

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**JAMES CUMMINGS, et al.,** )  
 )  
 **Plaintiffs** )  
 )  
 v. ) **Civil No. 00-211-P-H**  
 )  
 **OFFICER ALLAN McINTIRE, et al.,** )  
 )  
 **Defendants** )

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

Former Portland police officer Allan McIntire<sup>1</sup>, Portland police chief Michael Chitwood and the City of Portland seek summary judgment as to all counts against them in this civil-rights action brought by James Cummings and his wife Deborah Cummings as the result of McIntire’s alleged unjustified use of force against James Cummings<sup>2</sup> on October 4, 1998. Defendants’ Motion for Summary Judgment (“Defendants’ Motion”) (Docket No. 4); Complaint and Demand for Jury Trial (“Complaint”) (Docket No. 1). For the reasons that follow, I recommend that the Defendants’ Motion be granted in part and denied in part.

**I. Summary Judgment Standards**

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<sup>1</sup> Prior to the filing of the instant complaint McIntire retired from the police force. Complaint ¶ 3; Answer and Affirmative Defenses (Docket No. 2) ¶ 3.

<sup>2</sup> James Cummings henceforth is referred to as “Cummings.”

Summary judgment is appropriate only if the record shows “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 over it 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 Context**

The parties’ statements of material facts, credited to the extent that they are either admitted or supported by record citations in accordance with Loc. R. 56, and viewed in the light most favorable to the plaintiffs, reveal the following:<sup>3</sup>

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<sup>3</sup> The defendants assert that, in presenting their statement of material facts and for the purpose of this motion only, they do not dispute  
(continued on next page)

On October 4, 1998 a road race took place in the City of Portland. Defendants' SMF ¶¶ 4-5; Plaintiff's [sic] Response to Defendant's [sic] Statement of Material Facts, etc. ("Plaintiffs' Opposing SMF") (Docket No. 8) ¶¶ 4-5.<sup>4</sup> McIntire, a uniformed police officer and sworn member of the Portland Police Department, and two others were then directing traffic at the intersection of Washington and Ocean avenues, periodically stopping cars and runners. *Id.* ¶¶ 2, 4-5, 36. At times some lanes of traffic were moving with runners running through; at other times McIntire would have to stop all lanes of traffic, coordinating all of this with the other two people directing traffic there. *Id.* ¶ 8. Traffic at the intersection was heavy because it was being rerouted around the runners and streets were closed. *Id.* ¶ 6. It was a hectic traffic site and a particularly difficult traffic post with which McIntire was dealing. *Id.* ¶¶ 6-7.<sup>5</sup>

At approximately 9:20 a.m. Cummings came to the intersection of Washington and Ocean avenues looking for Arcadia Street. *Id.* ¶ 10; Plaintiffs' Additional SMF ¶ 1; Defendants' Reply Statement of Material Facts ("Defendants' Reply SMF") (Docket No. 12) ¶ 1. When he saw the road race going on, he pulled into a Cumberland Farms store on Washington Avenue. Defendants' SMF ¶ 10; Plaintiffs' Opposing SMF ¶ 10. He approached a volunteer on the street to ask directions. *Id.* ¶ 11. She said that they had had a couple of close accidents or some runners getting hit and she was busy. *Id.* She also told Cummings that she was not familiar with Arcadia Street, stating, "[T]here's a policeman right over there. He'd know." *Id.*<sup>6</sup>

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the plaintiffs' version of the facts. Defendants' Statement of Material Facts ("Defendants' SMF") (Docket No. 6) at 1 n\*. They reserve the right to dispute these facts at trial. *Id.*

<sup>4</sup> The plaintiffs' statement of material facts contains two separately titled and numbered sections, one responding to the defendants' facts and one setting forth additional facts. For ease of reference, I shall refer to the first section as "Plaintiffs' Opposing SMF" and the second section, which commences on page 7 of the document, as "Plaintiffs' Additional SMF."

<sup>5</sup> The plaintiffs deny the latter portion of this statement; however, because they fail to support their denial with a record citation and because the statement is supported by the defendants' citations, it is deemed admitted in accordance with Loc. R. 56.

<sup>6</sup> The defendants also state that on that day a runner "got hit by a car." Defendants' SMF ¶ 9. As the plaintiffs point out, Plaintiffs' Opposing SMF ¶ 9, it is impossible to tell whether this incident occurred before or after the event in question; if after, it is irrelevant.

Cummings approached McIntire with the intention of asking directions and crossed the road where the officer was directing traffic. *Id.* ¶ 12.<sup>7</sup> He was two-and-a-half to three feet away from the officer as he crossed the street. *Id.* ¶ 13. Cummings did not go as far as the curb, staying approximately twelve to eighteen inches in the street for no more than a minute and a half. *Id.* ¶ 14. McIntire, who was approximately four feet from the middle of Washington Avenue, had stopped car traffic, and there were runners coming. *Id.* ¶¶ 15-16. Just before Cummings asked McIntire his question, McIntire was facing Cumberland Farms, and his head was going right to left checking the traffic. *Id.* ¶ 17. At that time runners were starting to come through the intersection. *Id.* ¶ 18. The officer was essentially back to Cummings, with his head swiveling watching the traffic and runners. *Id.* ¶¶ 19-20. Cummings moved only a step forward and began to ask the officer for directions. *Id.* ¶ 21. From behind, Cummings said, “Excuse me sir,” waited for perhaps two seconds and repeated, “Excuse me, sir.” *Id.* ¶ 22. When no traffic was moving and it was perfectly quiet, Cummings began to ask his question, holding his right arm out straight from his body at approximately a forty-five degree angle. *Id.* ¶¶ 23-24. Cummings was standing approximately four feet away from the officer. *Id.* ¶ 13.

