

Civ. P. 41(a)(1)(ii). Accordingly, voluntary dismissal of these counts is not available at this time. Treating the statement as one of agreement that summary judgment may be entered on those counts as requested by the respective defendants against whom they are asserted, I recommend that the court grant summary judgment on those counts and will not address them further. I recommend that the plaintiffs' motion for partial summary judgment be denied, that the motions of the defendant police department and the Maine Municipal Association be granted, and that the motions of the remaining defendants be granted in part and denied in part.

I. Summary Judgment Standard

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 Background

The following material facts are appropriately supported in the parties’ statements of material facts and are undisputed.

The Town of Houlton (sometimes hereafter referred to as the “Town”) has a council/manager form of government. Statement of Material Facts in Support of Motions for Summary Judgment by Defendants Town of Houlton, Houlton Police Department, Darrell Malone and Allan Bean (“Houlton SMF”) (Docket No. 16) ¶ 4; Plaintiffs’ Response to Defendants Town of Houlton, Houlton Police Department, Darrell Malone and Allan Bean’s “Statement of Material Facts” (“Plaintiffs’ Responsive Houlton SMF”) (Docket No. 33) ¶ 4. At the time of the relevant events, the Houlton Police Department had 19 employees, including the chief, three sergeants and three corporals. *Id.* ¶ 5. Plaintiff Archer was a police officer with the Town from 1985 to 1997. *Id.* ¶ 1. He was a sergeant at all relevant times. *Id.* He resigned from the Houlton Police Department in February 1997 to accept a position as chief of police in Lincoln, Maine. *Id.* Plaintiff Hyman began working as a police officer with the Town in 1991 and was a patrol officer at all relevant times. *Id.* ¶ 2. Plaintiff O’Bar began working for the Houlton Police Department as a dispatcher in 1987 or 1988. *Id.* ¶ 3. He became a police officer in the early 1990s. *Id.*

In 1994 and 1995 the Town and the Maine Association of Police, the bargaining agent for a union unit composed of dispatchers, patrol officers, corporals and sergeants, were engaged in negotiations for a successor collective bargaining agreement. *Id.* ¶ 6. Defendants Malone, the police chief, and Bean, the town manager, were among the negotiators for the Town. *Id.* Plaintiff Archer was

a shop steward and among the negotiators for the union. *Id.* On November 29, 1995 the parties executed a new contract. *Id.* ¶ 7.

Defendant Malone has served as the chief of police for the Town since 1984. *Id.* ¶ 8. As such, he reports to the town manager. *Id.* Before becoming chief, Malone served as the shop steward for the police union for several years beginning in 1971. *Id.* ¶ 9. Defendant Bean was town manager in Houlton from August 1994 to December 26, 2000. *Id.* ¶ 13.

On November 19, 1995 Malone announced openings for the positions of corporal and patrol sergeant with applications due by December 15, 1995. *Id.* ¶ 14. In a memorandum dated December 20, 1995 Malone announced an opening for the position of staff sergeant detective for which applications were due by December 29, 1995. *Id.* ¶ 15. The union contended that James Skehan, who ultimately was promoted to the staff sergeant detective position, was not eligible for that promotion. *Id.* ¶ 18.

On January 5, 1996 Archer filed a class-action grievance pertaining to the criteria used by Malone to determine eligibility to compete for these positions. *Id.* ¶ 19. On January 17, 1996 Archer filed two grievances: one alleging failure of the Town to negotiate the terms and conditions of the newly-created position of staff sergeant detective and one alleging that Malone had failed to abide by a new contractual term concerning the cleaning of uniforms. *Id.* ¶ 20. Malone denied the grievances. *Id.* ¶ 21. Archer advanced the grievance concerning eligibility for promotion to the town manager, who also denied it. *Id.* ¶¶ 22, 25. The union filed for arbitration of this grievance. *Id.* ¶ 25. Arbitration was held and the arbitrator ruled that the minimum qualifications for promotion established by Malone did not violate the contract. *Id.* ¶ 26.

On December 21, 1995 Malone announced that a written examination would be administered by defendant Maine Municipal Association (“MMA”). *Id.* ¶ 34. The MMA is a nonprofit advisory

organization that is an instrumentality of its member municipal and quasi-municipal corporations. Defendant Maine Municipal Association's Statement of Material Facts ("MMA's SMF") (Docket No. 9) ¶ 1; Plaintiffs' Response to Defendant Maine Municipal Association's "Statement of Material Facts" ("Plaintiffs' Responsive MMA SMF") (Docket No. 25) ¶ 1. MMA's involvement in the 1996 testing for the Houlton Police Department began when Malone called David Barrett, then the assistant director of personnel for the MMA, and said he needed to schedule an exam. *Id.* ¶¶ 2, 5. The Houlton Police Department used a four-part promotional process in 1996. *Id.* ¶ 7. It included the written exam administered by Barrett, an oral interview panel with some law enforcement professionals, an evaluation tool used by the police chief, and seniority points. *Id.* The chief's subjective evaluation is supposed to be done without knowledge of applicants' scores in the other components of the process. Houlton SMF ¶ 41; Plaintiffs' Responsive Houlton SMF ¶ 41. At the end of the 1996 promotional process, Barrett compiled the scores from the four parts. MMA's SMF ¶ 8; Plaintiffs' Responsive SMF ¶ 8. MMA did not administer the oral boards (oral interview panel). *Id.* ¶ 12. All of the plaintiffs took the written exam. Houlton SMF ¶ 35; Plaintiffs' Responsive Houlton SMF ¶ 35.

MMA typically informs the hiring authority of each component score only at the end of the entire process when the final scores are released. *Id.* ¶ 40. Within a few days after the January 4, 1996 written exam, which Barrett corrected at his office, Archer and several other officers asked Malone if they could have the scores of their written exams. MMA's SMF ¶¶ 15, 23; Plaintiffs' Responsive SMF ¶¶ 15, 23. Archer and the others received their scores from Malone within a very short period of time after making this request. *Id.* ¶¶ 25-26.

After the written test, the candidates ranked as follows: Archer, O'Bar, Dana Duff, Maurice Ellis, Thomas Donahue, Hyman, Skehan, and Terry Beaton. Houlton SMF ¶ 48; Plaintiffs' Responsive SMF ¶ 48. The oral interview board for the positions of patrol sergeant and corporal was conducted

on January 12, 1996. *Id.* ¶ 49. The ranking of the candidates for these positions, after the scores for the written examination, oral board and seniority were combined, was as follows: Ellis, O’Bar, Hyman, Duff, Skehan, Donahue and Beaton. *Id.* ¶ 52. A separate oral board was held on January 24, 1996 for the staff sergeant detective position. *Id.* ¶¶ 53, 55. The ranking of candidates for this position, after the scores for the written examination, oral board and seniority were combined, was as follows: Archer, Ellis and Skehan. *Id.* ¶ 57.

The chief’s evaluation component of the process is to address the following categories: practical job knowledge as revealed in performance, personal habits as revealed on the job, work habits, interpersonal skills and overall present promotional potential. *Id.* ¶ 58. The chief is to complete these evaluations without knowledge of the candidates’ other scores. *Id.* ¶ 59. The scale for grading these evaluations provides a range of 17 to 20 points for “very good,” 14 to 16 points for “good” and 10 to 13 points for “acceptable.” *Id.* ¶ 60. Malone assigned the following scores to the candidates for the positions of corporal and patrol sergeant:

Ellis	19.5
Donahue	19.5
Skehan	19.5
Beaton	18.0
Duff	18.0
Hyman	14.5
O’Bar	12.0

Id. ¶ 63. He assigned the following scores to the candidates for the position of staff sergeant detective: Skehan 20.0, Ellis 17.5 and Archer 11.0. *Id.* Malone’s evaluations were dated January 4, 1996. *Id.* ¶ 70.

MMA mailed the final results to Bean on January 30, 1996 at Malone’s request. *Id.* ¶¶ 74, 77. Under the Houlton town charter, promotion decisions ultimately rest with the town manager. *Id.* ¶ 75. Bean kept the results in a sealed envelope until the arbitration decision concerning qualifications for

the promotions was issued and the union had agreed to the staff sergeant detective position. *Id.* ¶ 78. The promotions were made in November 1996 and Bean promoted the highest-scoring candidates. *Id.* ¶¶ 79-80. On November 20, 1996 the results were posted and Skehan was promoted to staff sergeant detective, Ellis to patrol sergeant and Duff and Donahue to corporal. *Id.* ¶ 83. Assuming no change in Malone's evaluation scores for all of the other candidates, Archer would have needed a score of 12 rather than 11 to be promoted to the staff sergeant detective position, O'Bar would have needed a score of 12.5 rather than 12 to be promoted to one of the corporal positions, and Hyman would have needed a score of 18 rather than 14.5 to be promoted to one of the corporal positions. *Id.* ¶¶ 86-88.

