

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>JACKSON OKOT, et al.,</i>)	
)	
<i>Plaintiffs</i>)	
)	
<i>v.</i>)	<i>Docket No. 99-254-P-C</i>
)	
<i>JOSEPH CONICELLI, et al.,</i>)	
)	
<i>Defendants</i>)	

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

The defendants, the City of Portland, the Portland Police Department, and Joseph Conicelli, a Portland police sergeant, move for summary judgment on all counts of the plaintiffs’ complaint. The plaintiffs have dropped all claims against the City and the Police Department. Report of Final Pretrial Conference and Order (Docket No. 16) at 2. Accordingly, I recommend that the motion be granted as to those defendants. With respect to defendant Conicelli, I recommend that the motion be denied.

I. Summary Judgment Standard

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).

II. Factual Background

The following material facts are appropriately supported in the summary judgment record and, unless otherwise noted, are undisputed.¹ On the afternoon of May 25, 1998 defendant Conicelli

¹ The plaintiffs filed both a Statement of Disputed Facts (“Plaintiffs’ Responsive SMF”) (Docket No. 10) and a Statement of Facts (“Plaintiffs’ SMF”) (Docket No. 11), as permitted by this court’s Local Rule 56(c). The defendants filed no response to the plaintiffs’ Statement of Facts. *See* Local Rule 56(d). Accordingly, the facts contained in the plaintiffs’ Statement of Facts, to the extent (continued...)

was dispatched to the corner of Chestnut Street and Cumberland Avenue in Portland, Maine to provide assistance to Officers Morin and Petty, who were conducting an investigation involving approximately eight young black men. Defendants' [sic] Conicelli, City of Portland, and Portland Police Department's Statement of Material Facts as to Which There is No Genuine Issue to be Tried ("Defendants' SMF") (Docket No. 6) ¶ 1; Plaintiffs' Responsive SMF ¶ 1. Morin had observed two young black men leaving the area of the scene of his investigation, where at least one weapon (a baseball bat) was seized. Defendants' SMF ¶ 5; Plaintiffs' Responsive SMF ¶ 5. While en route to the corner of Chestnut Street and Cumberland Avenue Conicelli was directed via radio by Morin to stop two young black men then walking east on Cumberland Avenue, who were the plaintiffs, Okot and Carlo.² Defendants' SMF ¶¶ 3-4; Plaintiffs' Responsive SMF ¶¶ 3-4; Deposition of Akim E. Carlo ("Carlo Dep."), Exh. 1 to Plaintiffs' SMF, at 17.

Plaintiff Okot was 16 years old at the time; Plaintiff Carlo was 15 years old at the time. Deposition of Jackson Okeny Okot ("Okot Dep."), Exh. 2 to Plaintiffs' SMF, at 12; Carlo Dep. at 2. They had been to the Portland Boys Club, which is located at the corner of Chestnut Street and Cumberland Avenue, found it closed, and were walking to Kennedy Park. Carlo Dep. at 15-17.

Conicelli, who had just passed the plaintiffs in his cruiser, did a U-turn and stopped them.

¹(...continued)

that they are supported by record citations, are deemed admitted. Local Rule 56(e). The defendant has attached some documents to his Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Defendant's Reply") (Docket No. 13), but neither the submission of documents in this manner nor the occasional remarks in the memorandum disputing some of the statements included in the plaintiffs' Statement of Facts is sufficient under the local rule.

² This action is brought by Okot, who is now an adult, and Cicilia Joseph on behalf of her son, Akim Carlo, who is still a minor. Complaint, ¶¶ 1, 3-4. For the sake of simplicity, I refer to Carlo as a plaintiff in this recommended decision.

Defendants' SMF ¶ 6; Plaintiffs' Responsive SMF ¶ 6. At this time, Conicelli was aware that a weapon had been seized from the scene at the corner of Chestnut Street and Cumberland Avenue. *Id.* ¶ 7. When Conicelli stopped the plaintiffs, he was the only police officer with them. *Id.* ¶ 8. Conicelli ordered the plaintiffs to lie face-down on the ground on the sidewalk on the north side of Cumberland Avenue, in the vicinity of Pearl and Wilmot Streets. *Id.* ¶ 10. Conicelli forced Okot to the ground, using his nightstick. Okot Dep. at 54.