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<sup>7</sup> Cummings avers in an affidavit that he was taught as far back as kindergarten that it is appropriate to ask police officers for help when one is lost or needs directions and that he had no compunction approaching McIntire for that kind of assistance on October 4, 1998. Plaintiffs’ Additional SMF ¶ 4. As an initial matter, the defendants seek exclusion of the entire Cummings affidavit on the basis of asserted (i) contradictions with Cummings’ deposition testimony, (ii) irrelevance of Cummings’ state of mind and (iii) Cummings’ incompetence to testify as to McIntire’s or any reasonable officer’s state of mind. Defendants’ Reply Memorandum (“Defendants’ Reply”) (Docket No. 11) at 6-7. I will consider the asserted contradictions on a case-by-case basis. Cummings’ state of mind, which helps establish the tenor of the encounter, is not completely irrelevant and I have thus credited certain of these assertions. I agree that Cummings is not competent to testify as to McIntire’s or other officers’ state of mind and have disregarded any statements to this effect; however, I consider Cummings competent to testify as to whether, in his opinion, his own actions reasonably could have been perceived as threatening under the circumstances. Turning to the specific statement, the defendants seek its exclusion on the basis that Cummings never so testified at deposition. Defendants’ Reply SMF ¶ 4. This is not the kind of direct contradiction of earlier sworn deposition testimony that warrants exclusion from a summary judgment record. *See, e.g., Williams v. Raytheon Co.*, 220 F.3d 16, 20 (1st Cir. 2000) (“When, as here, an interested witness had given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory but does not give an explanation why the testimony is changed.”) (citation and internal quotation marks omitted).

Before Cummings could get out his entire question, McIntire spun around and yelled, “If you don’t have a god damn emergency, get the hell out of here.” *Id.* ¶ 29. McIntire turned in a one-hundred-and-eighty degree kind of manner, his right foot came forward, he took one step at the most and pushed Cummings in the upper chest and shoulder area with an open hand. *Id.* ¶ 30. It was not a punch. *Id.* Cummings was pushed backward and his right heel hit the curb, setting up a fulcrum. *Id.* ¶ 31. He twisted and turned backwards, began to go down and caught himself. *Id.* He felt immediate pain in his left back and left leg and foot. *Id.* ¶ 32. He did not get knocked down by the force of the push because he stopped it with his right hand a little bit. *Id.* ¶ 34. It was more or less an off balance. *Id.* According to the plaintiffs, as a direct result of the incident on October 4, 1998 Cummings suffered a nerve root impingement necessitating surgery. *Id.* ¶ 33; Plaintiffs’ Additional SMF ¶¶ 41-42.<sup>8</sup>

Cummings, who was five feet, ten inches tall and weighed one hundred and fifty one pounds, had never met McIntire before October 4, 1998. Plaintiffs’ Additional SMF ¶¶ 22, 25; Defendants’ Reply SMF ¶¶ 22, 25. Cummings had no criminal record of any kind and had never been involved in a violent altercation with anyone. *Id.* ¶¶ 27-28. He was very cautious with his own body and to avoid contact with anyone or anything because he had already undergone cervical spinal fusion in 1990, making his neck vulnerable to fracture, herniation and paralysis. *Id.* ¶ 29.

Cummings avers that (i) he had no reason to believe that asking McIntire for directions was inappropriate in any way, shape or form; (ii) he consciously made an effort not to interfere with McIntire’s job function and that was why he waited to pose his question; (iii) at the time of the push there was no danger of any kind that McIntire’s force was designed to avert for instance, McIntire could not have been trying to push Cummings out of the way of a vehicle; (iv) Cummings stood a

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<sup>8</sup> The defendants assert that Cummings’ injury was attributable to a preexisting condition. *See* Defendants’ SMF ¶ 33; Defendants’ (continued on next page)

respectful and comfortable distance from McIntire; (v) Cummings wanted no physical contact with McIntire; and (vi) Cummings did nothing on October 4, 1998 that would give a normally constituted individual any reason to believe that he intended to threaten or initiate or trigger physical contact of any kind. Plaintiffs' Additional SMF ¶¶ 7, 13, 21, 30, 34-35.<sup>9</sup>

The Portland Police Department has a system of receiving and investigating citizen complaints against police officers through the Internal Affairs Unit. Defendants' SMF ¶ 42; Plaintiffs' Opposing SMF ¶ 42. All citizen complaints are processed through the Internal Investigation Unit. *Id.* ¶ 43. If the Internal Affairs Unit finds the citizen complaint to be justified, the officer is subject to further training or discipline. *Id.* ¶ 44.