The plaintiffs brought an unfair labor practices complaint against the Town, the Houlton Police Department and Malone before the Maine Labor Relations Board. Statement of Material Facts Pursuant to Local Rule 56(b) to Which There is No Dispute ("Plaintiffs' SMF I") (Docket No. 18); Reply of Defendants Town of Houlton, Houlton Police Department, Allan Bean and Darrell Malone to Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue ("Houlton's Responsive SMF") (Docket No. 30) ¶ 1. The Maine Labor Relations Board conducted 12 days of evidentiary hearings in connection with this matter. *Id.* ¶ 2. The Town, the Houlton Police Department and Malone were represented by counsel who examined and cross-examined witnesses, introduced documentary evidence and made oral and written arguments before the Board. *Id.* ¶ 3. The Board issued a decision on October 19, 1999 from which none of the parties took an appeal. *Id.* ¶ 4.

III. Discussion

A. Plaintiffs' Motion

The plaintiffs, invoking the principle of collateral estoppel, ask the court to establish the preclusive effect of the certain findings of the Maine Labor Relations Board. Motion for Partial Summary Judgment Pursuant to F.R.Civ.P. 56(a) (Docket No. 17). They identify these findings as

paragraphs 5 through 14 of their statement of material facts, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, etc. ("Plaintiffs' Motion"), attached to Docket No. 17, at 2. Each of these paragraphs of their statement of material facts has been denied by the Houlton defendants. Houlton's Responsive SMF ¶¶ 5-14. Two of the plaintiffs' proposed preclusive findings, paragraphs 7 and 12, are not supported as written by the citations to the Board's decision, which is Exhibit 1 to the plaintiffs' statement of material facts, furnished by the plaintiffs, and the motion should accordingly be denied as to those paragraphs. The following discussion addresses paragraphs 5-6, 8-11 and 13-14 of the plaintiffs' statement of material facts, which accurately represent findings, although not necessarily factual findings, included in the Board's decision.

"[W]hen a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's Courts." *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) (citation and internal punctuation omitted). Under Maine law, factual findings included in a final adjudication in an administrative proceeding have the same preclusive effect as those made in a court proceeding. *Peterson v. Town of Rangeley*, 715 A.2d 930, 933 (Me. 1998). "[T]he concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (citation and internal quotation marks omitted). The Houlton defendants contend that they did not have such an opportunity before the Maine Labor Relations Board and that this court's opinion in *Sewall v. Taylor*, 672 F. Supp. 542 (D. Me. 1987), requires denial of the plaintiffs' motion. Objection of Defendants Town of Houlton, Houlton Police Department, Darrell Malone and Allan Bean to Plaintiffs' Motion for Partial Summary Judgment ("Houlton's Objection") (Docket No. 31) at 2, 6-11.

Despite the plaintiffs' attempt to distinguish it, Plaintiffs' Motion at 6-8, this court's opinion in *Sewall* is applicable to this motion. In that case, the plaintiff had been discharged from his employment and applied for unemployment insurance benefits. *Id.* at 543. After a two-day evidentiary hearing, the Maine Unemployment Insurance Commission affirmed the decision to grant unemployment benefits. *Id.* The plaintiff brought an action in this court alleging violations of his rights under the First and Fourteenth Amendments arising out of the discharge. *Id.* The Commission had determined that the plaintiff was eligible for benefits under the applicable state statute because he was not discharged for misconduct as that word is defined in the statute. *Id.* at 543-44.

In contrast, in assessing Plaintiff's freedom of speech claim, the factfinder in the present action must determine whether Plaintiff was discharged because he exercised his constitutional rights. Simply put, the legal issues are not identical in these two actions.

* * *

Under Maine law, when the issues are different, "res judicata cannot be upheld and [collateral estoppel] is conclusive only to such facts without proof of which [the prior decision] could not have been rendered." *Chandler v. Dubey*, 378 A.2d 1096, 1098 (Me. 1977) (quoting *Cianchette v. Verrier*, 155 Me. [74] at 89). Therefore, only those facts essential to the Commission's finding of no misconduct on the part of the Plaintiff are entitled to preclusive effect in the present action between the two parties Although the issue of whether Plaintiff's discharge was in violation of his first amendment rights is not precluded by the Insurance Commission's administrative decision, the factual issue of the reasons for his dismissal were actually litigated and may be given preclusive effect.

Id. at 544. Here, the issue before the Maine Labor Relations Board was whether Malone's conduct during the promotional review process violated 26 M.R.S.A. § 964(1)(A) and (B), Decision and Order, *Dana E. Duff v. Town of Houlton, et al.*, Maine Labor Relations Board Case Nos. 97-20 & 97-21, issued October 19, 1999 ("MLRB Decision") (Exhibit 1 to Plaintiff's SMF I), at 1, which provide:

Public employers, their representatives and their agents are prohibited from:

A. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed in section 963;¹

B. Encouraging or discouraging membership in any employee organization by discrimination in regard to hire or tenure of employment or any term or condition of employment.

The issues remaining before this court with respect to the Houlton defendants other than Bean, who was not a party to the proceedings before the Board and accordingly against whom collateral estoppel is not available, are whether the plaintiffs were deprived of their constitutional rights to freedom of speech, freedom of association, substantive due process and procedural due process. Complaint ¶¶ 1-4, 9-12, 17-20, 25-28, 33-36, 41-44. As was the case in *Sewall*, these issues are different and accordingly only those factual findings essential to the Board's ultimate determination could possibly be given preclusive effect.

At least some of the remaining findings to which the plaintiffs ask this court to give preclusive effect were essential to the Board's determination that the Town, the police department and Malone violated section 964(1)(A) & (B). However, it is not necessary to discuss particular findings in this regard because Judge Carter's further holding in *Sewall* is also applicable here.

As noted above, the legal issues presented before this Court and those decided by the administrative tribunal are not identical. Defendants' potential liability in the state administrative proceeding is far less than it is in a suit for unlawful discharge brought pursuant to 42 U.S.C. § 1983. For both parties, there is less incentive to exhaustively litigate in an unemployment compensation hearing the factual issues that are subject to litigation in a subsequent § 1983 action. It would be unfair to permit the use of collateral estoppel under these circumstances. Maine courts have long recognized that the use of collateral estoppel should be permitted on a case-by-case basis and should not be sanctioned where it would be unfair to a party or where it would not serve the ends of justice

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The Court further concludes that the use of collateral estoppel in this instance would not promote judicial economy nor significantly reduce the

¹ Section 963 protects the right of public employees "voluntarily to join, form and participate in the activities of organizations of their own choosing for the purposes of representation and collective bargaining." 26 M.R.S.A. § 963.

burden of litigation on Plaintiff. Plaintiff will have to litigate both his constitutional claims regardless of whether the above issues of fact are given preclusive effect. Although Plaintiff may perceive a tactical advantage in the use of offensive collateral estoppel in this case, the doctrine of collateral estoppel must ultimately be justified on principles of finality, certainty, and the proper administration of justice. In the present case, the ends of justice are better served by allowing full litigation of these issues.

672 F. Supp. at 545 (citations omitted).

Here, the defendants' potential liability before the Board was much more limited than is its potential liability in the current court proceeding. Upon finding a violation of section 964, the Board must issue a cease and desist order and may order reinstatement of employees with or without back pay and take "such affirmative action" as "will effectuate the policies of this chapter." 26 M.R.S.A. § 968(5)(C). The Board in fact issued a cease and desist order, required the respondents to post a notice concerning their statutory responsibilities and the outcome of the proceeding, and ordered the respondents to pay Archer certain back pay and interest and certain costs of the Maine Association of Police. MLRB Decision at 41. The damages and other relief available in this section 1983 action far exceed the remedies available from and awarded by the Board. In addition, the plaintiffs in this action must prove at trial all necessary facts asserted in support of their claims against Bean, which are identical to their claims against the other Houlton defendants, because collateral estoppel would not be available against him due to the fact that he was not a party to the Board proceedings. Thus, the plaintiffs' burden of litigation would not be significantly reduced by the granting of their motion, although the potential for confusion of the jury would certainly be increased. As was the case in *Sewall*, full litigation of these issues would better serve the ends of justice.