Conicelli then checked Okot for weapons, patting him down while placing his knee against Okot's back, one hand holding his nightstick between Okot's shoulder blades, and with his foot on Okot's right hand. Defendants' SMF ¶ 12; Plaintiffs' Responsive SMF ¶ 12; Carlo Dep. at 39. During the pat-down, Okot turned his head toward Conicelli and asked why he had stopped Okot and Carlo. Defendants' SMF ¶ 13; Plaintiffs' Responsive SMF ¶ 13; Okot Dep. at 62. In response, Conicelli "picked up" Okot's neck and slammed his head into the sidewalk. Okot Dep. at 62. Conicelli's action caused Okot's nose to bleed. *Id.* When Okot told Conicelli that his nose was bleeding, Conicelli said "Welcome to America, nigger." Okot Dep. at 83-84.³ Carlo was patted-down for weapons without incident or injury. Defendants' SMF ¶ 18; Plaintiffs' Responsive SMF

³ The defendant's statement of material facts includes the statement that "Plaintiffs allege that Sgt. Conicelli said 'Welcome to America, Nigger.'" Defendants' SMF ¶ 17. However, he has not disputed the assertion in the plaintiffs' statement of material facts that Conicelli did in fact make this statement, Plaintiffs' SMF ¶ 28, and that paragraph of the plaintiffs' statement of material facts is supported by the portion of the record cited. The defendant argues, Defendants Conicelli, City of Portland, and Portland Police Department's Memorandum in Support of Their Motion for Summary Judgment ("Defendants' Memorandum") (Docket No. 7), at 12-13, correctly, that this statement cannot itself constitute a constitutional violation actionable under section 1983, *see, e.g., Aziz Zarif Shabazz v. Pico*, 994 F. Supp. 460, 474 (S.D.N.Y. 1998), and that, as evidence of improper motive, it is irrelevant to the question of the reasonableness of Conicelli's actions, *see, e.g., Whren v. United States*, 517 U.S. 806, 813 (1996). However, it is not the alleged remark alone that is at issue here, and the remark is relevant for other purposes as will become apparent in the discussion of all of the claims raised in this action that follows.

¶ 18. No weapons were seized from either plaintiff by Conicelli. *Id.* ¶ 19.

The plaintiffs told Conicelli that they were juveniles and gave him their names but did not provide him with identification and refused to give him their addresses. Defendants' SMF ¶ 22; Plaintiffs' Responsive SMF ¶ 22; Carlo Dep. at 61; Okot Dep. at 66. At some point after Officer Hutcheson arrived on the scene, Conicelli allowed the plaintiffs to sit up. Okot Dep. at 70; Deposition of Gary L. Hutcheson ("Hutcheson Dep."), Exh. 5 to Plaintiffs' SMF, at 9-10. Conicelli then picked Okot up by the collar and pushed him against a wall. Okot Dep. at 71. Another officer arrived and took photographs of Okot. Deposition of Sergeant Joseph Conicelli, Exh. 4 to Plaintiffs' SMF, at 38, 43. The plaintiffs were then placed in the back seat of a police cruiser and transported to the police station. Defendants' SMF ¶ 24; Plaintiffs' Responsive SMF ¶ 24. Conicelli made the decision to take the plaintiffs to the police station. Hutcheson Dep. at 22. The plaintiffs were put in the patrol interview area at the police station. *Id.* at 24. After their families were located and arrived at the police station, the plaintiffs were released. Defendants' SMF ¶ 26; Defendants' SMF ¶ 26; Hutcheson Dep. at 24-26. About one hour passed from the time the plaintiffs were stopped until they were released. Defendants' SMF ¶ 26; Plaintiffs' Responsive SMF ¶ 26.

On May 26, 1998 Okot sought medical attention for injuries to his nose and neck. Okot Dep. at 75-77. This action was filed on August 6, 1999. Docket.

III. Discussion

The complaint asserts the following claims against Conicelli: violation of 42 U.S.C. § 1983,

through a violation of the Fourth Amendment to the United States Constitution (Count I);⁴ violation of 5 M.R.S.A. § 4682 (Count V); assault (Count VII); battery (Count VIII); violation of 15 M.R.S.A. § 704 (Count IX); false imprisonment (Count X); negligent infliction of emotional distress (Count XI); and intentional infliction of emotional distress (Count XII). Conicelli contends that the doctrine of qualified immunity entitles him to summary judgment on the civil rights claims and that he has immunity under state statute from the common law claims.

