

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BILLIE JO FORTIER,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 97-295-P-H
)	
JAMES THERIAULT, et al.,)	
)	
<i>Defendants</i>)	

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

The summary judgment record in this proceeding presents a disturbing scenario. The plaintiff complained to the police department in Mexico, Maine about a serious domestic assault and received assurances that an arrest would be made. The perpetrator presented himself for arrest but was not taken into custody. Hours later, he tracked down the plaintiff and forced her to have sex with him. Alleging the deprivation of her constitutional rights to substantive due process and equal protection of the laws, the defendant now seeks relief under 42 U.S.C. § 1983 against the Town of Mexico ("Town"), Police Chief James Theriault and certain unnamed police officers. She also asserts state-law claims of negligence and fraud. Theriault and the Town (hereinafter referred to collectively as the defendants) seek summary judgment on all claims. For the reasons that follow, I recommend that the motion be granted in part and denied 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). “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 that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). 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. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The defendants make emphatic objection to certain evidence the plaintiff seeks to introduce into the summary judgment record. According to the defendants, some of this evidence runs afoul of the requirement in Fed. R. Civ. P. 56(e) that affidavits opposing a summary judgment motion “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” The defendants further point to assertions in the plaintiff’s factual statement submitted pursuant to Local Rule 56, objecting to them as improper statements of opinion and/or inaccurate representations of the record

evidence. Suffice it to say that I have carefully reviewed the summary judgment record and, while adopting the requisite plaintiff-favorable view of its contents, have not credited any material assertions by the plaintiff that are not supported by the record.

One additional observation is in order. The factual statements of both the plaintiff and the defendants refer the court in several places to the views of the plaintiff's designated expert witness as to the meaning of a state statute concerning domestic violence and the extent of the defendants' compliance with it. The First Circuit has recently made clear that the Federal Rules of Evidence generally do not permit an expert witness to opine about applicable principles of law because such matters are the province of the judge. *See Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997). I find that rule to be squarely applicable here, and so I have not credited any proffered statements by the expert witness as to statutory interpretation.

II. Factual Scenario

The summary judgment record, viewed in the light most favorable to the plaintiff, reveals the following: At all times relevant to this litigation, the Town of Mexico Police Department had in place a set of policies and procedures governing complaints of domestic violence. Deposition of William B. McClaran ("McClaran Dep.") at 105-06. The written policy in effect in October 1995 was adopted in 1990 by Gregory Gallant, who was then the town's police chief. Deposition of Town of Mexico by James A. Theriault and Deposition of James A. Theriault ("Theriault Dep.") at 65 and Exh. 9 thereto. The policy is included in the department's policy and procedures manual, which each officer in the department is required to read. *Id.* at 66.

James Theriault became chief of the Mexico Police Department on December 13, 1993. *Id.* at 67. He did not have occasion to review the domestic violence policy with his staff prior to its

revision in December 1995. *Id.* at 66. The Town of Mexico had four police officers in 1995, all of whom received training at the Maine State Criminal Justice Academy. Affidavit of Police Chief James Theriault in Support of the Summary Judgment Motion (“Theriault Aff.”) (Docket No. 13) at ¶ 6; Affidavit of Police Officer Colin Campbell in Support of the Summary Judgment Motion (“Campbell Aff.”) (Docket No. 12) at ¶ 1. Other than any training the officers received at the police academy, the Town of Mexico did not provide its police officers with any training on the issue of domestic violence during the period relevant to this litigation. Theriault Dep. at 69-70. Sergeant Robert Gallant, who joined the Mexico police force in 1979 and became a sergeant in 1994, neither reviewed the department’s domestic violence policy as promulgated in 1990 nor received any training in connection with that policy during the relevant period. Deposition of Robert J. Gallant (“Gallant Dep.”) at 3, 47-49.

The police department’s official policy, as promulgated by Theriault and as was in effect during the times relevant to this litigation, was that when an officer has probable cause to believe that a domestic assault has occurred, the officer should make an arrest. Theriault Dep. at 9, 71-72. According to the monthly statistical reports submitted by the police department to the Maine Department of Public Safety, all domestic assaults reported to the police department in 1995 were resolved either by arrest or “other exceptional means.” Theriault Aff. at ¶¶ 3, 5 and attachments thereto. It is not clear from the record what ‘other exceptional means’ are.

The plaintiff first became acquainted with a man named Gordon Lewis in June 1995. Deposition of Billie Jo Fortier (“Fortier Dep.”) at 11-12. The two went on a camping trip together a few days after meeting and, soon thereafter, were living with one another. *Id.* at 12-13. Lewis was abusive of the plaintiff from the start of their relationship, choking and hitting her during their initial

camping trip. *Id.* The plaintiff knew that Lewis had been released from jail the previous April, but it was only after they moved in together that he disclosed to her, in late July, that the assault conviction involved a former girlfriend as the victim. *Id.* at 13-16. In fact, Lewis told the plaintiff he had beaten up all of his former girlfriends. *Id.* at 13-14. Although the plaintiff was afraid of Lewis, she did not go to court to seek a protective order. *Id.* at 16. In late August, Lewis beat the plaintiff and she suffered a miscarriage. *Id.* at 83. She reported the assault to the treating physicians but not to the police. *Id.* at 84. On Thursday, September 28, 1995, the plaintiff was again hit by Lewis. *Id.* at 30.