Cummings filed a formal complaint against McIntire based on the October 4, 1998 incident. Plaintiffs' Additional SMF ¶ 45; Defendants' Reply SMF ¶ 45. Two other complaints were filed regarding McIntire's conduct at the traffic post that day. *Id.* ¶¶ 46-47. Alec Stevens complained of McIntire's inappropriate behavior and use of profanity in front of his family, while Peggy Nelson filed a complaint against McIntire for appalling use of profanity and inappropriate and irrational behavior. *Id.* The Portland Police Department found sufficient evidence to support the Stevens and Nelson complaints and the portion of Cummings' complaint alleging verbal conduct, but not the portion alleging physical conduct. *Id.* ¶ 48. The Portland Police Department (Chitwood) found that McIntire violated Standard Operating Procedure #10, Section III(B)(10), and imposed discipline in the form of

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Reply SMF ¶¶ 41-42.

<sup>9</sup> The defendants dispute this constellation of facts, asserting that Cummings was so close to McIntire that it made McIntire feel apprehensive; McIntire perceived that Cummings wanted a physical touching or coming together of them for whatever reason; and Cummings was extremely distracting and interfered significantly with McIntire's direction of traffic. Defendants' SMF ¶¶ 25-28. The defendants also seek exclusion of Cummings' statement that he made an effort to avoid interfering with McIntire's job function on the basis that he never so testified at deposition. Defendants' Reply SMF ¶ 13. This, again, is not a direct contradiction of earlier deposition testimony. *See, e.g., Williams*, 220 F.3d at 20.

a five-day suspension without pay. *Id.* ¶ 49.<sup>10</sup> Sub-subsection B(10) of Subsection III, titled “Conduct toward the public,” provides:

Employees of the Department shall be courteous in their dealings with the public. They shall perform their duties, avoiding harsh, violent, profane or insolent language, and shall respond professionally regardless of provocation to do otherwise. Employees are expected to use good judgment and a standard of reasonableness in their conduct toward the public. All employees are required to provide their name and position upon request.

*Id.* ¶ 52.

Chitwood has been the chief of police for the City of Portland since 1988. Defendants’ SMF ¶ 35; Plaintiffs’ Opposing SMF ¶ 35. During Chitwood’s term as police chief, City of Portland police officers have received training at the Police Academy and also annual police officer development training that consists of at least twenty-four hours of training on constitutional issues, laws of search and seizure, updates in the criminal code and other training deemed appropriate. *Id.* ¶ 37. Police attorney Beth Poliquin is responsible for training police officers with regard to new developments in the law as it applies to citizen contacts and arrests by police officers. *Id.* ¶ 38. Portland police officers are trained in the Maine criminal statutes and also in the many and varied ways in which they have contact with citizens. *Id.* ¶ 39.

McIntire was an officer with the Portland Police Department from September 1971 until June 2000. *Id.* ¶ 1. Throughout his twenty-nine years on the force he was a uniformed police officer. *Id.* ¶ 2.<sup>11</sup> McIntire was trained that, as a police officer, he would encounter stressful situations and that he should try to rise above them and remain calm if possible. *Id.* ¶ 40. He felt that he was adequately

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<sup>10</sup> The reference in the plaintiffs’ statement of material facts to Section III(B)(1) is a typographical error. It is Section III(B)(10). *See* Memorandum dated December 7, 1998 from Chief Michael J. Chitwood to Officer Allan McIntire, Plaintiffs’ Appendix of Documents, etc. (“Plaintiffs’ Appendix”), filed with Affidavit of Attorney Michael J. Waxman (Docket No. 9), at 11.

<sup>11</sup> The defendants admit that McIntire never progressed beyond this entry-level position in his twenty-nine years on the police force. Plaintiffs’ Additional SMF ¶ 71; Defendants’ Reply SMF ¶ 71. However, the defendants assert that McIntire chose not to seek promotion so that he could spend more time with his family. *Id.*

trained to deal with traffic-directing problems if they became stressful. *Id.* ¶ 41. Before October 4, 1998 McIntire was never suspended or removed from duty because of behavior at a traffic detail. *Id.* ¶ 3.

The Portland Police Department currently has Internal Affairs records dating back to 1994. *Id.* ¶ 45. According to those records, since 1994 and before October 4, 1998, McIntire was the subject of three informal complaints. *Id.* These include the following:

1. A complaint dated May 14, 1994 by Robin C. Tara of Scarborough, Maine that McIntire “was very rude and yelled at her” at a traffic post, and that when Tara asked for McIntire’s name he refused to give it to her. Plaintiffs’ Additional SMF ¶ 59; Defendants’ Reply SMF ¶ 59.<sup>12</sup> Chitwood became aware of this complaint, forwarding it to Lt. Peter F. Roper, one of McIntire’s supervisors, for investigation, discussion and resolution. *Id.* ¶ 60.