A. Qualified Immunity

Section 1983 of Title 42 of the United States Code provides a private cause of action against any person “who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” Section 1983 is not itself the source of any substantive rights; it merely provides a method for vindicating federal rights conferred elsewhere. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Here, the plaintiffs have identified the Fourth Amendment as the source of the rights of which they allege Conicelli deprived them.

“[G]overnment officials performing discretionary functions 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). “[I]n the light of pre-existing law the unlawfulness [of the conduct at issue] must be

⁴ The complaint also alleges violations of the Fifth, Sixth and Fourteenth Amendments, but the plaintiffs have “accepted” that their complaint is based only on alleged violations of the Fourth Amendment. Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment (“Plaintiff’s Opposition”) (Docket No. 9) at 1 n.1.

apparent.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

There are two prongs to the qualified immunity analysis. First, was the constitutional right in question clearly established at the time of the alleged violation? That is a question of law for the court. Second, would a reasonable, similarly situated official understand that the challenged conduct violated that established right?

Swain v. Spinney, 117 F.3d 1, 9 (1st Cir. 1997) (citations omitted). The Fourth Amendment right to be free from unreasonable searches and seizures has long been clearly established. *Id.* The qualified immunity analysis allows for “the inevitable reality that law enforcement officials will in some cases reasonably but mistakenly conclude that their conduct is constitutional and that those officials — like other officials who act in ways they reasonably believe to be lawful — should not be held personally liable.” *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995). “Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that the [challenged conduct was lawful]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

“[T]he Supreme Court’s standard of reasonableness is comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present.” *Roy v. City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994). The question here is whether Conicelli’s actions, viewed objectively, were unreasonable under the circumstances. “This prong of the inquiry, while requiring a legal determination, is highly fact specific, and may not be resolved on a motion for summary judgment when material facts are substantially in dispute.” *Swain*, 117 F.3d at 9.

Evaluation of the question whether Conicelli is protected by qualified immunity from the

section 1983 claim in this case⁵ begins with the appropriate characterization of the events at issue. The defendant contends that no arrest took place. Defendants' Memorandum at 5. If that is the case, Conicelli's actions may be justified as a reasonable investigatory stop within the limits of *Terry v. Ohio*, 392 U.S. 1, 27-31 (1968). "In *Terry*, the [Supreme] Court gave effect to the notion that some types of encounters between the police and citizens — such as brief detentions in the nature of a 'stop and frisk' — could constitute 'seizures' for Fourth Amendment purposes, yet be sufficiently limited in their intrusiveness to fall outside the traditional understanding of an 'arrest.'" *United States v. Acosta-Colon*, 157 F.3d 9, 14 (1st Cir. 1998). Such seizures could be constitutionally justified on a level of suspicion falling short of probable cause. *Id.*

The scope of activities during an investigatory stop must be reasonably related to the circumstances that initially justified the stop; when actions by the police exceed the bounds permitted by reasonable suspicion, the seizure becomes an arrest that must be supported by probable cause. *United States v. Richardson*, 949 F.2d 851, 856 (6th Cir. 1991).

In order to have probable cause for a *Terry* stop (a minimal intrusion relative to arrest), a police officer must have "specific and articulable facts which, taken together with rational inferences from those facts," could create a reasonable suspicion sufficient to justify a brief detention of an individual.

Rivera v. Murphy, 979 F.2d 259, 264 (1st Cir. 1992). Here, Conicelli had such probable cause. He

⁵ Evaluation of the defendant's claim of qualified immunity with respect to the section 1983 claim also applies to the plaintiffs' claim under the Maine Civil Rights Act, 5 M.R.S.A. § 4682 (Count V), *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1236 (D.Me. 1996), and, to the extent that 15 M.R.S.A. § 704 has not been superceded by the Maine Tort Claims Act, *see Jackson v. Town of Sanford*, 1994 WL 589617 (D. Me. Sept. 23, 1994), at *2 n.2, the plaintiffs' claims under that statute (Count IX), which provides a private cause of action for damages caused by a police officer who acts wantonly or oppressively in connection with the arrest and detention of an individual, should logically be subject to the same analysis.

had been called to provide backup to Morin with regard to a disturbance on Chestnut Street; he was directed by Morin to stop the plaintiffs; and he was aware that Morin had retrieved a weapon from the nearby scene of his investigation and that Morin's request that the plaintiffs be stopped was related to that investigation. The plaintiffs suggest, in conclusory fashion, that Conicelli's stop was "groundless," but concentrate on their argument that his actions amounted to an arrest. Plaintiffs' Opposition at 4-5.