On Monday, October 2, 1995, the plaintiff went to the Mexico Police Department headquarters in the company of Diane Gallagher and Mitzi Copeland. *Id.* at 54. Gallagher was a volunteer and Copeland a caseworker with the Abused Women’s Advocacy Program. Affidavit of Diane Gallagher (“Gallagher Aff.”), Attachment A to Plaintiff’s Statement of Undisputed Material Facts (“Plaintiff’s SMF”) (Docket No. 16), at ¶ 1; Affidavit of Mitzi Copeland (“Copeland Aff.”) (Docket No. 20), at ¶ 1. When she arrived at the police station, the plaintiff had visible bruises on her face. Gallagher Aff. at ¶ 4; Copeland Aff. at ¶ 3. The three women met with Theriault. Fortier Dep. at 54. Gallagher and Copeland explained that the plaintiff wished to file a complaint in connection with an assault that had occurred the previous Thursday. *Id.* Fortier identified Lewis as the person responsible for the injuries, stated that Lewis was extremely dangerous and further indicated she believed that Lewis would injure or kill her. Gallagher Aff. at ¶¶ 4, 8; Copeland Aff. at ¶ 4. She described the incident to Theriault as one in which Lewis had placed his hand over her mouth and nose as if he were going to suffocate her. Copeland Aff. at ¶ 4. Gallagher later recalled Theriault as having said “something to the effect [of] ‘What happened? He didn’t just haul off and

hit you, did he?”” Gallagher Aff. at ¶ 5.

Theriault asked the plaintiff why she had waited several days to report the assault, thinking such a delay to be unusual. Fortier Dep. at 54; Theriault Dep. at 6-7. The plaintiff explained that she had been under the impression there was an outstanding warrant for her own arrest and that she was concerned she would spend the weekend in jail if she went to the police.¹ Fortier Dep. at 54-55. Theriault told the plaintiff he would issue a warrant for the arrest of Lewis, and that the police would make the arrest if they could locate Lewis. Gallagher Aff. at ¶ 9; Copeland Aff. at ¶ 8; Fortier Dep. at 58; Theriault Dep. at 6.² The plaintiff gave Theriault information about where Lewis lived and the name of the trucking company where he worked as a driver, noting that Lewis planned to leave the state that evening for approximately a week but was probably still at home. Theriault Dep. at 12; Fortier Dep. at 61-62. Theriault and the plaintiff discussed imposing bail conditions on Lewis that would protect her, and she also indicated an intention to obtain a protection-from-abuse order from the state court in Lewiston. Fortier Dep. at 60. Sergeant Gallant arrived at the police station while Theriault was meeting with the three women. Gallant Dep. at 4.³

¹ According to the plaintiff, at issue was an incident of driving without a license and it ultimately turned out the authorities did not intend to arrest her. Fortier Dep. at 55.

² The issue of whether Therieault actually told the plaintiff he would issue an arrest warrant, and thus implicitly represented that he had the authority to issue such a warrant, is a disputed issue of fact. According to Theriault, what he actually said was that he would speak to the district attorney about obtaining a warrant for the arrest of Lewis, but that the police would arrest Lewis without a warrant if they could locate him that day. Theriault Dep. at 6. It is clear that Maine law vests only judicial officers with the authority to issue arrest warrants. *See* 15 M.R.S.A. § 702; M.R. Crim. P. 4.

³ The plaintiff brings certain evidence to the court’s attention in support of her asserted inference that Theriault and Gallant each had what can be characterized as an insensitive attitude toward women who complain of domestic violence. The evidence is as follows. Gallagher was of the opinion that Theriault’s concern on October 2, 1995 about why the plaintiff had waited to report

Therault and Gallant went to Lewis's residence later that day in an attempt to arrest him. Therault Dep. at 40-41; Gallant Dep. at 4. Gallant knocked on the door but there was no answer. Gallant Dep. at 6. Therault and Gallant then went to Lewis's place of employment and learned that Lewis was already on his way to New Jersey. *Id.* The following day — Tuesday, October 3 — Lewis called Therault on the telephone and Therault told Lewis that when he returned to Maine he

Lewis's abuse reflected a "very victim blaming" attitude. Gallagher Aff. at ¶¶ 4-6. Reflecting on the same events, Copeland expressed the view that Therault "did not appear to be at all sympathetic" toward the plaintiff, and inferred from the chief's question about the reporting delay "that he did not wish to pursue an arrest or help [the plaintiff] in any way." Copeland Aff. at ¶¶ 5-7. As for Gallant, the plaintiff cites his deposition testimony concerning certain "domestic violence classes" he had attended with the Abused Women's Advocacy Program ("AWAP") some years prior to the events at issue in this lawsuit. *See* Gallant Dep. at 27. Gallant testified as follows: "We've had classes with AWAP before where they're going to give us this big speech as to, you know, what's going on or what to expect." *Id.* at 27-28. According to Gallant, he and his fellow officers had "quite a conversation" with the representatives of the women's advocacy organization:

We were trying to explain to AWAP that men are abused as well as women were. And they wanted to disagree with it. And I can remember myself and Officer Louvat having an argument with them about it. . . . [I]t was one of those, you know, women are really abused, women — you know, they hide their feelings, they don't tell people. Well, like, men are in the same boat as they are, so don't just, you know, put us on the bad end of the deal. You know, like I've been doing this job long enough, I know how to handle domestic — I know how to handle it if I have a problem, and I take care of them. I don't usually go to the same house twice. I mean. I don't usually have to go get stuck in places like this event [i.e., a deposition concerning the events at issue in this lawsuit]. You know, I know my job. I do my job. And all the training in the world cannot prepare you for any domestic that you go to because they're all different.