Accordingly, I recommend that the plaintiffs' motion for partial summary judgment be denied.

B. The Houlton Police Department

The plaintiffs do not include in their list of specific counts that they agree to dismiss Counts 106-08 insofar as those claims for punitive damages are asserted against the Houlton Police Department. Plaintiffs' Houlton Opposition at 2. However, they do state that they "are dismissing all Counts against the Town of Houlton Police Department," *id.* at 1, and to the extent that any confusion is generated thereby, it is a basic principle of tort law that punitive damages may only be recovered when an award of damages has been made on an underlying substantive tort claim. *See Campos-Orrego v. Rivera*, 175 F.3d 89, 97 (1st Cir 1999); *DiPietro v. Boynton*, 628 A.2d 1019, 1025 (Me. 1993). Therefore, the Houlton Police Department is entitled to summary judgment on Counts 106-08 as well.

C. The Maine Municipal Association

Only Counts 100-08 are asserted against the Maine Municipal Association. The plaintiffs claim that they may recover against the Association as third-party beneficiaries of a contract between the Association and the Town, that the Association was negligent in a manner that caused them harm for which they may recover damages and that they are entitled to punitive damages from the Association. The Association seeks summary judgment on each of these claims.

1. Third-Party Beneficiary Claims. "Persons who are not parties to a contract nevertheless may sue for breach if they qualify as intended third party beneficiaries of the contract." *Finance Auth. of Maine v. L.L. Knickerbocker Co.*, 106 F.Supp.2d 44, 48 (D. Me. 1999). The Association contends that the plaintiffs cannot establish that they were intended beneficiaries of any agreement it may have had with the Town. Defendant Maine Municipal Association's Motion for Summary Judgment, etc. ("MMA Motion") (Docket No. 8) at 2-5. The plaintiffs respond, with minimal citation to authority, that the Association had a contractual obligation to the Town to maintain the integrity of the testing process, that its failure to do so caused them harm and that there was no reason for the Town to use the

testing if it did not intend to benefit applicants for the new police positions. Plaintiffs' Memorandum of Law in Opposition to Defendant Maine Municipal Association's Motion for Summary Judgment ("Plaintiffs' MMA Opposition") (Docket No. 24) at 5-10. In their discussion, the plaintiffs refer repeatedly to statements made in their affidavits but not presented to the court through a statement of material facts as required by this court's Local Rule 56(c) and to documents not identified in that manner, as is also required by the local rule. *Id.* at 7-9. Such assertions and documents will not be considered by the court.²

In order to proceed on their third-party beneficiary theory, the plaintiffs "must generate a genuine issue of material fact on the issue of [the Town's] intent that [they] receive an enforceable benefit under the contract." *Devine v. Roche Biomedical Labs.*, 659 A.2d 868, 870 (Me. 1995) ("*Devine II*").

It is not enough that [the plaintiffs] benefitted or could have benefitted from the performance of the contract. The intent must be clear and definite, whether it is expressed in the contract itself or in the circumstances surrounding its execution. If [the Town] did not intend to confer upon [the plaintiffs] an enforceable right, any benefit enjoyed by [them] as a result of the performance of the contract renders [them] mere incidental beneficiar[ies]. An incidental beneficiary cannot sue to enforce third party beneficiary rights.

Id. (citation and internal quotation marks omitted). The plaintiffs appear to argue that the absence of a written contract between the Association and the Town concerning the testing requires that the court not "limit" their claim. Plaintiffs' MMA Opposition at 7, 11-12. However, "the focus must be on the nature of the contract itself to determine if the contract necessarily implies an intent on the part of the

² In addition, the plaintiffs' response to the Association's statement of material facts includes the following unacceptable assertions: (i) "Plaintiffs admit and deny in part the fact or facts stated in Paragraph 20 of MMA's Statement," Plaintiffs' Responsive MMA SMF ¶ 20, with no indication which fact or facts are denied and which are admitted; (ii) "Plaintiffs . . . have insufficient knowledge upon which to base a belief as to the truth of the allegations contained in the second sentence . . . and therefore deny the same and demand strict proof thereof," *id.* ¶ 22; (iii) "Plaintiffs . . . refer the Court to their Affidavits, generally, . . . and Transcripts cited therein," *id.* ¶¶ 36-41; and (iv) "See . . . Expert's Reports," *id.* ¶ 59. The local rule requires specific citations to supporting documents; the court will not search through documents for a possible supporting statement or term. If a party lacks sufficient information to respond to an entry in (continued on next page)

promisee to give an enforceable benefit to a third party.” *Devine II*, 659 A.2d at 870. Contrary to the plaintiffs’ assertions, while it may be possible to infer such an intent from the circumstances set forth in the appropriately submitted material facts in the summary judgment record, nothing in that record *necessarily* implies such an intent. Indeed, the only evidence in the record on the point is a specific denial by Malone, the only representative of the Town who contacted the Association to arrange for the testing, that he intended to provide a benefit to the candidates by so doing or to give them any right to enforce the contract. MMA’s SMF ¶¶ 57-58. The plaintiffs’ denials of these assertions, Plaintiffs’ Responsive MMA SMF ¶¶ 57-58, do not place Malone’s statement in dispute; at most, they establish that the plaintiffs believed that the Town intended to benefit them in some way — without any mention of a right to enforce the contract — but they offer no factual support for this belief.

The Association is entitled to summary judgment on Counts 100, 102 and 104.

2. *Negligence.* The complaint alleges that the Association had a duty running to the plaintiffs to provide the testing results to the Town “in such a manner as to not allow the results to be used prejudicially and improperly” and to “not provide the results piecemeal.” Complaint ¶¶ 101, 103, 105. The Association contends that no such duty exists, and, even if such a duty existed, the plaintiffs cannot prove that they suffered physical injury as a result of its breach, which they contend is a necessary element of a claim for negligent performance of services. MMA Motion at 5-9. The plaintiffs respond that the existence of a duty may be established solely by the foreseeability of harm, that physical injury is not required, and that they have submitted evidence of physical injury. Plaintiffs’ MMA Opposition at 13-18.

“A plaintiff who fails to prove that the defendant violated a duty of care owed to the plaintiff cannot recover, whether the damage is emotional, physical, or economic.” *Devine v. Roche*

an opposing party’s statement of material facts, Fed. R. Civ. P. 56(f) provides the applicable procedure.

Biomedical Labs., Inc., 637 A.2d 441, 447 (Me. 1994) (“*Devine I*”). While the plaintiffs in this case style their claim as one of “simple negligence” rather than as a specific claim for negligent infliction of emotional distress, Plaintiffs’ MMA Opposition at 17-18, their reliance on *Gammon v. Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282, 1285 (Me. 1987), as authority for their argument that in such cases mere foreseeability is sufficient is misplaced. That argument was rejected by the Law Court in *Cameron v. Pepin*, 610 A.2d 279 (Me. 1992), where the plaintiffs argued that “whether a defendant owes a duty to a plaintiff is strictly a question of fact, dependent *solely* on the factfinder’s determination whether the injury was a reasonably foreseeable consequence of the defendant’s negligence,” *id.* at 281 (emphasis in original). The Law Court disagreed, *id.*, stating that “notwithstanding *Gammon*’s broad language, whether one party owes a duty of care to another necessarily involves considerations beyond the factual determination that a particular injury was a foreseeable consequence of some particular conduct,” *id.* at 282.

While the scope of duty owed does raise the question whether the defendant is under any obligation for the benefit of the particular plaintiff, it is not entirely a question of the foreseeable risk of harm but is in turn dependent on recognizing and weighing relevant policy implications. . . . Foreseeability, then, is one consideration among many that must be taken into account when courts engage in a duty analysis.

* * *

One policy consideration . . . is the necessity of avoiding both unlimited liability and liability out of all proportion to culpability.

Id. at 282-83 (citations and internal punctuation omitted). While *Cameron* involved a claim styled as one for negligent infliction of emotional distress, the quoted language cannot reasonably be construed to be limited solely to claims so denominated. After all, *Gammon*, on which the plaintiffs rely, involved a claim for negligent infliction of emotional distress.