If Conicelli had merely stopped the plaintiffs, searched them for weapons, and let them go, there would be no need for further analysis. Indeed, as to plaintiff Carlo, there is no evidence to support a Fourth Amendment claim before the point at which he was placed in a police cruiser. The plaintiffs' statement of material facts, and their response to the defendants' statement of material facts, establish with respect to Conicelli's interaction with Carlo during the time before he was put into the cruiser only that Conicelli told Carlo to lie prone on the sidewalk; that he asked Carlo why he had been on Chestnut Street and for his name, address, date of birth and telephone number; that he searched Carlo for weapons but found none. The plaintiffs agree that Conicelli was alone when he stopped them; a lone officer's direction to two individuals to lie on the ground so that he can frisk them for weapons is not unreasonable given the potential danger to the officer inherent in a situation in which he has been directed to stop two individuals who might be fleeing from the scene of a disturbance at which one potential weapon has already been retrieved by police.

However, Conicelli's actions with respect to Okot, and specifically the "slamming" of his head into the sidewalk as described by Okot, exceed the bounds permitted by the reasonable suspicion that Okot could be carrying a weapon. Even as this incident is described by Conicelli in the defendants' statement of material facts, it is not clear whether Conicelli had determined that Okot

was not carrying a weapon before Okot “moved his head toward Sgt. Conicelli,” Defendants’ SMF ¶ 14, a fact material and important to the determination whether Conicelli’s description of his use of force at that time, which admittedly bloodied Okot’s nose, was justified by the circumstances that justified the initial stop. On this record, it is not possible to conclude that Conicelli was entitled to qualified immunity for this action, even if no arrest occurred. As the incident is described by Okot, no reasonably competent police officer could have concluded that it was lawful to grab Okot by the neck and slam his head into the sidewalk. Material facts are disputed and can only be resolved through evaluation of the credibility of Okot and Conicelli. See *McLain v. Milligan*, 847 F. Supp. 970, 976-99 (D.Me. 1994) (summary judgment on issue of qualified immunity denied).

In any event, the facts presented in the summary judgment record establish that an arrest did occur in this case, and accordingly the issue of probable cause must be considered in light of that fact. The First Circuit has noted that “[t]here is no litmus-paper test . . . to determine whether any particular mode of detention amounted to a *de facto* arrest,” *Acosta-Colon*, 157 F.3d at 14, and that among the characteristics ordinarily associated with an arrest are the prevention of the individual from proceeding to his destination, placing the individual in handcuffs, involuntarily transporting the individual some distance from the place of the original stop, confining the individual and keeping him under observation for “more than a momentary period,” and never informing the individual how long he would be detained or that he was not under arrest, *id.* at 15. The use of bodily force by the police is also a factor that may distinguish a *Terry* stop from an arrest. *Richardson*, 949 F.2d at 857. Here, the summary judgment record establishes that, by the time they were placed in the police cruiser, a reasonable person in the plaintiffs’ position would have felt that he was under arrest or “otherwise deprived of his freedom of action in a[] significant way.” *Miranda v. Arizona*, 384 U.S.

436, 477 (1966); *see Richardson*, 949 F.2d at 857. The plaintiffs were prevented from proceeding to their intended destination, were transported to the police station, kept under observation there for more than a momentary period, and were not told that they were not under arrest.

The defendant contends that any determination concerning probable cause to arrest the plaintiffs can only be made with respect to the time of the initial stop, and that, since he had probable cause to arrest the plaintiffs at that time, he is entitled to qualified immunity. Defendants' Memorandum at 3-11. However, liability for a Fourth Amendment violation under section 1983 may also attach when an arrest is maintained "after it should have become clear that probable cause did not exist." *Thompson v. City of Portland*, 620 F. Supp. 482, 485 n.1 (D. Me. 1985). Here, when no weapons were found after the search of the plaintiffs, and the officers who had originally called Conicelli for backup had arrived at the scene where he was detaining the plaintiffs before the plaintiffs were transported to the police station, Interview with Officer Gayle Petty (6/11/98), Exh. 10 to Plaintiffs' SMF, at 4, so that they could have been asked about any criminal activity discovered in the investigation that had given rise to the stop of the plaintiffs and whether the plaintiffs had in fact left that site in defiance of Morin's order to stay, it would have been clear to a reasonable police officer that probable cause to arrest the plaintiffs did not exist. *See Illinois v. Wardlow*, 120 S.Ct. 673, 677 (2000) ("If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.") Arrest without probable cause is itself a violation of the Fourth Amendment, *Santiago v. Fenton*, 891 F.2d 373, 383 (1st Cir. 1989), one which was clearly established at the time of the events in question here, *see, e.g., Beck v. Ohio*, 379 U.S. 89, 91 (1964), and no reasonable officer could have concluded that the arrest of the plaintiffs under the circumstances was constitutional.

