

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JEFFREYTON BAILEY,)
)
 Plaintiff)
)
 v.) **Civil No. 01-82-P-C**
)
 JAMES McCARTHY,)
)
 Defendant)

**RECOMMENDED DECISION ON DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM DECISION ON REQUEST TO STRIKE**

Defendant Maine state trooper James McCarthy moves for summary judgment as to all claims against him in this action arising from his stop and search of plaintiff Jeffreyton Bailey’s vehicle on February 23, 2001. Defendant James McCarthy’s Motion for Summary Judgment, etc. (“Motion”) (Docket No. 14) at 1-2; *see generally* Complaint for Relief (“Complaint”) (Docket No. 1). Incident thereto, McCarthy presses the court to disregard the entirety of Bailey’s opposing papers on the ground of untimely filing. Defendant’s Reply to Plaintiff’s Motion in Opposition to Summary Judgment, etc. (“Reply”) (Docket No. 26) at 1-2. For the reasons that follow, I disregard Bailey’s opposing papers and recommend that the Court grant the Motion as to Count I, which asserts federal claims pursuant to 42 U.S.C. § 1983, and decline to exercise its supplemental jurisdiction as to the remaining two counts, which set forth state-law claims of intentional infliction of emotional distress (Count II) and false imprisonment (Count III). *See* Complaint ¶¶ 3-26.

I. Request To Strike

McCarthy filed the instant motion on November 27, 2001. *See* Motion at 1. Local Rule 7, as amended March 1, 2001, affords a period of “twenty-one (21) days after the filing of a motion” to file papers in opposition. Loc. R. 7(b). No additional time is added for mailing. Loc. R. 7(d). In computing time, the day of the event from which the designated period of time begins to run is excluded, but the last day of the period computed is included unless it falls on a Saturday, Sunday, legal holiday or other day on which the clerk’s office is inaccessible. Fed. R. Civ. P. 6(a). Bailey’s opposing papers therefore were due (as reflected in the court’s electronic docket) on December 18, 2001. They were filed two days late, on December 20, 2001. *See* Plaintiff Jeffreyton Bailey’s Motion in Opposition to Summary Judgment, etc. (“Opposition”) (Docket No. 22) at 1; Plaintiff’s Statement of Material Facts in Dispute in Oposition [sic] to Defendant’s Motion for Summary Judgement [sic] (“Plaintiff’s Opposing SMF”) (Docket No. 23) at 1.

As McCarthy points out, *see* Reply at 2, Bailey did not accompany his late filing with a motion to enlarge time nor offer any explanation for his delay. Nor, to date, has he done so. Per Fed. R. Civ. P. 6(b), “the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect[.]” No motion having been made and no excuse having been tendered, Bailey’s papers merit disregard. *See, e.g., Maine v. United States Dep’t of Interior*, 124 F. Supp.2d 728, 735 (D. Me. 2000) (“The excusable neglect standard [of Fed. R. Civ. P. 6(b)] takes all relevant circumstances into account, but it does not relieve a defendant from setting forth some reason for the delay.”).

In any event, even were Bailey’s papers not tardily filed without proffer of excuse, their disregard would be warranted on the basis of significant nonconformance with Loc. R. 56. For

example, Bailey strews a number of asserted facts throughout the body of his opposing brief. *See* Opposition at 8-16. Such facts are not cognizable. *See, e.g., Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995) (“The parties are bound by their [Local Rule 56] Statements of Fact and cannot challenge the court’s summary judgment decision based on facts not properly presented therein.”). In addition, Bailey consistently purports to “admit” certain of McCarthy’s statements by rephrasing them in such a manner as to introduce additional facts. *Compare generally* Defendant James McCarthy’s Statement of Material Facts in Support of His Motion for Summary Judgment (“Defendant’s SMF”) (Docket No. 15) *with* Plaintiff’s Opposing SMF. An admission should be just that – an admission, unvarnished. Additional facts are required to be set forth in a “separate section.” Loc. R. 56(c).

Practices such as these contravene not only the letter but also the spirit of the rule, key purposes of which are to focus the issues and to conserve the time of counsel and the court. Indeed, it is evident that counsel for McCarthy, understandably reluctant to assume that the court would grant her request to strike, expended considerable energy addressing not only the substance but also the flawed presentation of Bailey’s asserted facts. *See generally* Defendant’s Response to Plaintiff’s Statement of Material Facts (“Defendant’s Reply SMF”) (Docket No. 24).¹ Such practices warrant serious sanctions, including the striking of the offending opposing statement of material facts.