Id. at 28-29. A reasonable factfinder could certainly determine based on this evidence that Gallant had an insensitive attitude about women's complaints of domestic violence.

The evidence concerning Therault is not as compelling in that regard. In their reply memorandum, the defendants vigorously object to the court's crediting any of the opinions expressed by Gallagher and Copeland about Therault's attitude toward the plaintiff when he spoke with her on October 2. In my view this is an issue the court need not address in deciding the summary judgment motion because the result does not turn on whether Therault's attitude about domestic violence was insensitive.

would be arrested for domestic assault.⁴ Theriault Dep. at 41-42. Lewis told Theriault he planned to return to Maine on Saturday, October 7, and would turn himself in at that time. *Id.* at 42. Theriault instructed Lewis to report to Gallant, who would be working that Saturday. *Id.* Gallant took over the investigation because Theriault was leaving town for a conference the following day and did not plan to return until some time Saturday. *Id.* at 57. Ironically, Theriault's memory is that one of the subjects of the conference was domestic abuse. *Id.* at 84.

Gallant did not speak to Lewis himself while Lewis was out of state. Gallant Dep. at 24. However, Gallant spoke with the plaintiff at least once during the period. *Id.* It was as a result of a call to the Mexico Police Department that the plaintiff learned that Lewis had not been arrested before he left Maine but that the police had instructed him to turn himself in upon his return. Fortier Dep. at 67, 95.

Theriault's expectation notwithstanding, Lewis returned to Maine on October 6 rather than October 7. On October 6, Lewis appeared at the headquarters of the Rumford Police Department and asked to speak with Gallant. Campbell Aff. at ¶¶ 5, 8. Rumford is the town adjacent to Mexico; the Rumford Police Department provides dispatching services to the Mexico Police Department. Theriault Dep. at 42. Gallant had not left instructions to arrest Lewis in the event he appeared prior to his expected return date. Gallant Dep. at 29. The dispatcher at the Rumford police headquarters told Lewis that Gallant was not working that day, but would be working the following day, during the day shift. Campbell Aff. at ¶ 6. Lewis indicated that he would return the following day, when

⁴ Tuesday, October 3, was also the day Theriault spoke to District Attorney Norman Croteau about Lewis. Statement of Chief James A. Theriault ("Theriault Statement"), Exh.D to Plaintiff's SMF, at 2. Croteau's advice was that Theriault could either execute an affidavit and use it to obtain an arrest warrant or simply arrest Lewis without a warrant. *Id.*

Gallant was on duty, to turn himself in. *Id.* at ¶ 7. He then left. *Id.* Officer Colin Campbell of the Mexico Police Department was present for the exchange between Lewis and the Rumford dispatcher. *Id.* at ¶ 5. Before allowing Lewis to leave, the dispatcher ascertained that there was no outstanding warrant for Lewis’s arrest, asked Campbell if there was any reason to detain Lewis, and was told by Campbell that he was not aware Lewis was “wanted . . . for anything.” Theriault Statement at 2.

During the period that Lewis was out of state, the plaintiff stayed at the apartment of a friend in Lewiston. Fortier Dep. at 33-34. At approximately 6:30 a.m. on Saturday, October 7, Lewis knocked on the door of the apartment and the plaintiff opened the door. *Id.* at 71-72. Lewis asked the plaintiff if she would go to Dunkin’ Donuts with him; she said no and told him to leave. *Id.* at 73. After asking the other three people present in the apartment if they wanted him to bring back coffee and donuts for them, Lewis again asked the plaintiff to go to Dunkin’ Donuts with him and this time she agreed. *Id.* The plaintiff left with Lewis, who did go into the drive-through of a local Dunkin’ Donuts. *Id.* at 73, 75. But Lewis turned left after leaving the donut shop, which alerted the plaintiff to the fact that he did not plan to return to her friend’s apartment. *Id.* at 75. Instead, Lewis took the plaintiff to some other place — the location is not disclosed in the record — and, holding her down by the throat, forced her to have sex with him. *Id.*

Later that morning, Lewis and the plaintiff appeared together at the Rumford police headquarters, where Lewis asked to speak with Gallant. Gallant Dep. at 6-7. The Mexico police sergeant was dispatched to Rumford, where he met Lewis for the first time. *Id.* at 7. When Gallant expressed surprise that Lewis had appeared at the police station with the woman he stood accused of assaulting, he told Gallant — in Gallant’s words — that the two had “straightened things out” and

that she was present “for support.”⁵ *Id.* Gallant took Lewis into a conference room and placed him under arrest. *Id.* While he was preparing his arrest report, the dispatch officer called him over and suggested that he speak with the plaintiff. *Id.* The plaintiff told Gallant about the incident that had occurred earlier in the day, whereupon Gallant informed Lewis that he would also be charged with rape and kidnapping and thus would not be admitted to bail. *Id.* at 8-9.