The defendant contends that the detention of the plaintiffs at his direction was nonetheless lawful by virtue of 15 M.R.S.A. § 3501. Defendants' Memorandum at 13-14. That statute provides, in pertinent part:

1. Interim care. A juvenile may be taken into interim care by a law enforcement officer without order by the court when the officer has reasonable grounds to believe that:

A. The juvenile is abandoned, lost or seriously endangered in his surroundings and that immediate removal is necessary for his protection; or

B. The juvenile has left the care of his parents, guardian or legal custodian without the consent of such person.

2. Limit. Under no circumstances shall any juvenile taken into interim care be held involuntarily for more than 6 hours.

3. Interim care, police record. The taking of a juvenile into interim care pursuant to this section is not an arrest and shall not be designated in any police records as an arrest.

4. Notification of parents, guardian or custodian. When a juvenile is taken into interim care, the law enforcement officer or the Department of Human Services shall, as soon as possible, notify the juvenile's parent, guardian or legal custodian of the juvenile's whereabouts. If a parent, guardian or legal custodian cannot be located, such notification shall be made to a person with whom the juvenile is residing.

5. Interim care, placement.

A. When a law enforcement officer takes a juvenile into interim care, the officer shall contact the Department of Human Services which shall designate a place where the juvenile will be held.

* * *

9. Interim care, identification of juvenile. No fingerprints of a juvenile taken into interim care pursuant to this section may be obtained from the juvenile. Solely for the purpose of restoring a juvenile to his residence, the juvenile's name, address, photograph and other reasonably necessary information may be obtained and transmitted to any appropriate person or agency.

The defendant invokes section 3501(1)(A), Defendants' Memorandum at 13, but does not specify

whether the plaintiffs were lost, abandoned or seriously endangered when he decided to take them in to the police station. His argument does not mention, and his statement of material facts provides no support for, any possibility that either plaintiff was lost or abandoned. He must therefore be relying on the “seriously endangered” alternative of section 3501(1)(A); he argues that the plaintiffs “were believed to be involved in an incident or fight, and a hostile crowd was growing at the scene of their stop.” *Id.* at 14. Neither of the other reasons given by the defendant — that the plaintiffs had not given him their addresses when asked and that he “reasonably believed” that Okot’s injury “should be documented with his family,” Defendant’s Reply at 5 — would justify taking either of the plaintiffs into interim care under section 3501.

The defendant offers no evidence in his statement of material facts to support his argument that the plaintiffs were seriously endangered at the time he decided to take them to the police station; the section of his brief quoted above contains factual assertions not present in his statement of material facts. In his reply memorandum, the defendant cites paragraphs 33 and 36 of the plaintiffs’ statement of material facts in support of these assertions (“a crowd was gathering at the scene of this incident and at least one citizen was becoming hostile towards Sgt. Conicelli”), *id.* at 5, but neither of these paragraphs of the plaintiffs’ statement of material facts supports these assertions. Indeed, the only paragraph of the plaintiffs’ statement of material facts that refers to a “crowd” at the scene states that a “group of 15 or 20 people had come to the scene” and that this crowd was “controlled and nonthreatening.” Plaintiffs’ SMF ¶ 37. Further, the presence of someone hostile toward the police officer is not necessarily, or even likely to be, a source of serious danger to the plaintiffs he was detaining.

The defendant’s reliance on section 3501 is further undermined by the lack of evidence that

he or anyone else on behalf of the police contacted the Department of Human Services as required by section 3501(5). Based on the summary judgment record, the defendant is not entitled to invoke section 3501 to avoid the conclusion that he did in fact arrest the plaintiffs.