2. A complaint dated February 16, 1995 by attorney Stephen MacKenzie that McIntire had behaved rudely in a traffic type of situation. *Id.* ¶ 61. This incident also prompted a letter dated February 10, 1995 from MacKenzie to Chitwood, in which MacKenzie explained what he perceived as inappropriate, rude and hot-headed behavior and commented:

I do a significant amount of criminal defense and have seen many situations develop because police take a hot headed, arrogant, abusive attitude such as this officer, and situations which otherwise would have been manageable erupt into a problem. Perhaps this officer would benefit from being put into a position where he does not have to deal with the public on a regular basis. . . . It’s unfortunate when one individual such as this officer tarnishes the image of the rest of the force.

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<sup>12</sup> The defendants generally contend that McIntire’s complaint history and performance evaluations are irrelevant. *See* Defendants’ Reply SMF ¶¶ 59-103; Defendants’ Reply at 5-6. The defendants themselves include a summary of McIntire’s complaint history in their statement of material facts. *See* Defendants’ SMF ¶¶ 45-47. In any event, such materials are relevant to the question whether Chitwood or the City of Portland can be held liable for McIntire’s behavior toward Cummings on October 4, 1998. *See, e.g., Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 572 (1st Cir. 1989) (“The complaint files were relevant to prove the supervisory liability of Cartagena and Alvarez.”). The defendants further correctly point out that, per Fed. R. Evid. 404(b), evidence of past wrongs is not admissible to prove that McIntire acted in conformity therewith on October 4, 1998. *See* Defendants’ Reply at 5. I note that I have excluded McIntire’s history from the calculus in determining whether his conduct on October 4, 1998 could be said to have violated Cummings’ civil rights.

*Id.* ¶¶ 62-63.

The three informal complaints were handled in the normal procedure and resolved without formal proceedings against McIntire. Defendants' SMF ¶ 46; Plaintiffs' Opposing SMF ¶ 46. Complaints resolved in this informal manner are done to the satisfaction of the citizen complainant. *Id.*<sup>13</sup>

During McIntire's career with the Portland Police Department, his performance evaluations included the following:

1. An evaluation for the period June 30, 1976 to December 31, 1976 stating that McIntire had been given a letter of reprimand. Plaintiffs' Additional SMF ¶ 73; Defendants' Reply SMF ¶ 73. McIntire denies any such written discipline. *Id.* ¶ 74.<sup>14</sup>

2. An evaluation for the period January 1, 1977 to June 30, 1977 in which reviewing officer Lt. Edward J. Guevin wrote: "He must develop further in the area of initiative and must demonstrate more positive leadership skills. Productivity must [s]how a significant rise. In fact, writer feels that initiative could very well be below average." *Id.* ¶ 75.

3. An evaluation for the period June 30, 1977 to December 31, 1977 in which Guevin wrote: "Sgt. Lewis has been generous in his evaluation of Officer McIntire. He rarely makes a decision of any significance without first consulting a supervisor. He shows very little, if any, initiative and only if constantly pressed. His organizational behavior does not indicate positive attitudes. At this time, he is not even close to being ready in assuming a supervisory role." *Id.* ¶ 76.

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<sup>13</sup> From 1994 to October 4, 1998, McIntire also was the subject of a formal complaint that resulted in an Internal Affairs investigation. Defendants' SMF ¶ 47; Plaintiffs' Opposing SMF ¶ 47. The investigation resulted in a suspension without pay as per Chitwood's memorandum to McIntire of February 2, 1996. *Id.* The basis of the discipline was McIntire's failure to file a police report and to share investigative leads with a detective. *Id.* In addition, McIntire was disciplined after a "big investigation with internal affairs" through a fifteen-day suspension on a charge of reckless driving or driving to endanger in the Town of Scarborough while off-duty. Plaintiffs' Additional SMF ¶¶ 67-69; Defendants' Reply SMF ¶¶ 67-69.

<sup>14</sup> The plaintiffs also state that the defendants have failed to provide any letter of reprimand; however, the citation given does not support this portion of the statement.

McIntire contested Guevin's characterization of his performance. *Id.* ¶¶ 77-78; Memorandum dated May 2, 1978 from Allan McIntire, Plaintiffs' Appendix at 71.<sup>15</sup>

4. An evaluation for the period from July 1, 1978 to December 31, 1978 in which the rating officer, Sgt. S.D. Plympton, wrote: "His relationship with his supervisors is usually on the defensive. Officer McIntire can be classified as civil and tolerating but not courteous [sic] with the public." Plaintiffs' Additional SMF ¶ 79; Defendants' Reply SMF ¶ 79. Plympton also wrote: "Officer McIntire has never shown me his willingness to assume leadership. With almost 8 years seniority he still does not take charge. Officer McIntire requires too many decisions to be made by his supervisors, considering his longevity." *Id.* McIntire contested this evaluation, stating: "In conclusion, I can only surmise that Sgt. Plympton is still in the process of acclimating himself to his new position and has yet to acquire judicious insight into his charges." *Id.* ¶¶ 80-81.