Had the plaintiff known that the Mexico Police Department would not protect her from further contact with Lewis by arresting him, she would have had herself placed out-of-state by the Abused Women’s Advocacy Program. Fortier Dep. at 66, 69. The Mexico Police Department conducted no internal investigation concerning the issue of why Lewis was not placed under arrest when he first presented himself at Rumford police headquarters on October 6. Theriault Dep. at 73.

III. Discussion

a. Unknown Defendants

⁵ Discussing why she agreed to go to the Dunkin’ Donuts with Lewis in the first place, the plaintiff testified at her deposition as follows:

I know what would have happened to me if I didn’t agree to at least talk to Gordon. If anybody else can look and see what kind of person Gordon is, they would have done the same thing. There isn’t a single person out there that can say they would have done anything different than what I would have done. He has gone as far as to break other women’s legs, so they won’t testify and beat them unconscious three times in a 24-hour period. I had already taken a beating, and I wasn’t going to take another one.

Fortier Dep. at 74-75. Citing this testimony, the plaintiff contends in her factual statement that she “passively went along with the ordeal Gordon Lewis put her through pretending she would drop the charges so that she could ultimately bring Gordon Lewis to the Mexico Police Department to have him arrested.” Plaintiff’s SMF at ¶ 25. Based on the evidence cited, a reasonable factfinder could certainly accept this explanation for why the plaintiff appeared at the Rumford police headquarters with Lewis after he sexually assaulted her.

The First Amended Complaint (Docket No. 2) names as defendants Theriault, the Town of Mexico and “Unknown Police Officers Employed by the Town of Mexico.” The unknown officers have not appeared as parties. Accordingly, Theriault and the Town seek their dismissal and the plaintiff makes no objection in her opposition to the summary judgment motion.⁶ I therefore recommend dismissal of all claims against unknown defendants.

b. Counts III and IV

Counts III and IV of the Amended Complaint are alternative versions of the section 1983 claims stated in Counts I and II, premised on the assumption that a warrant for the arrest of Lewis was issued but not executed. Pointing out that the record demonstrates that no warrant was ever issued, the defendants seek summary judgment on these claims. As I previously noted in my Recommended Decision on the plaintiff’s motion to amend her complaint, the parties indicated during a chambers conference that they would stipulate to the dismissal of Counts III and IV. *See* Recommended Decision on Plaintiff’s Motion to Amend Complaint (Docket No. 14) at 2. I therefore so recommend.

c. Substantive Due Process

The defendants contend that Theriault is entitled to summary judgment on Count II, the section 1983 claim alleging the violation of the plaintiff’s substantive due process rights, because (1) under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the

⁶ The plaintiff separately sought leave pursuant to Fed. R. Civ. P. 15(a) to amend her complaint a second time (Docket No. 8), seeking *inter alia* to substitute Gallant for the previously designated unknown police officers. The court denied this motion (Docket No. 22).

mere failure to protect a citizen against the private invasion of her rights to life, liberty and property is not itself actionable under section 1983 and (2) even if an exception to the *DeShaney* rule, as recognized in other circuits, were to apply because Theriault, as the state actor, created the harm at issue, Theriault would still be entitled to summary judgment based on the doctrine of qualified immunity. I recommend that the court follow the lead of the First Circuit in *Soto v. Flores*, 103 F.3d 1056 (1st Cir.), *cert. denied*, 118 S.Ct. 71 (1997), and hold that qualified immunity bars the substantive due process claim against Theriault, leaving the “difficult question” of the state-created-danger theory to another day. *See id.* at 1064.

Under the doctrine of qualified immunity, “government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The question whether qualified immunity is applicable to Theriault in his handling of the matters involving the plaintiff’s complaint against Lewis turns on whether a reasonable officer could have determined his actions to be lawful in light of clearly established law and the information he possessed. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Berthiaume v. Caron*, 142 F.3d 12, 15 (1st Cir. 1998) (stressing that “the question is not whether some right has been established clearly at a highly abstract level”).

Soto, a 1997 decision, answered the relevant question in the negative as to events that took place in 1991. At issue was an incident in which a man shot his two young children to death (and then killed himself) four days after his wife complained to police about the physical and emotional abuse she had suffered at her husband’s hands. *Soto*, 103 F.3d at 1058. In deciding that the doctrine of qualified immunity was applicable, the First Circuit strongly suggested it would follow the lead

of seven other circuits⁷ and hold that an exception to *DeShaney* exists for a case in which “the state actor’s affirmative acts . . . played a part in creating the danger” and thus “rendered [the victim] more vulnerable to harm.” *Id.* at 1063, 1065 (noting that the case law from other circuits “would appear to militate in favor of finding that there is clearly established law in this area”). Although “a violation of clearly settled law may be found even where the Supreme Court and the circuit in question have not specifically addressed the question,” in the case of substantive due process claims invoking the state-created-danger theory, at least as of 1991 the doctrine enjoyed an “uneven” history in which “[t]he distinction between affirmatively rendering citizens more vulnerable to harm and simply failing to protect them ha[d] been blurred.” *Id.* at 1065. Therefore, as of 1991, “the contours of the right were [not] sufficiently plain that a reasonably prudent state actor would have realized not merely that his conduct might be wrong, but that it violated a particular constitutional right.” *Id.* (citation and internal quotation marks omitted). The parties do not draw the court’s attention to any authorities that would tend to suggest a different outcome as to events occurring in 1995.⁸ As the First Circuit noted recently in *Berthiaume*, even though a court might in hindsight discern a