The defendant contends that he was nonetheless protected by his reasonable belief at the relevant time that section 3501 applied. Defendant's Reply at 6. However, he has submitted no evidence in his statement of material facts that even suggests that he held such a belief at the time. Accordingly, there is no need to reach the question whether such a belief would have been reasonable.

The defendant is not entitled to summary judgment on the basis of qualified immunity on Counts I, V and IX. This conclusion does not bar him from presenting evidence on this issue at trial.

B. Statutory Immunity

In somewhat summary fashion, Defendants' Memorandum at 18-19, the defendant argues that he is immune from liability on the remaining claims in the plaintiffs' complaint, all of which arise under state tort law, pursuant to 14 M.R.S.A. § 8111(1)(C), which provides:

Notwithstanding any liability that may have existed at common law, employees of governmental entities shall be absolutely immune from personal civil liability for the following:

* * *

(C). Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid

* * *

The absolute immunity provided by paragraph C shall be applicable whenever a discretionary act is reasonably encompassed by the duties of the governmental employee in question, regardless of whether the exercise of discretion is specifically authorized by statute, charter, ordinance, order, resolution, rule or resolve and shall be available to all governmental employees, including police officers and governmental employees involved

in child welfare cases, who are required to exercise judgment or discretion in performing their official duties.

The Law Court has suggested that a police officer performs a discretionary function within the meaning of section 8111(1)(C) when making a warrantless arrest. *Leach v. Betters*, 599 A.2d 424, 426 (Me. 1991). It has also suggested that ill will, bad faith or improper motive may take the use of more force than was necessary to effect an arrest outside the protection of section 8111(1)(C). *Id.* Here, the defendant's alleged remark is evidence of ill will, bad faith and improper motive.

Discretionary immunity under section 8111(1)(C) is not available where an officer's conduct was so egregious that it "clearly exceeded, as a matter of law, the *scope* of any discretion he could have possessed in his official capacity as a police officer." *Polley v. Atwell*, 581 A.2d 410, 414 (Me. 1990) (emphasis in original). While this has been interpreted as a standard more protective of an officer's conduct than qualified immunity, *see, e.g., Hegarty v. Somerset County*, 848 F. Supp. 257, 264, 269-70 (D. Me. 1994), I cannot conclude that the defendant's conduct during his search of Okot, as reported by the plaintiffs, and his decision to arrest the plaintiffs without probable cause, did not exceed, as a matter of law, the scope of his discretion to make warrantless arrests. The defendant's remark, as reported by the plaintiffs, is evidence that he may have imposed harm on them intentionally, and section 8111(1)(C) does not shield a police officer from liability for such conduct. *MacKerron v. Madura*, 474 A.2d 166, 167 (Me. 1984).

The defendant is not entitled to summary judgment under 14 U.S.C. § 8111(1)(C). *See generally Hodsdon v. Town of Greenville*, 52 F.Supp.2d 117, 122-24, 126 (D. Me. 1999). Again, this conclusion does not bar the defendant from presenting evidence on this issue at trial.

C. Punitive Damages

The defendant also seeks summary judgment on the plaintiffs' claim for punitive damages. Punitive damages are available under section 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). With respect to the force involved in the defendant's pat-down search of Okot, as described by Okot, including the remark reported by both plaintiffs, there is evidence of evil motive or intent in the summary judgment record. With respect to the arrest of the plaintiffs, there is evidence in the summary judgment record tending to show that the defendant "determined to effectuate the arrest knowing that he lacked probable cause to do so, or, at least, with conscious indifference to the possibility that he lacked probable cause." *Iacobucci v. Boulter*, 193 F.3d 14, 26 (1st Cir. 1999). Accordingly, the defendant is not entitled to summary judgment on the claim for punitive damages arising out of the alleged Fourth Amendment violations.

Punitive damages are available on the Maine state-law claims when the defendant acted with actual malice, that is, when his tortious conduct was motivated by ill will toward the plaintiff, or when the defendant's deliberate conduct was so outrageous that malice toward the plaintiff can be implied. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). While reckless indifference will not support an award of punitive damages under Maine law, *id.* at 1361-62, the defendant's statement as reported by the plaintiffs is evidence of malice sufficient to require the court to deny summary judgment to the defendant on the claim for punitive damages on the state-law claims as well.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment

be **GRANTED** as to defendants the City of Portland and the Portland Police Department and otherwise **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 17th day of February, 2000.

*David M. Cohen
United States Magistrate Judge*