5. An evaluation for the period from July 1, 1980 to June 5, 1981 in which it was noted that McIntire received a departmental reprimand on January 6, 1981. *Id.* ¶ 82. McIntire denies any such written discipline. *Id.* ¶ 83.<sup>16</sup>

6. An evaluation for the period from July 1, 1981 to July 1, 1982 in which Guevin noted that rater Sgt. McCarthy had been overly generous in his assessment of McIntire and added: "To put it simply, I have never seen any police officer make such little use of his obvious abilities and capacities . . . he rarely, if ever applies himself to his responsibilities in an intensive or consistent manner. Indeed, this failure to apply himself to any substantial degree has been his downfall for almost as long as he has been with the department . . . . *Id.* ¶ 86. McIntire contested Guevin's evaluation, noting:

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<sup>15</sup> The plaintiffs twice attempt to characterize McIntire's responses to his evaluations, *e.g.*, as revealing an "angry," "defensive," or "frustrated" man. *See* Plaintiffs' Additional SMF ¶¶ 78, 85. The defendants dispute these characterizations. Defendants' Reply SMF ¶¶ 78, 85. The plaintiffs' characterizations are not "facts" and will not be treated as such.

<sup>16</sup> The plaintiffs also state that the defendants have failed to provide any letter of reprimand; however, the citation given does not support this portion of the statement.

“Lieutenant Guevin, as has been his inexplicable custom, chooses not to respect the findings that have been determined by these competent veteran supervisors. Lieutenant Guevin apparently [sic] has great difficulty in rendering an unbiased assessment of any individual whose philosophy of police service differs in any degree from that of his own.” *Id.* ¶ 87.

7. An evaluation for the period from July 1, 1982 to July 1, 1983 in which Guevin, as the reviewer, noted: “By and large, Officer McIntire has exhibited a lackluster effort which is reflective of his performance scores. Relative to his job, he is totally self-centered and unconcerned about professional requirements or organizational goals. Everything about his performance suggests that he attaches little importance to his vocational choice and is merely trying to complete his 20 years of ‘alleged’ [sic] service. He compounds the shamefulness of the situation when one considers that he is capable of performing at far superior levels.” *Id.* ¶¶ 89-90. Guevin added: “He totally lacks of initiative and displays little consideration of others, whether they be citizen, peer, supervisor, or organization.” *Id.* ¶ 91.

8. An evaluation for the period from July 1, 1984 to July 1, 1985 in which the rater, Sgt. Hosea Carpenter, observed: “He is usually courteous and understanding in his dealings with people, but sometimes becomes antagonistic when under stress or dealing with a totally unreasonable person.” *Id.* ¶ 92.

9. An evaluation for the period from July 1, 1985 to July 1, 1986 in which the rater, Sgt. R. Kierstead, observed: “I only wish to caution the use of sarcastic humor with those who may not appreciate it.” *Id.* ¶ 93.

10. An evaluation for the period from July 1, 1988 to July 1, 1989 in which the reviewer observed: “His wit has occasionally got [sic] him into trouble with citizens.” *Id.* ¶ 94.

11. An evaluation for the period from July 1, 1989 to June 30, 1990 in which the rater, Lt. R. F. Lincoln, observed: “His sense of humor keeps him at the fringes of trouble almost constantly.” *Id.* ¶ 95. The reviewer noted: “Officer McIntire’s overall performance is adequate however, it is obvious that he has lost the enthusiasm to perform at a much higher level of performance that [sic] he is capable of.” *Id.* ¶ 96. Both rater and reviewer concurred that McIntire had not demonstrated the requisite abilities to be recommended for a supervisory position. *Id.* ¶ 97.

12. An evaluation for the period from July 1, 1990 to June 30, 1991 in which the rater noted: “[A]s of lately I think he is only interested in getting to his retirement as quickly and easily as possible. I don’t think he is interested in a promotion at this time.” *Id.* ¶ 98.

13. An evaluation for the period from January 1, 1992 to December 31, 1992 and a six-month progress report dated October 7, 1992 in which it was noted that McIntire needed improvement in performing his work in a motivated and self-directed manner. *Id.* ¶¶ 99-100.

14. An evaluation for the period from January 1, 1994 to December 31, 1994 in which the reviewer, Lt. Russell F. Lincoln, wrote: “I agree with Sergeant Barnes’ [the rater’s] comment that ‘those who don’t know his ways may be put off by them’ is very correct. I also feel that Officer McIntire should not routinely allow his ways to put people off.” *Id.* ¶ 101.<sup>17</sup>

15. An evaluation for the period from January 1, 1996 to December 31, 1996 in which it was noted: “Al gets along with his co-workers well. They understand his unique view of things and his sense of humor. Sometimes, however, Mr. and Mrs. John Q. Public don’t [see] Al in the same humorous way.” *Id.* ¶ 102.

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<sup>17</sup> The plaintiffs’ statement of material facts incorrectly states that these comments were made in the context of the 1992 review. *See* Portland Police Department Performance Appraisal for Allan McIntire for the period from 1/1 – 12/31/94, Plaintiffs’ Appendix at 139-43.

The procedure at the Portland Police Department is that performance appraisals that the officers receive are reviewed by the officer's supervisors all the way up to the chief of police. *Id.* ¶ 72.<sup>18</sup>

### **III. Analysis**

#### **A. Police Officer McIntire**

##### **1. Civil-Rights Claims (Count I)**

In Count I, Cummings asserts that McIntire, in violation of 42 U.S.C. § 1983, deprived him of his right to be free from the use of excessive and unreasonable force pursuant to the Fifth and Fourteenth amendments to the United States Constitution, and that McIntire violated “analogous rights under the Maine Constitution.” Complaint ¶¶ 30-32. He seeks, *inter alia*, punitive damages. *Id.* at 4.