⁷ It appears that those circuits are the Second, Third, Fifth, Seventh, Eighth, Ninth and Tenth. *See Soto*, 107 F.3d at 1065 (referencing seven circuits as having recognized doctrine and citing *Kneipp v. Teddler*, 95 F.3d 1199, 1208 (3d Cir. 1996)); *Kneipp*, 95 F.3d at 1205, 1208 (endorsing doctrine and relying on cases from Second, Fifth, Seventh, Eighth, Ninth and Tenth circuits post-*DeShaney*). The plaintiff contends, without citation, that “at least eleven circuits” had endorsed the state-created-danger theory as of the events giving rise to the instant lawsuit. Plaintiff’s Objection to Defendants’ Motion for Summary Judgment and Incorporated Memorandum of Law (Docket No. 15) at 11.

⁸ The plaintiff places particular emphasis on *Rutherford v. City of Newport News*, 919 F.Supp. 885 (E.D.Va. 1996), *aff’d*, 107 F.3d 867 (4th Cir. 1997) (table), contending that it embraces a second, “special relationship” exception to *DeShaney* that is distinct from the one recognized in the state-created-danger cases. Plaintiff’s Memo at 11. To the contrary, the district court that decided *Rutherford* stressed that the two phrases describe the same exception. *See Rutherford*, 919 F.Supp. at 891 n.8.

constitutional violation in the actions of a police officer, the doctrine of qualified immunity “leaves ‘ample room for mistaken judgments.’” *Berthiaume*, 142 F.3d at 15 (citation omitted). Whatever the events in question, viewed in the requisite plaintiff-favorable light, would suggest to a factfinder about the competence of anyone in the Mexico Police Department or about the vigilance of the department in responding to specific and compelling complaints of domestic violence, I conclude that Theriault is entitled to summary judgment on the due process claim to the extent that the plaintiff seeks to hold him directly liable (as opposed to holding him liable as the supervisor of others).

The defendants also contend that Theriault cannot be liable for any substantive due process claim on this record in his capacity as supervisor. The foregoing analysis is also dispositive to the extent the plaintiff seeks to impose supervisory liability on Theriault in connection with her substantive due process claim. Liability of the subordinate is necessary, but not sufficient, to establish supervisory liability in a section 1983 claim. *See Aponte Matos v. Toledo Dávila*, 135 F.3d 182, 192 (1st Cir. 1998). According to the plaintiff, the predicate subordinate liability for violating her substantive due process rights consists of Gallant’s failure to communicate what he knew about Lewis, including the decision to arrest him, to the other appropriate police officials in Mexico and Rumford. Again, while expressing no view about how a reasonable factfinder might view the way in which Gallant handled this situation, Gallant would not be directly liable on the substantive due process claim for the same reason Theriault is not. Since any constitutional right at issue was not clearly established in October 1995, Theriault cannot be liable in his capacity as supervisor. *See, e.g., McKinney v. DeKalb County*, 997 F.2d 1440, 1443 (11th Cir. 1993).

The remaining question is whether the municipality itself is entitled to summary judgment

on the substantive due process claim as further urged by the defendants. Because “municipalities do not enjoy qualified immunity, . . . [i]t is not impossible for a municipality to be held liable for the actions of lower-level officers who are themselves entitled to qualified immunity.” *Joyce v. Town of Tewksbury*, 112 F.3d 19, 23 (1st Cir. 1997) (en banc) (citations omitted). The defendants contend the Town is entitled to summary judgment on Count I because the record establishes no municipal policy or custom that caused the plaintiff to be deprived of her right to substantive due process. *See Hayden v. Grayson*, 134 F.3d 449, 456 (1st Cir.) (no municipal liability under section 1983 unless “official policy or custom” was “moving force” behind alleged deprivation of rights) (citations omitted), *cert. denied*, 66 U.S.L.W. 3734 (Jun. 26, 1998).

In my view, *Joyce* states the applicable rule and, as in that case, the court need not reach the question whether a municipal policy or custom existed. Because “the unsettled state of the law made it reasonable to believe the conduct in this case constitutional,” those with responsibility for training and supervision of Mexico’s police force “could not have been ‘deliberately indifferent’ to citizens rights . . . in failing to teach the officers that their conduct was unconstitutional,” thus precluding municipal liability without reaching the policy-or-custom issue. *Joyce*, 112 F.3d at 23 (citations omitted).⁹ The Town is also entitled to summary judgment on the plaintiff’s substantive due process

⁹ According to the plaintiff, the Town of Mexico and its police department had a policy or custom of ignoring both a state statute, 19 M.R.S.A. § 770, and its own policy concerning the handling of domestic violence cases. Section 770, subsequently recodified as 19-A M.R.S.A. § 4012, requires law enforcement agencies to report incidents of domestic abuse to the State Bureau of Identification, to establish procedures for assuring that officers at the scene of alleged domestic abuse incidents have access to information about prior incidents and any recorded orders of protection, to provide training for officers in dealing with domestic violence, to apply the same standard at the scene of an alleged incident as would be applicable in an incident involving strangers to each other, to make an arrest in certain circumstances, and to establish a written policy governing these requirements. 19-A M.R.S.A. § 4012 at subsections (1) to (5) and (7). A reasonable factfinder could certainly conclude that the Town had a policy or custom of not following these requirements,

claim.

d. Equal Protection

Count II of the Amended Complaint is a section 1983 claim alleging the deprivation of the plaintiff's constitutional right to equal protection of the laws. In contrast to their bid for summary judgment on the substantive due process claim, the defendants do not invoke the doctrine of qualified immunity or raise any issue relating to municipal liability. Instead, they mount an attack on the merits of the claim based on the First Circuit's decision in *Soto*. The plaintiff's position is that *Soto* provides the basis for allowing her equal protection claim to go to trial.