For the foregoing reasons, Bailey’s papers filed in opposition to the instant motion are disregarded.

¹ In addition to these transgressions, McCarthy complains *inter alia* that certain of Bailey’s asserted facts are not supported by citations to “record” material, as required by Loc. R. 56, and that even if the materials cited were of evidentiary quality, “[t]he Plaintiff repeatedly includes record citations that in no way support the factual assertions presented,” with these “misleading citations,” in McCarthy’s view, possibly “ris[ing] to the level of bad faith contemplated by Fed. R. Civ. P. 56(e) and/or Fed. R. Civ. P. 11.” Defendant’s Reply SMF ¶ 2 & n.1. It would be a needless exercise, and an additional waste, for the court to seek to verify the truth of McCarthy’s assertions; however, if true, such serious transgressions also independently would justify the complete disregard of Bailey’s opposing papers.

II. Applicable Legal Standards

The striking of Bailey's opposing papers does not in itself entitle McCarthy to summary judgment in his favor. "The failure of the nonmoving party to respond to a summary judgment motion does not in itself justify summary judgment." *Lopez v. Corporaci?n Azucarera de Puerto Rico*, 938 F.2d 1510, 1517 (1st Cir.1991). "Rather, before granting an unopposed summary judgment motion, the court must inquire whether the moving party has met its burden to demonstrate undisputed facts entitling it to summary judgment as a matter of law." *Id.* (citations, internal quotation marks and brackets omitted).

III. Factual Context

Per Loc. R. 56(e), the following statements of fact offered by McCarthy are deemed admitted inasmuch as properly supported by the record citations given:

McCarthy is a Maine state trooper, a position he has held since 1997. Defendant's SMF ¶ 1; Affidavit of James McCarthy in Support of Defendant's Motion for Summary Judgment ("McCarthy Aff.") (Docket No. 16) ¶ 1. On February 23, 2001, as dusk approached at 4:27 p.m., McCarthy was patrolling Interstate 295 northbound in his marked police cruiser. Defendant's SMF ¶ 2; McCarthy Aff. ¶ 2. He observed a Honda with heavily tinted windows traveling in front of him. *Id.* He believed that the Honda's window tint violated 29-A M.R.S.A. § 1916. Defendant's SMF ¶ 2; McCarthy Aff. ¶¶ 2-3.

Because McCarthy could not see inside the vehicle, for safety reasons he radioed dispatch to verify that there were no outstanding warrants for the vehicle's owner. Defendant's SMF ¶ 3; McCarthy Aff. ¶ 2. When he determined that there were no known warrants, he stopped the vehicle at approximately mile marker 56 northbound to determine the legality of the window tint. *Id.* He did not know the race of any of the vehicle's occupants until he approached the vehicle. *Id.* When McCarthy approached the vehicle, he observed that there were two male occupants. Defendant's SMF ¶ 4; McCarthy Aff. ¶ 3. The passenger was not wearing his seatbelt. *Id.* McCarthy told the driver that he

pulled him over because he believed the vehicle's windows were tinted in violation of the law (29-A M.R.S.A. § 1916). *Id.*

McCarthy asked the driver for his license, registration, proof of insurance and certificate of compliance for his window tint; he also asked the passenger for identification. *Id.* The driver provided the requested documentation, including a Maine license that identified him as Jeffreyton Bailey and a certificate of compliance that indicated the vehicle's windows were tinted in accordance with Maine law. Defendant's SMF ¶ 4; McCarthy Aff. ¶¶ 4-5. Bailey offered that he was traveling from Portland to Lewiston. Defendant's SMF ¶ 4; McCarthy Aff. ¶ 4. The passenger provided a Maine State Identification Card that identified him as Larry Lagueux and informed McCarthy that his license was suspended. *Id.*

McCarthy returned to his cruiser and inquired into the status of Bailey and Lagueux. Defendant's SMF ¶ 5; McCarthy Aff. ¶ 5. McCarthy learned that Lagueux's license was in fact suspended and that he was a classified habitual offender. *Id.* Before leaving his cruiser, McCarthy decided that he would ask Bailey for consent to search the vehicle; he radioed trooper George Loder to see if Loder could assist with the consent search. *Id.* Loder had been a Maine state trooper since June 1994. Defendant's SMF ¶ 5; Affidavit of George Loder in Support of Defendant's Motion for Summary Judgment ("Loder Aff.") (Docket No. 17) ¶ 1.