The Law Court did suggest in *Devine II* that a tort duty runs between a drug-testing laboratory and an individual who is required to take a drug test as a condition of employment, 659 A.2d at 871

n.2, but that duty is to perform the testing itself in a manner that is not negligent, *see Devine I*, 637 A.2d at 448. Here, the plaintiffs do not contend that the Association administered the test or calculated the combined scores in a negligent manner, but rather that it negligently revealed the results of the written test to Malone at a time when he could use those scores to produce the overall results he desired by “skewing” his subjective evaluations of the candidates, which provided a significant portion of each candidate’s final score. This is a very different duty. The plaintiffs do not discuss foreseeability in this respect at all, stating that “[t]he question of fact is one concerning foreseeability, which is not argued, nor could it be argued by MMA.” Plaintiffs’ MMA Opposition at 17. To the contrary, there is no evidence in the summary judgment record from which a reasonable inference could be drawn that Barrett should have foreseen that giving Malone the scores on the written test would have resulted in Malone’s misuse of those scores by manipulating his subjective evaluations of the candidates. Indeed, the only record evidence is directly to the contrary. The plaintiffs admit that Barrett would not have provided the results of a written exam to Malone if he had known that Malone asked for the scores “in order to intentionally skew the results,” MMA’s SMF ¶ 18, Plaintiffs’ Responsive MMA SMF ¶ 18, and their denial of the statement that Barrett had no reason to suspect that Malone had targeted a particular individual for promotion, *id.* ¶ 19, is based only on the assertion that “there is always a chance” that such a problem might arise, but that assertion does not contradict the specific factual statement that Barrett had no reason to suspect such activity by Malone in this case. If such an assertion were sufficient to create foreseeability, it would suffice to establish foreseeability of wrongful manipulation in every case of employment-related testing conducted by a party other than the employer, a result unacceptable as a matter of public policy.

While foreseeability thus could very much be argued in this case, the plaintiffs are correct in their assertion that the Association does not do so. The Association does argue that relevant policy

implications, a consideration imposed by *Cameron*, weigh against establishing a duty not to reveal written test results in the circumstances of this case, in order to avoid unlimited liability and liability out of proportion to culpability. Defendant Maine Municipal Association's Reply Memorandum (Docket No. 28) at 5-6. I agree. If every organization conducting testing on behalf of an employer or potential employer had a tort duty imposed by law not to release the results of those tests to the employer until such time as the organization could be reasonably certain that the employer would not misuse those results, liability would expand dramatically for events that are essentially outside the organization's control. I conclude that the Maine Law Court would hold that such a duty does not exist in Maine law.

Accordingly, it is unnecessary to address the Association's argument that physical injury other than emotional injury is required in order to recover on a negligence claim like that presented by the plaintiffs, a question which the Law Court has to date specifically declined to address. *Devine I*, 637 A.2d at 447-48. The Association is entitled to summary judgment on Counts 101, 103 and 105.

3. *Punitive Damages*. If the court adopts my recommendation concerning the substantive claims asserted against the Association, it is also entitled to summary judgment on the plaintiffs' claims for punitive damages, for the reasons discussed above with respect to such claims against the Houlton Police Department. Punitive damages are not available in any event on the state-law contract claims. *Stull v. First Am. Title Ins. Co.*, 745 A.2d 975, 981 (Me. 2000). Even if the negligence claims were to survive, the plaintiffs have failed to submit evidence even beginning to approach the applicable legal standard for such claims. *Palleschi v. Palleschi*, 704 A.2d 383, 385-86 (Me. 1998) (clear and convincing evidence that defendant's conduct motivated by actual ill will toward plaintiffs or so outrageous that malice is implied). The Association is entitled to summary judgment on Counts 106-08.

C. The Houlton Defendants

The Town of Houlton, Malone and Bean move for summary judgment on the remaining claims asserted against them.

1. Constitutional Issues

a. *The Town of Houlton*. Counts 1-4, 17-21 and 33-36, invoking 42 U.S.C. § 1983, allege that the Town violated the plaintiffs' constitutional rights to freedom of speech, freedom of association, substantive due process of law and procedural due process of law. A municipality in a section 1983 case may not be held liable for the acts of its employees on a *respondeat superior* basis. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691 (1978). Rather, it may be held liable for such acts only to the extent that they are tantamount to a "custom" or "policy" of the municipality. *Id.* at 694. This may be proved by a showing that (i) the acts were carried out pursuant to established policy or were reflective of a governmental custom, or (ii) were taken or ratified by a final policymaker for the municipality or someone to whom final policymaking authority clearly was delegated. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 123, 126-27 (1988). The "custom" or "policy" must in turn have been "the cause of and the moving force behind the deprivation of constitutional rights." *Hodsdon v. Town of Greenville*, 52 F.Supp.2d 117, 124 (D. Me. 1999) (citation and internal quotation marks omitted). In this case the plaintiffs contend that the evidence is sufficient to allow them to reach a jury under the second alternative set forth in *Praprotnik*. Plaintiffs' Houlton Opposition at 3. They discuss only Bean, the town manager, in this context and suggest that Bean "created the atmosphere which fostered Defendant Malone's test result skewing" and that "Bean's own anti-union actions constitute a separate basis for liability" which may be imputed to the Town. *Id.* at 3-4. "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the

municipality is not held liable solely for the actions of its employee.” *Board of County Comm’rs v. Bryan*, 520 U.S. 397, 405 (1997).

The first suggestion is offered to support the plaintiffs’ contention that Bean knew or should have known that his own anti-union bias would lead to Malone’s “skewing” of the subjective evaluation portion of the promotional process. Plaintiffs’ Houlton Opposition at 4-5. The plaintiffs offer the findings of the Maine Labor Relations Board on this point to support this argument. Plaintiffs’ Separate Statement of Material Facts (“Plaintiffs’ SMF II”), included in Plaintiffs’ Responsive Houlton SMF, ¶ 2. The Houlton defendants deny this paragraph of the plaintiffs’ statement of material facts, Defendants’ Reply to Plaintiffs’ Separate Statement of Material Facts (Docket No. 40) ¶ 2, but the plaintiffs’ assertions are supported by the record citations they provide, and the existence of disputed facts means that the plaintiffs may avoid the entry of summary judgment insofar as the facts are material to resolution of the claim at issue. The problem here for the plaintiffs is that the case law upon which they rely, *Dennis v. Thurman*, 959 F. Supp. 1253, 1261 (C.D. Cal. 1997), Plaintiffs’ Houlton Opposition at 4-5, deals only with the test for establishing personal liability for supervisors, not with imputing that liability to a municipality. Further, even if it could be said that Malone’s actions were a foreseeable result of Bean’s alleged anti-union bias, that bias having been communicated to Malone, that fact does not resolve the question whether Bean himself took or ratified actions that violated section 1983, the only legal theory upon which the plaintiffs are proceeding here. The mere harboring of such a bias, and even the communicating of it to subordinates, does not itself constitute a constitutional violation. However, interpreting the evidence with the benefit of reasonable inferences in the plaintiffs’ favor, it is possible that a jury could conclude that “there was supervisory encouragement, condonation and even acquiescence” by Bean in Malone’s alleged unconstitutional practice based on the findings of the Maine Labor Relations Board, particularly if the evidence

presented to the Board is presented to the jury in this case. *Bordanaro v. McLeod*, 871 F.2d 1151, 1157 (1st Cir. 1989). While the plaintiffs have chosen to present minimal evidence on this point at this stage of the proceedings, *Bryan*'s "rigorous standards" must be tempered by the rules applicable to evaluation of motions for summary judgment. On balance, I conclude that the plaintiffs should be allowed to proceed against the Town on those constitutional claims that survive the instant motion on their own merits.

b. Freedom of Speech. The plaintiffs identify their First Amendment right to freedom of speech as one that was violated by the Houlton defendants, all of whom seek summary judgment on this claim. The plaintiffs do not identify the specific speech involved other than "complaints about Lieutenant Mitchell and his illegal and improper activity, as well as the speech related to the vote of no confidence of [sic] the Chief," with a supporting citation to 16 pages of the decision of the Maine Labor Relations Board. Plaintiffs' SMF II ¶4. The plaintiffs' memorandum of law cites two pages of that document not cited in their statement of material facts, Plaintiffs' Houlton Opposition at 6, so those pages may not be considered by the court in support of their position. A careful reading of the pages cited in the statement of material facts, which would not have been necessary had counsel for the plaintiffs provided the appropriate pinpoint citation, reveals the following statements concerning the instances of allegedly protected speech:

There was extensive testimony concerning the charges against the lieutenant, the AG's investigation, the proposed vote of no confidence, the additional charges against the lieutenant of assaulting two police department employees, and his eventual discharge and criminal conviction for the assaults.