Under the rule announced in the *Soto* case, a domestic violence victim seeking section 1983 relief for an equal protection violation "must show that there is a policy or custom of providing less protection to victims of domestic violence than to victims of other crimes, that gender discrimination is a motivating factor, and that [the plaintiff] was injured by the practice." *Soto*, 103 F.3d at 1066 (citation omitted). The parties here are in agreement that the facts in *Soto* are similar to those in the instant case.

The equal protection claim in *Soto* foundered for lack of proof on the issue of discriminatory intent. *Id.* at 1072. The "key actor at the precinct level," a police sergeant, "made statements which a trier of fact could easily find reveal gender-discriminatory stereotypes and biases." *Id.* at 1069.

but this is a different question than whether the Town had a policy or custom that was "unconstitutional." See *Reid v. New Hampshire*, 56 F.3d 332, 338 (1st Cir. 1995); see also *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (section 1983 remedy "broadly encompasses violations of federal statutory as well as constitutional law"); *Clark v. Link*, 855 F.2d 156, 163 (4th Cir. 1988) (plaintiff may not defeat qualified immunity in section 1983 case by pointing to violation of state law); *Hicks v. Bexar County*, 973 F.Supp. 653, 667 (W.D.Tex. 1997) (to same effect as to absolute immunity), *aff'd*, 137 F.3d 1352 (5th Cir. 1998) (table).

The statements, which the First Circuit characterized as “very troubling” and reflecting a “hostility to enforcing the [Puerto Rico] domestic violence law,” that “could certainly be understood as arising from archaic stereotypes” about the role of women, *id.* at 1069-70, are similar in character to the views expressed in this record by Gallant. Like Gallant, the sergeant in *Soto* was not a defendant. *Id.* at 1070. But he was a supervisor, and therefore his expressed attitudes were evidence of whether the precinct’s failure to enforce the domestic violence law was based on discrimination. *Id.*

Facts sufficient “to raise a reasonable inference that the failure to enforce [the domestic violence statute] at the precinct level was based on gender discrimination” did not answer the question in *Soto* whether the actual defendant, an individual officer, acted with discriminatory intent in taking what turned out to be the fatal step of going to the perpetrator’s home and warning him that his wife had made a complaint. *Id.* at 1060, 1070. In contrast, a reasonable factfinder could determine here that Gallant’s hostility to domestic violence claims had an effect not because he had supervisory authority — which, as a sergeant, he presumably did — but because of his failure to leave instructions with the dispatchers that Lewis should be arrested immediately upon his return to the area.

However, upon a careful review of the summary judgment record I do not believe that a reasonable factfinder could determine that Theriault had the requisite discriminatory intent in connection with anything he did that is causally related to the plaintiff’s injuries. Even assuming a factfinder would adopt the same view as Gallagher and Copeland — that the chief’s comments during his interview with the plaintiff on October 2 reflected an insensitive blame-the-victim attitude that is at variance with the intent of the domestic violence statute — it is undisputed that he expressed an intention to arrest Lewis as a result of the plaintiff’s complaint. He thereupon followed

through on that intention, albeit unsuccessfully, by going to the home of the perpetrator in search of him. It is also undisputed that Theriault then left for a conference and, thus, played no further role in directly causing any of the events at issue.¹⁰

The plaintiff would also impose liability on Theriault on the theory that his discriminatory intent also infected the training and supervision he gave his staff, which was thus inadequate to assure that the domestic violence statute would be enforced and domestic violence complaints would be treated with the seriousness they deserve. In my view, *Soto* precludes any recovery against Theriault based on a failure-to-train or inadequate supervision theory. In *Soto*, the First Circuit assumed *arguendo* that evidence existed causally linking the lack of training to the events at issue, and further recounted extensive public statements made by the supervisory official in question indicating an unambiguous disagreement with Puerto Rico’s domestic violence statute. *Soto*, 103 F.3d at 1071 & n.14. The court further noted evidence reflecting an attitude of non-cooperation between the supervisory official and the Women’s Affairs Commission, charged with evaluating the statute. *Id.* at 1071-72. But the court noted that the record was “devoid” of evidence suggesting that the domestic violence statute “was handled differently than other new major law enforcement initiatives” or that the supervisor knew about and failed to curb discriminatory attitudes on his staff. *Id.* at 1071. Thus, although the evidence as to supervision and training “paint[ed] an unwholesome