McCarthy returned to Bailey's vehicle and issued Lagueux a summons for not wearing his seatbelt. Defendant's SMF ¶ 6; McCarthy Aff. ¶ 6. He returned both Bailey's documentation and Lagueux's identification. *Id.* He then asked Bailey if there was anything illegal in the vehicle. Defendant's SMF ¶ 6; McCarthy Aff. ¶ 7. When Bailey denied that there was, McCarthy asked for consent to search the vehicle. *Id.* Lagueux spoke up that he did not object to the search. *Id.*; Affidavit of Larry Lagueux ("Lagueux Aff.") (Docket No. 19) ¶ 5. Bailey also agreed, and both he and Lagueux

exited the vehicle without voicing any objection. *Id.*; Deposition of Jeffreyton Bailey (“Bailey Dep.”), filed with Motion, at 8-9, 115.

As Bailey and Lagueux were getting out of the vehicle, Loder arrived on the scene. Defendant’s SMF ¶ 6; Loder Aff. ¶ 2. When Lagueux was exiting the vehicle, McCarthy discovered that he had an open bottle of beer. Defendant’s SMF ¶ 7; McCarthy Aff. ¶ 8. McCarthy dumped the beer out, then asked Lagueux and Bailey to stand in front of the car, positioning them apart from each other so that they could not communicate. *Id.* McCarthy then explained to Bailey that he was legally responsible for his passenger’s open container of alcohol. *Id.*

Loder stood with Lagueux and Bailey while McCarthy searched the vehicle. Defendant’s SMF ¶ 8; Loder Aff. ¶ 3. Loder asked both Bailey and Lagueux where they were from, meaning a location in Maine. *Id.* Bailey misunderstood him and responded, “Jamaica.” *Id.* Loder then told him that he meant where in Maine, and asked whether Bailey was a U.S. citizen. *Id.* Bailey told Loder that he was not. *Id.*

During his search, McCarthy found an outdated prescription bottle containing Oxycodone in the trunk of Bailey’s car. Defendant’s SMF ¶ 9; McCarthy Aff. ¶ 9. He also found a prescription bottle containing approximately twenty capsules under the driver’s seat, with the label completely torn from the bottle. *Id.* In addition, he discovered a small brown substance in the shape of a cube located in a small plastic bag in the glove box. *Id.* At that time, Loder placed Bailey and Lagueux in handcuffs. Defendant’s SMF ¶ 10; McCarthy Aff. ¶ 9. Bailey then advised that the unlabeled bottle belonged to Andrea Robinson. *Id.*; Bailey Dep. at 53. Bailey also stated that the brown substance was not an illegal drug, but rather a substance used to stay awake. Defendant’s SMF ¶ 10; McCarthy Aff. ¶ 9. As a result of Bailey’s admissions, Loder removed Lagueux’s handcuffs. *Id.*

McCarthy then radioed dispatch and requested that a drug detection dog assist with the search. Defendant's SMF ¶ 11; McCarthy Aff. ¶ 11. Trooper Roger Teachout and K-9 Apache ("Apache") arrived shortly thereafter. *Id.* Teachout, who has been a Maine state trooper for twelve years, has been assigned to a drug detection dog for the past six years. Defendant's SMF ¶ 11; Affidavit of Roger Teachout in Support of Defendant's Motion for Summary Judgment ("Teachout Aff.") (Docket No. 18) ¶ 1. When Teachout arrived on the scene, he spoke to McCarthy about the events leading up to the consent search. Defendant's SMF ¶ 11; Teachout Aff. ¶ 3.

Teachout then directed Apache to do an exterior sniff of the vehicle. Defendant's SMF ¶ 12; Teachout Aff. ¶ 4. Apache indicated in the vicinity of the driver's door handle. *Id.* Teachout then allowed Apache to search the interior of the vehicle. *Id.* Apache moved to the back seat area and displayed much interest by sniffing intensely. *Id.* Apache did not indicate on the seat but did indicate on a cooler. *Id.* Teachout searched the cooler, but the search did not yield any drugs or contraband. *Id.* McCarthy, Loder and Teachout conducted a search of the back-seat area. Defendant's SMF ¶ 13; Teachout Aff. ¶ 5. The troopers lifted up the back seat and did not discover any additional drugs. *Id.* Loder found a yellow wire under the rear seat that did not appear to lead anywhere. Defendant's SMF ¶ 13; McCarthy Aff. ¶ 11. He pulled the wire, believing that it may have been connected to a hidden compartment. Defendant's SMF ¶ 13; Loder Aff. ¶ 5. The wire, which simply came out, was subsequently discovered to have been attached to stereo equipment in the trunk. Defendant's SMF ¶ 13; Loder Aff. ¶ 5; McCarthy Aff. ¶ 11.