The parties agree that the Maine constitutional claims essentially are subsumed in the federal constitutional analysis. Defendants’ Motion at 17; Plaintiff’s [sic] Memorandum in Opposition to Defendants’ Motion for Summary Judgment (“Plaintiffs’ Opposition”) (Docket No. 7) at 10. They further agree that, in view of the fact that the alleged excessive force was not employed in the context of arrest, detention or imprisonment, Cummings’ section 1983 claim implicates the right to substantive due process. Defendants’ Motion at 3; Plaintiffs’ Opposition at 2. However, they sharply disagree as to the standard pursuant to which such a claim should be analyzed. Defendants’ Motion at 4-5; Plaintiffs’ Opposition at 2-3. The plaintiffs assert that the question presented is whether McIntire displayed a reckless or callous indifference to Cummings’ rights; the defendants contend that the court

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<sup>18</sup> The defendants deny this statement, asserting that McIntire testified that he did not know what the specific practice was. Defendants’ Reply SMF ¶ 72. McIntire testified that, in theory, the chief of police reviews the performance evaluations of all police officers. Deposition of Allan McIntire, filed with Plaintiffs’ Opposing SMF, at 22. This testimony sufficiently supports the statement, (*continued on next page*)

must decide whether McIntire's conduct could be considered so outrageous as to "shock the conscience." *Id.*

The defendants win the battle but lose the war. The question presented is indeed whether McIntire's conduct could reasonably be found to have been conscience-shocking. However, I agree with the plaintiffs that, even under this more stringent standard, Count I survives summary judgment. *See* Plaintiffs' Opposition at 3.

In arguing for application of a callous-indifference standard, the plaintiffs rely heavily on a 1990 First Circuit police pursuit case, *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990). *See* Plaintiffs' Opposition at 2. The First Circuit in *Landol-Rivera* observed: "[G]overnment officials may be held liable for a substantive due process violation only if their conduct reflect[ed] a reckless or callous indifference to an individual's rights." *Landol-Rivera*, 906 F.2d at 796 (citations and internal quotation marks omitted). However, the First Circuit subsequently clarified:

[W]e hold that police officers' deliberate indifference to a victim's rights, standing alone, is not a sufficient predicate for a substantive due process claim in a police pursuit case. Rather, in such a case, the plaintiff must also show that the officers' conduct shocks the conscience.

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We think, moreover, that this standard is not inconsistent with, but is merely a refinement of, *Landol-Rivera*. As in *Landol-Rivera*, a plaintiff is still required to show the police officers' deliberate indifference to his rights. The plaintiff in *Landol-Rivera* could not clear this hurdle, so we had no occasion to explore whether any further hurdle blocked his path. . . .

*Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996) (footnote omitted). The Supreme Court later expressly sided with *Evans* in adopting a shock-the-conscience standard in a substantive due-process case emanating from injury to a bystander during a high-speed police chase. *County of Sacramento v. Lewis*, 523 U.S. 833, 839-40, 853-54 (1998) (citing *Evans*). The Court in so doing observed:

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which concerns "procedure" (not practice).

To recognize a substantive due process violation in these circumstances when only midlevel fault has been shown would be to forget that liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates the large concerns of the governors and the governed.

*Id.* at 853 (citation and internal quotation marks omitted).

The First Circuit in turn subsequently cited *Lewis* in observing in a non-police pursuit case: “The basic due process constraint, where substance and not procedure is involved, is against behavior so extreme as to ‘shock the conscience.’ Outside of a few narrow categories, like the safeguarding of prisoners who have been wholly disabled from self-protection, this means conduct that is truly outrageous, uncivilized and intolerable.” *Hasenfus v. LaJeunesse*, 175 F.3d 68, 72 (1st Cir. 1999) (citations omitted).<sup>19</sup>

There yet remains the question of the yardstick by which one judges whether conduct is conscience-shocking. The Supreme Court has indicated that “conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.” *Lewis*, 523 U.S. at 849. Further, each side in this dispute cites a test formulated by Judge Friendly in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), *abrogated on other*

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<sup>19</sup> The plaintiffs also argue that the “shock the conscience” test need not be met in a case in which a plaintiff can point to an identified liberty or property interest protected by the due-process clause. Plaintiffs’ Opposition at 2. The First Circuit has held that “[t]here are two theories under which a plaintiff may bring a substantive due process claim. Under the first, a plaintiff must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. Under the second, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but, rather, he must prove that the state’s conduct ‘shocks the conscience.’” *Cruz-Erazo v. Rivera-Montañez*, 212 F.3d 617, 622 (1st Cir. 2000) (citations and internal quotation marks omitted). To say that Cummings brings his claim pursuant to the first theory nonetheless begs the question of the standard to be applied in pressing it. As the *Evans*, *Lewis* and *Hasenfus* decisions make clear, the standard applicable in this case is the “shock the conscience” test which happens to coincide with the standard applicable in cases in which a plaintiff does not identify a specific liberty or property interest protected by the due-process clause.