* * *

This chain of events regarding the lieutenant was set in motion when Archer approached Chief Malone about the lieutenant's having falsified the police report.

* * *

Archer [and one other individual not a plaintiff here] had initiated the proposed vote of no confidence in the Chief as representatives of the police

department's union, not as concerned officers in positions of authority within the department.

* * *

We believe Chief Malone, motivated by Archer's role in the proposed vote of no confidence, reprimanded him in February, 1995, in order to begin to build a case against his advancing any further in the department.

* * *

Archer filed a grievance about this . . . prior to the promotional process in question.

MLRB Decision at 31-33. As an initial matter, it is not possible to draw a reasonable inference from this, the only evidence in the summary judgment record upon which the plaintiffs rely in support of this claim, that either O'Bar or Hyman engaged in any of the allegedly protected speech, and accordingly the defendants are entitled to summary judgment on Counts 18, 26, 30, 34, 42 and 46, which are brought by these plaintiffs.

It is difficult, in the absence of evidence of specific statements, to evaluate Archer's free-speech claims. The applicable legal standard is supplied by *Connick v. Myers*, 461 U.S. 138 (1983). First, a public employee alleging violation of his free speech rights must demonstrate that the speech at issue addressed a matter of public concern. *Id.* at 146. Whether the statement may be so characterized "must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. If the employee speaks "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, . . . 'absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.'" *Green v. City of Montgomery*, 792 F. Supp. 1238, 1251 (M.D. Ala. 1992) (quoting *Rankin v. McPherson*, 483 U.S. 378, 385 n.7 (1987)).

If a plaintiff establishes that the speech for which he allegedly suffered reprisal addresses a matter of public concern, he must then establish that the expression was a "substantial" or "motivating"

factor in the employment decision. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). If that element is established, the employer has the burden to justify its actions; the court must decide whether the detrimental impact, if any, of the speech on the interests of the public employer “in promoting the efficiency of the public services it performs through its employees” outweighs “the interests of the [employee], as a citizen, in commenting upon matters of public concern.” *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Finally, the employer may still avoid liability by demonstrating that it would have reached the same adverse decision in the absence of the protected speech. *Mount Healthy*, 429 U.S. at 287.

Here, the defendants contend that the speech alleged by Archer to be protected did not address a matter of public concern. Defendant Town of Houlton’s Motion for Summary Judgment, etc. (“Houlton Motion”) (Docket No. 12) at 5-6; Defendant Darrell Malone’s Motion for Summary Judgment (“Malone Motion”) (Docket No. 14) at 3-4; Defendant Allan Bean’s Motion for Summary Judgment (“Bean Motion”) (Docket No. 15) at 3-4. Only if the point of the speech at issue was to bring the substance of the speech to the attention of the general public might that speech be entitled to protection under *Connick*. *Linhart v. Glatfelter*, 771 F.2d 1004, 1009-10 (7th Cir. 1985). “Where personal or employee grievances are more the subject-matter of the speech than matters of public interest it is the rule that a wide degree of deference to the employer’s judgment is appropriate.” *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 879 (4th Cir. 1984). The fact that there may be some, but limited, public interest in such an issue does not bring it within *Connick*’s zone of protection. *Id.* at 880.

As noted above, the only evidence in the summary judgment record concerning speech specifically by Archer is that he told Malone that the lieutenant had falsified a police report and that Archer initiated discussion among police officers of a possible vote of no confidence in Malone.

There is no suggestion that Archer made any attempt to bring either of these matters to the attention of the general public. *See, e.g., Wallace v. City of Montgomery*, 956 F. Supp. 965, 974 (M.D. Ala. 1996) (participation in televised news conference alleging misconduct by “higher-ups” in fire department protected); *McDonald v. City of Freeport*, 834 F. Supp. 921, 930 (S.D. Tex. 1993) (providing information to newspaper regarding issuance of unauthorized warrants by dispatchers addresses a public concern). If the subject matter of the speech “relate[s] only to internal departmental employment matters which affect [the plaintiff] and other . . . employees,” it is not protected. *Broderick v. Roache*, 751 F. Supp. 290, 293 (D. Mass. 1990). Unlike the statement at issue in *Sanders v. District of Columbia*, 16 F.Supp.2d 10, 13 (D. D.C. 1998), upon which Archer relies, neither of the two statements at issue in this case involves a clear misuse of public funds. Here, the discussion among officers of the possibility of taking a vote of no confidence in their chief does not appear to be so much a matter of public concern — although the public might have some interest in knowing that such discussions had taken place — as it is a matter of internal departmental concern. The reporting to the chief of the falsification of a police report by a superior officer presents a closer question but, under the circumstances present here, including the minimal evidence appropriately included in the summary judgment record, I conclude that this speech did not address a matter of public concern.³ Accordingly, the defendants are entitled to summary judgment on Counts 2, 10 and 14.

c. Freedom of Association. None of the parties devotes much discussion to the plaintiffs’ claims of violation of their right to free association, but the applicable legal standard and the outcome are different from those set forth in the preceding discussion of the plaintiffs’ free-speech claims. The

³ Resolution of the question whether the speech at issue was constitutionally protected is a matter of law. *Connick*, 461 U.S. at 148 n.7. To the extent that the plaintiffs’ assertion that “[s]ummary judgment on this point is . . . inappropriate,” Plaintiffs’ Houlton Opposition at 6, is intended to suggest otherwise, it is incorrect.

First Amendment protects a public employee's right to engage in union activity. *International Assn. of Firefighters, Local No. 3808 v. City of Kansas City*, 220 F.3d 969, 974 (8th Cir. 2000). A public employee is shielded from retaliation by his employer on the basis of the employee's associational activity whether or not the activity relates to a matter of public concern. *Hatcher v. Board of Pub. Educ. & Orphanage*, 809 F.2d 1546, 1558 (11th Cir. 1987). The employee must demonstrate that his associational activity was a substantial or motivating factor in an adverse employment action. If he does so, the employer may avoid liability only by proving either that it would have reached the same decision in the absence of the associational activity or that the government's interest in the efficient operation of the workplace supports the challenged action. *Id.* at 1559. *See Tang v. State of Rhode Island Dep't of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998) (applying test of government interest in efficient performance in workplace to free speech claim); *Padilla-Garcia v. Guillermo Rodriguez*, 212 F.3d 69, 74 (1st Cir. 2000) (examining whether defendant has established that same action would have been taken regardless of plaintiff's protected activity in free speech case, noting that it has also been applied in context of freedom-of-association political discrimination cases).

In this case, the plaintiffs have offered sufficient evidence to allow a jury to determine that Malone acted to prevent them from being promoted due to their union activity. Plaintiffs' SMF II ¶ 1; Plaintiffs' SMF I ¶¶ 5-6, 8-11, 13-14. The Town makes no attempt to argue that the plaintiffs would not have received the promotions even if Malone had not acted as alleged.⁴ Its arguments address the second alternative: that its interest in efficient operation of the police department supports the decision to promote individuals other than the plaintiffs. To that end, the Town cites case law discussing a police department's need for *esprit de corps* and uniformity and the need for employers in small

⁴ The Town contends only that "[n]one of the Plaintiffs have established that 'but for' their union activity they would have received a promotion." Houlton Motion at 7. This assertion mistakenly places the burden of proof on the plaintiffs. In addition, the plaintiffs have submitted evidence that Archer would have received the promotion but for his union activity. Plaintiffs' SMF I ¶¶ 6, 11, 14.

offices to take adverse action against disloyal or disruptive employees. Houlton Motion at 7-8.⁵ However, it offers no evidence to support the factual inference necessary to establish the existence of such a situation in this case. Nothing in the statement of material facts submitted by the Houlton defendants or in their response to the plaintiffs' statement of material facts can reasonably be construed to establish that the plaintiffs' union activity disrupted the department, destroyed working relationships within the department or "carrie[d] the clear potential for undermining office relations." *Connick*, 461 U.S. at 152. The size of the police department is relevant only to the extent that it may make it more likely that the allegedly disruptive activity will prevent effective performance of the police department's mission. *See McBee v. Jim Hogg County*, 730 F.2d 1009, 1016-17 (5th Cir. 1984) (cited by plaintiffs). Again, the defendants have not submitted evidence demonstrating that the plaintiffs' union activity prevented or was likely to prevent effective police work in Houlton; the defendants bear the burden of producing such evidence. The size of the department, standing alone, cannot justify Malone's alleged actions. *See generally Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 454 (1st Cir. 2000) (even a "significant interference" with freedom of association may be upheld if state demonstrates "sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms").