¹⁰ According to the plaintiff, relying on the opinion of her designated expert witness, Theriault additionally failed to prepare a complete report of his meeting with the plaintiff, his determination that an arrest was appropriate and his awareness that Lewis was dangerous. Plaintiff’s SMF at ¶ 12, citing McClarron Dep. at 46-47. The plaintiff and her expert contend that a thorough report would have put others on notice that Lewis should have been arrested. Plaintiff’s SMF at ¶ 13, citing McClarron Dep. at 53-54. In my view, in the face of evidence indicating that Theriault instructed Gallant to arrest Lewis, a reasonable factfinder would be compelled to attribute the lack of an adequate written report to something other than discriminatory intent.

picture,” it was “not enough to meet the strict standards imposed by the Supreme Court for showing discriminatory intent in equal protection claims.” *Id.* at 1072. There is no basis for distinguishing the instant case, given the lack of evidence that Theriault handled the issue of training his staff on the domestic violence statute any differently than he treated other aspects of police training. I recommend that the court enter summary judgment in Theriault’s favor on the equal protection claim, but deny the motion for summary judgment on Count II as to the Town.

e. Tort Claims

The defendants next take the position that Theriault is entitled to summary judgment on the plaintiff’s state-law claims for negligence and fraud based on the employee immunity provisions of the Maine Tort Claims Act, 14 M.R.S.A. § 8111.¹¹ Pursuant to this provision, employees of governmental entities are “absolutely immune” from civil liability in connection with, *inter alia*, “[p]erforming or failing to perform any discretionary function or duty, whether or not the discretion is abused,” as well as “[a]ny intentional act or omission within the course and scope of employment; provided that such immunity shall not exist in any case in which an employee’s actions are found to have been in bad faith.” *Id.* at subsections (1), (1)(C) and (1)(E). According to the plaintiff, the cited immunity provision is inapposite because many of the actions complained of, including the preparing of reports and the dissemination of information about the decision to arrest Lewis, are “ministerial” rather than “discretionary” functions, particularly in light of the mandatory-arrest provisions of the statute now codified as 19-A M.R.S.A. § 4012. Plaintiff’s Memorandum at 18.

¹¹ Other provisions of the Tort Claims Act concern immunity for government entities themselves. The defendants’ memorandum in support of their summary judgment motion does not contend that the Town is entitled to judgment on the state-law claims and so I do not reach the issue of governmental immunity.

This issue is not as easily resolved as the parties' cursory treatment of it would suggest. It is well-established that the making of a warrantless arrest is a discretionary function within the meaning of section 8111. *See Hegarty v. Somerset County*, 848 F.Supp. 257, 269 (D.Me. 1994) (citations omitted), *aff'd in part and rev'd in part on other grounds*, 53 F.3d 1367 (1st Cir. 1995). Obviously, therefore, it follows that, at least in an ordinary case, the failure to make such an arrest would also be a discretionary function. In either instance, the police officer in question is "required to use [his or her] judgment while acting in furtherance of a departmental policy [or a legislatively imposed duty]." *Id.* (quoting *Moore v. City of Lewiston*, 596 A.2d 612, 616 (Me. 1991)).¹²

On the other hand, and as the plaintiff points out, a governmental employee does not automatically win on discretionary-function immunity grounds simply because the tort in question involves an arrest. In *Kane v. Anderson*, 509 A.2d 656 (Me. 1986), relied upon by the plaintiff, the Law Court concluded that a police officer was not entitled to discretionary function immunity under section 8111 of the Tort Claims Act for having negligently taken the wrong person into custody while executing an arrest warrant. *Id.* at 656. The court reasoned that the execution of an arrest warrant is "ministerial" rather than discretionary, the former being acts "carried out by employees, by the order of others or of the law, with little personal discretion as to the circumstances in which the act is done." *Id.* at 656-57 (citing *Restatement (Second) of Torts* § 895D cmt. h (1977)).

What looms large here are these legislative commands that apply to situations in which domestic violence is reported to police authorities in Maine:

¹² It bears emphasis that the reference in *Hegarty* to 'legislatively imposed duty' does not appear in the quoted passage from *Moore*, and the immunity issue in *Hegarty* turned not on the nature of duty at issue but on whether the officers exceeded the scope of any possible discretion. *See Hegarty*, 848 F.Supp. at 269-70.

5. **Arrest in certain situations.** When a law enforcement officer has probable cause to believe . . . that a violation of Title 17-A, section 208¹³ has occurred between members of the same family or household, that enforcement officer *shall* arrest and take into custody the alleged offender.

6. **Officer responsibilities.** When a law enforcement officer has reason to believe that a family or household member has been abused, the officer *shall* immediately use all reasonable means to prevent further abuse, including:

A. Remaining on the scene as long as the officer reasonably believes there is a danger to the physical safety of that person without the presence of a law enforcement officer, including, but not limited to, staying in the dwelling unit;

B. Assisting that person in obtaining medical treatment necessitated by an assault, including driving the victim to the emergency room of the nearest hospital;

C. Giving that person immediate and adequate written notice of that person's rights, which include information summarizing the procedures and relief available to victims of the family or household abuse; or

D. Arresting the abusing party with or without a warrant pursuant to section 4011 and Title 17-A, section 15.¹⁴

19-A M.R.S.A. § 4012(5) and (6) (emphasis added). Viewing the record in the light most favorable to the plaintiff, there is no question that Theriault had probable cause to believe that Lewis had