*grounds by Graham v. Connor*, 490 U.S. 386 (1989), that has been embraced by the First Circuit in the substantive due-process context:

In determining whether the state officer has crossed the constitutional line that would make the physical abuse actionable under Section 1983, we must inquire into the amount of force used in relationship to the need presented, the extent of the injury inflicted and the motives of the state officer. If the state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience, it should be redressed under Section 1983.

*Thompson v. Olson*, 798 F.2d 552, 558-59 (1st Cir. 1986) (quoting *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981), *modified as recognized by Petta v. Rivera*, 143 F.3d 895 (5th Cir. 1998) (citing *Johnson*, 481 F.2d at 1033)); *see also* Defendants' Motion at 3-4; Plaintiffs' Opposition at 3.

Per these yardsticks, a reasonable trier of fact could find McIntire's conduct in this case to have been conscience-shocking. Even granting that McIntire's traffic-directing detail was hectic and demanding, the plaintiffs paint a picture in which a benign pedestrian whose only "crime" was to attempt to ask for directions was shamefully and completely unjustifiably assaulted by a uniformed police officer. In the plaintiffs' version of events, McIntire's conduct was swift, intentional and malicious, as underscored by the accompanying abusive command: "If you don't have a god damn emergency, get the hell out of here."

Both sides note, and my research corroborates, that there is no published case precisely on point (*i.e.*, an alleged push or shove of a citizen by a police officer in the circumstances here presented). *See* Defendants' Motion at 9; Plaintiffs' Opposition at 6. However, the case that appears to be most closely on point, *Shillingford*, tilts the scales in favor of Cummings. In *Shillingford*, a tourist was attempting to photograph the arrest of a Mardi Gras reveler an event with which he was not in any way interfering when a police officer struck the tourist's camera with a nightstick. *Shillingford*, 634 F.2d at 264. The force of the blow not only broke the camera but also drove it into

the tourist's face, lacerating his forehead. *Id.* Applying Judge Friendly's test in *Johnson*, the Court of Appeals for the Fifth Circuit held:

In this case, the assault by the policeman was unprovoked and unjustified. It was patently taken because, as a bystander on the public streets, Shillingford was photographing what the policeman did not want to be memorialized. That the results of the attack on Shillingford's person were not crippling was merely fortuitous. The same blow might have caused blindness or other permanent injury. Therefore, we find the physical abuse in this case sufficiently severe, sufficiently disproportionate to the need presented and so deliberate and unjustified a misuse of the policeman's badge and bludgeon as to transcend the bounds of ordinary tort law and establish a deprivation of constitutional rights.

*Id.* at 266. In so concluding, the court observed: "Actions permissible in controlling a riotous mob or in dealing with a life-threatening situation might weigh differently when taken against a peaceful pedestrian." *Id.* at 265.

In this case, unlike in *Shillingford*, Cummings directly interacted with the police officer, and significantly less force was used — an open-handed push versus a nightstick. Nonetheless, the plaintiffs' version of events and the *Shillingford* facts intersect in a fundamental way, each entailing the deliberate and utterly unjustified use of force by a police officer against a peaceful pedestrian.<sup>20</sup> Such conduct qualifies, in the words of the First Circuit in *Hasenfus*, as "truly outrageous, uncivilized and intolerable." *Hasenfus*, 175 F.3d at 72.

In view of these findings, little need be said regarding McIntire's bids for qualified immunity and for summary judgment as to punitive damages. *See* Defendants' Motion at 11-12. The defendants concede that qualified immunity is inherently inappropriate in a case in which a trier of fact could find a defendant's conduct so outrageous as to shock the conscience. *Id.* at 11; *see also Fernandez v. Leonard*, 784 F.2d 1209, 1216 (1st Cir. 1986) ("[T]he very concept of a violation of substantive due

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<sup>20</sup> In the plaintiffs' version of events, Cummings' interference with McIntire was minimal, with Cummings waiting to begin to ask his question until traffic was stopped and all seemed quiet (even though runners were proceeding through the intersection), and with Cummings standing four feet away from the officer.

process is that the conduct complained of is impermissible *per se* and is thus necessarily clearly established.”). Although not conceded by the defendants, *see* Defendants’ Motion at 12, such conduct manifestly also could form the predicate for punitive damages, which are available in a section 1983 action for behavior “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).

## **2. Loss of Consortium Claim (Count II)**

In Count II, Deborah Cummings brings a claim against McIntire for loss of consortium based on McIntire’s alleged use of excessive force against her husband. Complaint ¶¶ 33-34. The defendants’ claim to entitlement to summary judgment as to this count rests entirely on their claim of entitlement to summary judgment as to Count I. *See* Defendants’ Motion at 1. Inasmuch as the primary claim survives summary judgment, this derivative claim also survives.

### **B. Police Chief Chitwood (Count III: Civil-Rights Claims)**

In Count III, Cummings asserts a supervisory liability claim against Chitwood on the basis that the police chief knew or should have known that McIntire had a reputation for violent and/or inappropriate conduct, that the police chief failed to take reasonable steps to supervise or discipline McIntire or to minimize the risk of harm he presented and that this alleged failing was affirmatively linked to the incident on October 4, 1998 in which Cummings was injured. Complaint ¶¶ 35-43.