The remaining Houlton defendants are not entitled to summary judgment on the plaintiffs' freedom-of-association claims, Counts 1, 9, 13, 17, 25, 29, 33, 41 and 45.

d. Substantive Due Process. The defendants contend that the plaintiffs' substantive due claims duplicate their First Amendment claims and accordingly "should be dismissed." Houlton Motion at 9. The plaintiffs respond that they are allowed to plead claims in the alternative and, should summary judgment be granted on their First Amendment claims, they must be allowed to proceed with their

⁵ These arguments are adopted by reference by Bean and Malone. Malone Motion at 4; Bean Motion at 4.

substantive due process claims. Plaintiffs' Houlton Opposition at 6-7. The plaintiffs rely on a selective quotation from the First Circuit's opinion in *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992), *id.* at 7, but the court in that case was not addressing the issue presented here. To the extent that any portion of the plaintiffs' direct First Amendment claims remains viable, however, the cited *dictum* does have relevance: "Should [the First Amendment] claim turn out to be viable . . . there is obviously no need to enter the uncharted thicket of substantive due process to find an avenue for relief." 964 F.2d at 46.

The Supreme Court has held that substantive due process analysis is inappropriate if the claim at issue is covered by a specific constitutional provision. *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998); *Graham v. Connor*, 490 U.S. 386, 395 (1989). *See Parella v. Retirement Bd. of Rhode Island Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999). This test is applied when the claims are brought, not after determining whether the plaintiff has submitted sufficient evidence to avoid the entry of summary judgment on the claim that does not invoke substantive due process. *See, e.g., Cignetti v. Healy*, 89 F.Supp.2d 106, 124 (D. Mass. 2000) (free speech claim; summary judgment granted); *El Dia, Inc. v. Rossello*, 30 F.Supp.2d 160, 174 (D. P.R. 1998) (free speech claim, granting judgment on the pleadings); *Silva v. University of New Hampshire*, 888 F. Supp. 293, 325-26 (D. N.H. 1994) (free speech claim, granting summary judgment).

The defendants are entitled to summary judgment on the plaintiffs' substantive due process claims, Counts 3, 11, 15, 19, 27, 31, 35, 43 and 47.

e. Procedural Due Process. The plaintiffs' final constitutional claims invoke the doctrine of procedural due process. In order to avoid summary judgment on a procedural due process claim, the plaintiffs must show that they had a property interest defined by state law and that the defendants, acting under color of state law, deprived them of that interest without adequate process. *Licari v.*

Ferruzzi, 22 F.3d 344, 347 (1st Cir. 1994). The defendants contend that the plaintiffs had no property interest in the promotions they sought. Houlton Motion at 10-11. In response, the plaintiffs cite to no statute or contract that creates a property interest in any of the promotions at issue. Instead, they contend that, because it was “the practice in 1995, as well as in previous years, to promote the highest scoring candidate,” their level of expectancy arose to a property right. Plaintiffs’ Houlton Opposition at 8. The first problem with this argument is that the plaintiffs have submitted evidence only that Archer would have been the highest-scoring candidate for the position he sought were it not for Malone’s evaluation. Plaintiffs’ SMF I ¶ 14. The argument is without factual support in the summary judgment record for plaintiffs O’Bar and Hyman, and accordingly summary judgment should be entered on their claims. The second problem with the argument is that the defendants have submitted evidence to the effect that one individual who was not the highest scoring candidate was promoted from dispatch to patrol officer in the Houlton police department in 1995. Defendants’ Reply to Plaintiffs’ Separate Statement of Facts (Docket No. 40) ¶ 5.

In addition, Maine law strongly suggests that the plaintiffs had no property interest in the promotions. “[A] public employee has no property interest sufficient to invoke the Fourteenth Amendment’s due process guarantees unless the applicable statute or employment contract requires that employment may be terminated only on a showing of ‘cause.’” *Cook v. Lisbon Sch. Comm.*, 682 A.2d 672, 676 (Me. 1996). While the instant case does not, as did *Cook*, concern termination or the question whether one has a property interest in continued employment, a similar rationale applies. The Law Court has held that an individual has no property right in particular job duties. *Pratt v. Ottum*, 761 A.2d 313, 319 (Me. 2000). It is a minor, logical step to conclude that the Law Court would hold that there is no property interest in a promotion, at least absent an objectively reasonable expectation of such a promotion. *Cook*, 682 A.2d at 676. The plaintiffs have not shown that they had

“an objectively reasonable expectation” of promotion, whether by express promises or representations made to them, by the absence of other candidates for the positions, or, with the possible exception of Archer, by showing that they would have had the highest score among applicants but for Malone’s unreasonably low subjective evaluation scores. Even Archer’s claim must fail due to the evidence that promotions in the Houlton Police Department did not always go to the individual who achieved the highest overall score in the promotional process.⁶

Because the plaintiffs had no property interest in the positions at issue, the defendants are entitled to summary judgment on their procedural due process claims, Counts 4, 12, 16, 20, 28, 32, 36, 44, and 48.

f. Qualified Immunity — Malone and Dean. Defendants Malone and Dean contend that they are entitled to qualified immunity from the constitutional claims raised by the plaintiffs. “[G]overnment 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). “Under this standard, the reasonableness of the official conduct is not measured against the official’s *actual* knowledge of constitutional standards and the probable constitutionality of his or her action, but rather against a relatively uniform level of ‘presumptive knowledge’ of constitutional standards.” *Floyd v. Farrell*, 765 F.2d 1, 4 (1st Cir. 1985) (emphasis in original; citation omitted).

The right alleged to have been violated must have been clearly established as of the time of the alleged violation and the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

⁶ The fact that Bean would have promoted Archer if he had had the highest score among candidates for the sergeant detective position, Houlton’s SMF ¶ 84; Plaintiffs’ Responsive Houlton SMF ¶84, is not relevant in this context. The standard set by the Law Court is the plaintiff’s reasonable expectation that he would be promoted, irrespective of the actual scores awarded or what the appointing authority intended to do.

Singer v. State of Maine, 49 F.3d 837, 844 (1st Cir. 1995). See also *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). Here, the constitutional right at issue is the right to freedom of association, which extends to union membership and activity. It cannot be said that in 1995 it was objectively reasonable for a person in the position of Malone or Bean not to have known that this well-established constitutional right existed or that their conduct, if it occurred as alleged by the plaintiffs in their statements of material facts, violated that right.

Malone and Bean understandably do not address the application of this legal standard directly, arguing instead in conclusory fashion that they had “legitimate reasons” for denying promotions to the plaintiffs, Malone Motion at 7, Bean Motion at 7, presumably in addition to their allegedly objectionable reason. They cite no authority for the proposition, essential to their argument, that a public official who otherwise violates a clearly established constitutional right may nonetheless enjoy qualified immunity if he can provide, after the fact, an alternative basis for his action that would not violate any such right. If this were an accurate statement of the law, almost every action of a public official challenged on constitutional grounds would be immunized. The fact that the courts have used the term “arguable” for the presence of probable cause in cases challenging arrests or searches when a constitutional claim is raised, *e.g.*, *Floyd*, 765 F.2d at 5 (cited by the defendants), does not affect this analysis. Evaluation of the existence of probable cause implicates an officer’s “arguable” basis for his actions that is not necessarily implicated when other constitutional rights are at issue.

Malone and Bean are not entitled to qualified immunity from the remaining constitutional claim asserted by the plaintiffs.