¹³ The quoted provision is the section of the Maine Criminal Code covering aggravated assault, defined therein as, in relevant part, “intentionally, knowingly, or recklessly caus[ing] . . . [s]erious bodily injury to another.” 17-A M.R.S.A. § 208(1); *cf.* 17-A M.R.S.A. § 207(1) (defining simple assault as intentionally, knowingly or recklessly causing “offensive physical contact to another”). Aggravated assault is a Class B crime. 17-A M.R.S.A. § 208(2)

¹⁴ Section 4011(3) authorizes warrantless arrests for the criminal violation of a protective order “upon probable cause whether or not the violation is committed in the presence of the law enforcement officer.” 19-A M.R.S.A. § 4011(3). Section 15 of Title 17-A is the general provision in the Maine Criminal Code setting forth the crimes for which a police officer may, with probable cause, effect a warrantless arrest. 17-A M.R.S.A. § 15 (listing “[a]ny Class A, Class B or Class C crime” among them).

committed an aggravated assault upon the plaintiff when she appeared at the Mexico police headquarters to make her initial complaint. The question is therefore whether the mandatory arrest provision in section 4012 takes the arrest of Lewis out of the discretionary realm for purposes of the Tort Claims Act. I conclude that it does.

The Law Court has enumerated four factors for deciding whether a particular governmental

A. action involves a discretionary function:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Polley v. Atwell, 581 A.2d 410, 413 (Me. 1990) (citations omitted). When a statute unambiguously requires that police make an arrest when they have probable cause to believe an aggravated assault has occurred in a domestic setting, it cannot be said that such an act requires the exercise of any policy evaluation, judgment or expertise. In a case like *Hegarty*, the exercise of discretion involved the decision as to whether to conduct an arrest in the first place. When the Legislature removes that decisionmaking authority from the police, the carrying out of the mandated arrest is every bit as ministerial as the arrest in *Kane*.¹⁵ While I express no view as to the underlying merits of the tort

¹⁵ Accordingly, it is not necessary to consider the plaintiff's alternative position on discretionary function immunity, which concerns the Law Court's discussion of the so-called "special relationship" doctrine in *Moore*. See *Moore*, 596 A.2d at 614 & n.3. In any event, the Law Court made clear in *Moore* that the 'special relationship' test has no place in Maine law because it concerns the common law of sovereign immunity, "which in Maine has been entirely displaced and supplanted by the enactment of the Maine Tort Claims Act." *Id.* at 614.

claims, which I find to be somewhat confusingly pleaded,¹⁶ I conclude that Theriault is not entitled to discretionary function immunity under the Maine Tort Claims Act.

f. Punitive Damages

The defendants further contend that, to the extent the plaintiff's claims otherwise survive summary judgment, they are entitled to judgment in their favor on the issue of punitive damages because even a fully plaintiff-favorable view of the record does not yield the requisite level of fault under either the applicable federal or state law. I agree.

“[A] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant[s'] conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” *Smith v. Wade*, 461 U.S. 30, 56 (1983); *but see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (municipalities immune from punitive damages under section 1983). Similarly, punitive damages are available under Maine law “if the plaintiff can establish by clear and convincing evidence that the defendant[s'] conduct was motivated by actual ill will or was so outrageous that malice is implied.” *Palleschi v. Palleschi*, 1998 ME 3, 704 A.2d 383, 385-86 (citation omitted). In response to the defendants' contention that a reasonable factfinder could not determine that the evidence of record meets either standard, the plaintiff refers to Theriault's “extensive badgering” and “humiliation” of her at their October 2, 1995 meeting, and the fact that Theriault never issued an arrest warrant after informing her that he would. Plaintiff's Memorandum at 20. Even assuming that Theriault badgered

¹⁶ In their reply memorandum, the defendants invite the court for the first time to consider the merits of the tort claims. That would be inappropriate given the absence of any such argument in the summary judgment motion itself. *See* Loc.R. 7(c) (reply memoranda “shall be strictly confined to replying to new matter raised in the objection or opposing memorandum.”).

and humiliated the plaintiff when she came forward to the police, and that such behavior could meet the standards described in *Smith* and *Palleschi*, it would be to no avail. The complained-of conduct is not causally related to the plaintiff's actual causes of action, which relate to the police department's failure to arrest Lewis and otherwise to protect the plaintiff from him. As for the failure to issue an arrest warrant, the plaintiff cannot seriously contend that a municipal police chief has the authority to take such action. Therefore, the failure to issue an arrest warrant is obviously not conduct that would permit a factfinder to award punitive damages.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED IN PART AND DENIED IN PART** and, accordingly, that the complaint be dismissed as to the "Unknown Police Officers Employed by the Town of Mexico" described in the Amended Complaint; that judgment be entered in favor of defendants James Theriault and Town of Mexico on Count I (substantive due process under 42 U.S.C. § 1983, no warrant issued), Count III (substantive due process under 42 U.S.C. § 1983, warrant issued), Count IV (equal protection under 42 U.S.C. § 1983, warrant issued) and on all counts to the extent the plaintiff seeks punitive damages; that judgment be entered in favor of defendant James Theriault on Count II (equal protection under 42 U.S.C. § 1983, no warrant issued); and that the summary judgment motion otherwise be **DENIED**.

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 6th day of July, 1998.

*David M. Cohen
United States Magistrate Judge*