A supervisor may be held liable under section 1983 for the constitutional violation of a subordinate “only if (1) there is subordinate liability, and (2) the supervisor’s action or inaction was affirmatively linked to the constitutional violation caused by the subordinate.” *Aponte Matos v. Toledo Dávila*, 135 F.3d 182, 192 (1st Cir. 1998) (citations and internal quotation marks omitted). “That affirmative link must amount to supervisory encouragement, condonation or acquiescence, or

gross negligence amounting to deliberate indifference.” *Id.* (citation and internal quotation marks omitted).

“[A] supervisor’s failure to take remedial actions regarding a miscreant officer may result in supervisory liability where it amounts to deliberate indifference.” *Id.* (citation and internal quotation marks omitted). “To demonstrate deliberate indifference a plaintiff must show (1) a grave risk of harm, (2) the defendant’s actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk.” *Camilo-Robles v. Hoyos*, 151 F.3d 1, 7 (1st Cir. 1998).

The plaintiffs establish for purposes of summary judgment that (i) Chitwood, who became police chief in 1988, was personally aware of three of the four complaints lodged against McIntire between 1994 and October 4, 1998, (ii) per police department procedure, Chitwood reviews the performance evaluations of all Portland police officers, and (iii) McIntire received a string of negative performance evaluations from various reviewers and raters over the course of his twenty-nine-year Portland Police Department career. These complaints and evaluations in turn bespeak a longstanding history of surly behavior with the public, a lax and uncaring attitude and stubborn resistance to change. Nonetheless, the plaintiffs adduce no evidence that, prior to the incident in question, McIntire ever was the subject of a complaint, discipline or negative performance review for use of excessive force or any propensity to violence. On these facts, Chitwood cannot reasonably be said to have ignored a “grave risk” that the harm of which the plaintiffs complain McIntire’s unjustified use of excessive force would eventuate. *See, e.g., Camilo-Robles*, 151 F.3d at 7 (notice of behavior likely to result in the violation of constitutional rights “is a salient consideration in determining the existence of supervisory liability.”); *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 93-94 (1st Cir. 1994) (five prior complaints against officer, which stemmed from incidents

completely unrelated to incident at bar, could not have alerted supervisor to fact that officer had propensity to assault citizens, deny detainees necessary medical treatment or deal inappropriately with mentally handicapped persons; supervisor “therefore did not know that he needed to supervise Officer Rodriguez more closely, or discipline him, in order to prevent constitutional violations in the future.”)<sup>21</sup> Chitwood accordingly is entitled to summary judgment as to Count III.

### **C. City of Portland (Count IV: Civil-Rights Claims)**

In Count IV, Cummings seeks to hold the City of Portland liable for McIntire’s conduct on the theory that Chitwood a policymaker in effect ratified the conduct in issue by virtue of his asserted omissions in the supervision and discipline of McIntire. Complaint ¶¶ 44-49; Plaintiffs’ Opposition at 10. Inasmuch as the plaintiffs fall short of demonstrating an “affirmative link” between McIntire’s conduct on October 4, 1998 and Chitwood’s supervision, Chitwood’s alleged acts or omissions cannot serve as the predicate for liability against the City of Portland. *See, e.g., Hayden v. Grayson*, 134 F.3d 449, 456 (1st Cir. 1998) (“Plaintiffs simply allege that the Town is liable under section 1983 because Grayson established an official Town policy or custom of selective law enforcement which in turn caused them injury. Since their predicate claim against Grayson fails, however, . . . so must their contention that any such discriminatory Town policy or custom existed.”) (footnote omitted). Summary judgment in favor of the City of Portland accordingly is warranted.

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<sup>21</sup> The plaintiffs argue that Chitwood knew or should have known that McIntire “was an angry, sarcastic, lazy, hurtful man who had great difficulty behaving appropriately with the public” and who should have been removed years earlier from any position entailing interaction with the public. Plaintiffs’ Opposition at 8. While one wonders why McIntire was permitted to continue to have street-level dealings with the public in view of his history of rudeness, the plaintiffs adduce no evidence that a propensity to use angry, sarcastic or threatening language is linked to a propensity to wield excessive force. Nor is such a link self-evident. Thus, the plaintiffs on this record fall short of demonstrating that Chitwood turned a blind eye to a “grave risk” that, unless McIntire were removed from dealings with the public, he would commit the kind of act of which the plaintiffs complain.



v.

PORTLAND POLICE OFFICERS,  
Allen McIntyre in his official  
capacity as a Portland Police  
Officer  
defendant

MARK E. DUNLAP  
774-7000  
[COR LD NTC]  
NORMAN, HANSON & DETROY  
415 CONGRESS STREET  
P. O. BOX 4600 DTS  
PORTLAND, ME 04112  
774-7000

POLICE CHIEF OF CITY OF  
PORTLAND, Michael Chitwood, in  
his official capacity as City  
of Portland Chief of Police  
defendant

MARK E. DUNLAP  
(See above)  
[COR LD NTC]

CITY OF PORTLAND  
defendant

MARK E. DUNLAP  
(See above)  
[COR LD NTC]