2. State-Law Issues

The complaint alleges various state-law torts against Malone and Bean. As an initial matter, each claims immunity under the Maine Tort Claims Act. Malone Motion at 8-10, Bean Motion at 8-10.

a. Discretionary Function Immunity. The complaint alleges that Malone interfered with the plaintiffs' advantageous relationships, intentionally inflicted emotional distress and negligently inflicted emotional distress. Complaint Counts 49, 51, 53, 66, 70, 74, 78, 82, 86. The same claims are made against Bean, as well as a claim that he negligently retained Malone as police chief. *Id.* Counts 50, 52, 54, 57, 60, 63, 67, 71, 75, 79, 83, 87. Both Malone and Bean rely on 14 M.R.S.A. § 8111(1)(C) as the source of an immunity which they contend bars these claims. That statute provides, in relevant part:

1. Immunity. 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.

14 M.R.S.A § 8111(1). The plaintiffs take the position that this immunity is not available to Malone and Bean under the circumstances of this case. Plaintiffs' Houlton Opposition at 9-11.

“Immunity pursuant to the discretionary function immunity is applicable whenever a discretionary act is reasonably encompassed by the duties of the governmental employee in question.”

Gove v. Carter, 775 A.2d 368, 372 (Me. 2001) (citation and internal quotation marks omitted). Here, Bean’s act of appointing others to the positions in question is explicitly included in the statutory scope of his duties as a town manager.

The town manager:

* * *

6. Appoint town officials. Unless otherwise provided by town ordinance, shall appoint, supervise and control all town officials whom the municipal officers are required by law to appoint . . . and appoint, supervise and control all other officials, subordinates and assistants, except that the town manager may delegate this authority to a department head and report all appointments to the board of selectmen.

30-A M.R.S.A. § 2636(6). The evidence in the summary judgment record also establishes that a policy of the Town, specifically the promotional process at issue, required Malone to evaluate the plaintiffs, along with other candidates for the positions available. Houlton’s SMF ¶¶ 36-37, 41, 58-60; Plaintiffs’ Responsive Houlton SMF ¶¶ 36-37, 41, 58-60.

However, acts that violate a policy of the governmental agency by which the defendant is employed and that are not essential to accomplish any basic governmental policy, program or objective are not protected by section 8111(1)(C). *Rippett v. Bemis*, 672 A.2d 82, 88 (Me. 1996); *Gove*, 775 A.2d at 373 (suggesting that violations of ordinance or statute are similarly unprotected). Here, the plaintiffs have submitted no evidence that Bean’s actions in connection with the appointment of officers to the new positions violated any policy, ordinance or statute. The plaintiffs do contend that Bean and Malone’s “intentional infringement of the Plaintiffs’ First Amendment rights of freedom of speech and freedom of association” was so egregious that as a matter of law it exceeded the scope of any discretion that either could have possessed in his official capacity. Plaintiffs’ Houlton Opposition at 10-11.

The protection of section 8111 does not extend to conduct so egregious that it exceeds as a matter of law the scope of any discretion that the government employee could have possessed in his or her official capacity. *Bowen v. Department of Human Servs.*, 606 A.2d 1051, 1055 (Me. 1992). While exceptions to governmental immunity under the Maine Tort Claims Act are to be strictly construed, *Grossman v. Richards*, 722 A.2d 371, 375 (Me. 1999),

[i]n cases where the questioned conduct has little or no purely governmental content but instead resembles decisions or activities carried on by people generally, there is an objective standard for judgment by the courts and the doctrine of discretionary immunity does not bar the action.

Adriance v. Town of Standish, 687 A.2d 238, 241 (Me. 1996) (citation and internal quotation marks omitted). I do not agree with the plaintiffs' contention that Bean and Malone's conduct in the promotional process so resembles activities carried on by people generally that it has little or no purely governmental content, so that the doctrine is not applicable. Plaintiffs' Houlton Opposition at 10. The fact that appointment of police officers is specifically governed by statute is evidence to the contrary, as is the nature of those positions, which are uniquely governmental. Still, the evidence in the summary judgment record to support the plaintiffs' allegations that Bean and Malone acted with the intent to punish union activity, interpreted with the benefit of all reasonable inferences in favor of the plaintiffs, brings these claims outside the discretionary function immunity because such actions would be beyond the scope of any discretion that either defendant would have possessed in his official capacity.

Accordingly, Bean and Malone are not entitled to immunity under the Maine Tort Claims Act.

b. Interference with Advantageous Relationship. The complaint alleges that each plaintiff "had an advantageous relationship arising from his employment with the Department and had the prospect of continued employment with promotion" and that both Bean and Malone "intentionally interfered with

[the] advantageous relationship through fraud and intimidation.” Complaint Counts 49-54.⁷ Bean and Malone contend that the plaintiffs cannot establish the elements of this tort. Malone Motion at 10-11; Bean Motion at 10-11.

Under Maine law,

[i]nterference with an advantageous relationship requires the existence of a valid contract or prospective economic advantage, interference with that contract or advantage through fraud or intimidation, and damages proximately caused by the interference.

Barnes v. Zappia, 658 A.2d 1086, 1090 (Me. 1995). Here, there is no evidence of a contract entitling the plaintiffs to the promotions and there is no evidence of intimidation. It is not clear from the plaintiffs’ brief discussion of this issue, Plaintiffs’ Houlton Opposition at 11, but it can reasonably be inferred that the advantageous relationship at issue is the prospective economic advantage of a promotion, presumably accompanied by higher pay. The plaintiffs do make clear that they are proceeding on a theory that the interference was accomplished by fraud, consisting of “those facts implied in the improperly skewed Chief’s Evaluations,” and Bean’s aiding and abetting of this fraud.

Id.

A person is liable for fraud in the context of an interference claim

if the person (1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.

Grover v. Minette-Mills, Inc., 638 A.2d 712, 716 (Me. 1994). The plaintiffs identify the person to whom the false representation was made as the Maine Municipal Association. Plaintiffs’ Houlton Opposition at 11. There are several problems with the plaintiffs’ position.

⁷ The complaint does not identify the other party to any of these alleged relationships.

First, the plaintiffs do not identify any false representation, referring only to “facts implied” in Malone’s subjective evaluations. All that is included in the plaintiffs’ statements of material facts are allegations that Malone “skewed” his evaluation scores “to an artificially low level to deny each of the three Plaintiffs the sought after promotion,” Plaintiffs’ SMF II ¶ 1; that the evaluation scores given by Malone were directly related to the degree of the applicant’s union activity, Plaintiffs’ SMF I ¶ 6; that Malone ensured that his ratings of the plaintiffs were low enough to defeat their chances of promotion, *id.* ¶¶ 8, 10; and that Malone’s “skewing” of the evaluation scores was purposeful, *id.* ¶ 13. A subjective evaluation, by its nature, is subjective; it cannot be “false.” Giving the plaintiffs the benefit of reasonable inferences does not extend to the inference sought by the plaintiffs here — that false representations of fact were necessarily implied by the allegedly artificially low scores.

Even if that were not the case, the plaintiffs’ position suffers from the additional problem that it cannot reasonably be said that the Maine Municipal Association “relied on” Malone’s evaluations in any way. The summary judgment record establishes that the Association merely included those scores in its summary of the scores on the written tests and oral boards and the points awarded for security. The alleged damage to the plaintiffs was caused by the evaluation scores themselves, not by the fact that the Association included those scores in its final tally. Adding the scores was merely a ministerial act by the Association, which was not “induced” to act in any way by the content of those evaluations.

Bean and Malone are entitled to summary judgment on Counts 49-54.

c. Negligent Retention. The complaint alleges that Bean should have removed Malone as chief of police in order to protect the plaintiffs from discrimination based on their union activity, and that he owed them a duty of care to do so. Complaint Counts 57, 60, 63. Bean contends that the plaintiffs

cannot prove the elements of this tort. Bean Motion at 11-12. In a response so brief as to raise the possibility of waiver, the plaintiffs describe this claim as

center[ing] around whether or not, upon being presented with clear evidence of the skewing of the test results, [Bean] should have taken steps to cure the problem by discharging Defendant Malone at that point.

Plaintiffs' Houlton Opposition at 11. The first problem for the plaintiffs is the absence from their statements of material facts of any evidence that Bean was "presented with clear evidence of the skewing of the test results."

A more basic problem is presented by the only description of this tort in Maine case law cited by the parties. In *Cote v. Jay Mfg. Co.*, 115 Me. 300 (1916), the claim was described as an exception to the fellow servant rule, allowing an employee to recover against his employer for injuries caused by a fellow employee if the employer "could be proven guilty of negligence in employing [the fellow employee] or retaining him in its employ." *Id.* at 302. The Law Court made clear that its discussion of this exception was *dicta*. *Id.* at 303. The Law Court identified the elements of the exception as

first, that [the fellow employee] was incompetent; and, second, that the master knew that fact, or by the use of reasonable diligence should have known it.

