town manager “closely monitor the performance of certain officers that are named consistently throughout many of the allegations of misconduct.” *Id.* ¶ 5.

The only disciplinary action taken as a result of the investigation was a two-week suspension of Lajoie; he remained chief through the time of the plaintiff’s arrest. Affidavit of Richard B. Brown, Exh. C to Defendants’ Statement, ¶ 7. No disciplinary action was taken against Thomas in connection with the Buchanan report. Lajoie Dep. at 17-18.

As the result of the 1992 reports of Buchanan & Associates and the Select Citizens Committee, both defendants were on notice that police misconduct, both generally and specifically that of Thomas, was a significant problem. The reports also put the municipality on notice that Lajoie’s supervision was inadequate. For purposes of the defendants’ summary judgment motion, it would be inappropriate for the court to conclude that this inadequacy did not rise to reckless indifference to the constitutional rights of others, and that the specific misconduct alleged to have been committed by Thomas was not pursuant to the custom of the South Berwick Police Department.

Because the Law Court applies the same qualified immunity analysis conducted pursuant to section 1983 when considering claims that arise under the analogous Maine Civil Rights Act, *Jenness*, 637 A.2d at 1155-56, the defendants are not entitled to summary judgment on Count VI of the amended complaint.

C. Punitive Damages

Count XIV seeks punitive damages against Thomas only. Such a claim requires the existence of an underlying claim. The only remaining state law claim against Thomas is analogous to his federal claim under section 1983. Punitive damages are available on claims under 42 U.S.C. § 1983, under certain circumstances. *Smith v. Wade*, 461 U.S. 30, 51 (1983). The evidence in the summary judgment record, construed most favorably to the plaintiff, does not rise to the level necessary to meet the *Wade* standard of intentional violation of federal law or reckless or callous indifference to a plaintiff's rights. 461 U. S. at 51. Therefore, summary judgment for the defendants on Count XIV is appropriate.

V. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED** in favor of all defendants as to Counts I, II (only to the extent of claims arising out of the alleged lack of probable cause to arrest and the act of handcuffing the plaintiff) IV-V, VI (only to the extent of claims arising out of the alleged lack of probable cause to arrest and the act of handcuffing the plaintiff) and VII-XIV of the complaint and in favor of defendants Thomas and Lajoie as to Count III of the complaint, and that the motion be otherwise **DENIED**. If my recommendation is accepted, Counts II (only as to claims of excessive force arising out of tightness of the handcuffs and the fingerprinting procedure), III (as to the defendant town), and VI (only as to claims of excessive force arising out of tightness of the handcuffs and the fingerprinting procedure) will remain for trial.

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 26th day of February, 1997.

*David M. Cohen
United States Magistrate Judge*