Id. at 304. The Law Court also made clear that the fellow employee's negligence at the time of the injury could not establish his incompetence. Contrary to the plaintiffs' formulation of the issue as whether Bean should have fired Malone after he became aware of the act that allegedly caused the plaintiffs injury, the Law Court appears to contemplate evidence of incompetence available to the employer before the injury-causing act. *See also Robbins v. Lewiston, A. & W. St. Ry.*, 107 Me. 42, 47-48 (1910); *Leftwich v. Gaines*, 521 S.E.2d 717, 726 (N.C. App. 1999). Here, the plaintiffs offer no evidence of Malone's incompetence either before or after he allegedly deliberately gave the plaintiffs scores so low on his subjective evaluation that they could not receive the promotions they sought other

than by that act itself. Anti-union bias does not constitute incompetence, which is generally defined as “[t]he state or fact of being unable or unqualified to do something.” *Black’s Law Dictionary* (7th ed. 1999) at 768. Even assuming that the Law Court would recognize this tort, and further assuming that it would find the cause of action viable in the context of public employment, *see, e.g., Infurna v. City of New York*, 703 N.Y.S.2d 478, 479 (N.Y. App. Div. 2000), and outside the fellow-servant rule, the plaintiffs have not provided sufficient evidence to establish the elements of the claim, even with the benefit of all reasonable inferences in their favor.

Bean is entitled to summary judgment on Counts 57, 60 and 63.

d. Intentional and Negligent Infliction of Emotional Distress. The complaint alleges that Bean and Malone inflicted emotional distress on each of the plaintiffs, both intentionally and negligently. Complaint Counts 66-67, 70-71, 74-75, 78-79, 82-83 & 86-87. Bean and Malone contend that the plaintiffs cannot provide sufficient evidence to establish the elements of either claim. Malone Motion at 11-12; Bean Motion at 12. The plaintiffs’ opposition is again minimal. Plaintiffs’ Houlton Opposition at 12.

Under Maine law,

in order to recover for the intentional infliction of emotional distress, a plaintiff must establish that (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff’s emotional distress; and (4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it.

Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154 (Me. 1979) (citations and internal quotation marks omitted). On this claim, Bean and Malone merely argue that “a reasoned process of decision making could not be considered extreme and outrageous conduct that would give rise to severe

emotional distress,” Malone Motion at 11, apparently as a matter of law. The evidence in the summary judgment record allows a reasonable factfinder to conclude that “a reasoned process of decision making” did not occur in this case; it is the gravamen of the complaint that the process of decision making was deliberately perverted by Bean and Malone, resulting in damage to the plaintiffs. Still, the summary judgment record does not include sufficient evidence to support a finding that either Malone or Bean engaged in conduct that was “ so extreme and outrageous as to exceed all possible bounds of decency” and which could only be regarded as “atrocious, and utterly intolerable in a civilized community.” *Vicnire*, 401 A.2d at 154. *See also Loe v. Town of Thomaston*, 600 A.2d 1090, 1091, 1093 (Me. 1991) (publication of terms of settlement of grievance over termination of town employee not extreme and outrageous); *Latremore v. Latremore*, 584 A.2d 626, 630 (Me. 1990) (threats to evict aged and ill parents, sending them monthly bills over \$3,000 and demanding total of over \$100,000, making vicious remarks to father regarding father’s mental condition and eliciting sister’s aid in having father declared mentally incompetent sufficient to allow finding of extreme and outrageous conduct); *Staples v. Bangor Hydro-Elec. Co.*, 561 A.2d 499, 501 (Me. 1989) (humiliating plaintiff at staff meetings and demoting him without cause insufficient). Accordingly, Bean and Malone are entitled to summary judgment on Counts 66, 67, 70, 71, 74 and 75.

In order to recover on a claim of negligent infliction of emotional distress, a plaintiff must establish

one, that the defendant was negligent, that is that the defendant acted or failed to act in a manner which a reasonably prudent person or corporation would act in the management of their affairs taking into account all of the circumstances of this case; two, that emotional distress to the plaintiff was a reasonably foreseeable result of the defendant’s negligent act; and, three, that the plaintiff suffered serious emotional distress as a result of the defendant’s negligence.

Gayer v. Bath Iron Works Corp., 687 A.2d 617, 622 (Me. 1996) (citation omitted). Bean and Malone argue only that “the completion of an evaluation cannot be said to cause the foreseeable emotional distress contemplated by the common law.” Malone Motion at 12. To the contrary, the completion of an evaluation in a manner calculated to deprive the plaintiffs of a benefit to which they might otherwise have been entitled can cause foreseeable emotional distress. This is Bean and Malone’s only argument in support of their motion for summary judgment on this claim, which accordingly must fail.

f. Punitive Damages. The plaintiffs agree that their claim for punitive damages against the Town must fail insofar as such damages are sought on claims brought under 42 U.S.C. § 1983. Plaintiffs’ Houlton Opposition at 12; *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). Since all claims other than those brought under section 1983 have been “voluntarily dismiss[ed]” by the plaintiffs, *id.* at 1-2, the Town is entitled to summary judgment on all of the plaintiffs’ claims against it for punitive damages.

Bean and Malone seek summary judgment on the punitive damages claims as well. Malone Motion at 16-17; Bean Motion at 14-15. On the claims brought pursuant to 42 U.S.C. § 1983, punitive damages are available where there is proof of the defendant’s reckless or callous disregard for the plaintiff’s rights or intentional violation of federal law. *Smith v. Wade*, 461 U.S. 30, 51 (1983). There is sufficient evidence in the summary judgment record to allow a factfinder to determine that Bean and Malone recklessly or callously disregarded the plaintiffs’ First Amendment right to freedom of association. *See generally Acosta-Sepulveda v. Hernandez-Purcell*, 889 F.2d 9, 10-11, 13 (1st Cir. 1989) (discussing evidence held sufficient to support award of punitive damages for violation of rights of free speech and freedom of association when political affiliation was reason for adverse employment action).

With respect to the state-law claims, punitive damages are available upon a showing of express or actual malice, or of deliberate conduct so outrageous that malice toward a person injured as a result of that conduct can be implied. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). Proof of malice requires clear and convincing evidence. *Boivin v. Jones & Vining, Inc.*, 578 A.2d 187, 189 (Me. 1990). The evidence in the summary judgment record regarding Bean's conduct does not satisfy this standard.⁸ However, the evidence in the summary judgment record would allow a reasonable inference to be drawn of malice on the part of Malone.

Bean is entitled to summary judgment on the plaintiffs' claims for punitive damages on the state-law claims. In all other respects, the motions of Bean and Malone for summary judgment on the punitive damages claims should be denied.

D. Conclusion

For the foregoing reasons, I recommend (i) that the plaintiffs' motion for partial summary judgment be **DENIED**; (ii) that the motion of defendant Maine Municipal Association be **GRANTED**; (iii) that the motion of the Houlton Police Department for summary judgment be **GRANTED**; (iv) that the motion of the Town of Houlton for summary judgment be **GRANTED** as to Counts 2, 3, 4, 18, 19, 20, 34, 35, 36, 55, 58, 61, 64, 68, 72, 76, 80, 84, 88, 92, 96, 106, 107 and 108 and otherwise **DENIED**; (v) that the motion of Defendant Malone be **GRANTED** as to Counts 10, 11, 12, 26, 27, 28, 42, 43, 44, 49, 51, 53, 66, 70 and 74 and otherwise **DENIED**; and (vi) that the motion of Defendant Bean be **GRANTED** as to Counts 14, 15, 16, 30, 31, 32, 46, 47, 48, 50, 52, 54, 57, 60, 63, 67, 71 and 75 and any claims for punitive damages on state-law claims in Counts 106-08, and otherwise **DENIED**. Remaining for trial if the court adopts my recommendations will be Counts 1, 9, 13, 17,

⁸ The only entry in the plaintiffs' statements of material facts that might allow the drawing of an inference concerning malice on the part of Bean, Plaintiffs' SMF I ¶ 7, is not supported by the citation given in support of it.

25, 29, 33, 41, 45, 78, 79, 82, 83, 86 and 87 and 106-08 as to Bean and Malone with respect to the federal claims and to Malone with respect to the state-law claims.

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.

Date this 12th day of September, 2001.

David M. Cohen
United States Magistrate Judge

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