McCarthy arrested Bailey for illegal possession of a schedule Z drug in violation of 17-A M.R.S.A. § 1107. Defendant's SMF ¶ 14; McCarthy Aff. ¶ 13. He transported Bailey to the Cumberland County Jail without incident. *Id.* Bailey was held there for approximately one hour

before being released. Defendant's SMF ¶ 14; Bailey Dep. at 60. Bailey's car was towed from the scene. Defendant's SMF ¶ 14; McCarthy Aff. ¶ 13.

McCarthy conducted the search of Bailey's vehicle in accordance with state police procedure and his own practice with respect to consent searches. Defendant's SMF ¶ 15; McCarthy Aff. ¶ 15. He caused no damage to Bailey's vehicle during the consent search. Defendant's SMF ¶ 15; McCarthy Aff. ¶ 12. He never used racial slurs during his contact with Bailey, and his conduct was not motivated by racial animus or bias. Defendant's SMF ¶ 15; McCarthy Aff. ¶ 14. On February 22, 2001, the night before Bailey was stopped, McCarthy conducted a routine traffic stop of a white individual during which he requested consent to search the vehicle. Defendant's SMF ¶ 18; McCarthy Aff. ¶ 15.

Bailey sought no therapy or counseling as a result of his arrest. Defendant's SMF ¶ 19; Bailey Dep. at 56. When Bailey was stopped he was on his way home from work. Defendant's SMF ¶ 20; Bailey Dep. at 5. He was wearing thick, warm overalls as well as gloves and boots. Defendant's SMF ¶ 20; Bailey Dep. at 117-18. Bailey sometimes has a hard time understanding what other people are saying. Defendant's SMF ¶ 21; Bailey Dep. at 69.

Bailey bases his equal-protection claim on the facts that McCarthy followed him before pulling him over and asked for consent to search his vehicle even though his window tint complied with Maine law. Defendant's SMF ¶ 22; Bailey Dep. at 130-31. Bailey could not see what McCarthy, Loder or Teachout were doing inside of his vehicle. Defendant's SMF ¶ 23; Bailey Dep. at 80-81.

IV. Analysis

In Count I of his complaint Bailey asserts that, in violation of 42 U.S.C. § 1983 and his federal constitutional rights, McCarthy (i) unlawfully seized him after he (Bailey) produced documents demonstrating his compliance with Maine window-tinting law; (ii) searched, examined, destroyed and

dismantled his car without legal authority to do so; (iii) unlawfully seized prescription drugs belonging to Robinson, (iv) lacked probable cause to search or detain him; (v) charged him with criminal conduct without probable cause; and (vi) was motivated by racial animus against him. Complaint ¶¶ 1, 3-18.

As a threshold matter, McCarthy correctly observes that any section 1983 claim against him in his official capacity (which is in essence a claim against the state) is foreclosed by the holding of the United States Supreme Court that “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” Motion at 6-7 (quoting *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989) (internal quotation marks omitted)); *see also O’Neill v. Baker*, 210 F.3d 41, 47 (1st Cir. 2000) (same).

As to Bailey’s section 1983 claims against him personally, McCarthy seeks summary judgment on grounds, *inter alia*, that (i) the initial stop was lawful inasmuch as based on articulable suspicion that Bailey’s window tint violated Maine law; (ii) the vehicle search was lawful because performed pursuant to Bailey’s consent; (iii) McCarthy did not damage the vehicle; (iv) Bailey’s arrest was lawful on the basis of commission of a Class E crime (unlawful possession of a schedule Z drug) in the presence of an officer; and (v) Bailey fails to demonstrate that McCarthy treated him differently than others similarly situated and, in any event, McCarthy was not motivated by racial animus. Motion at 7-14. McCarthy demonstrates his entitlement to summary judgment as a matter of law with respect to all of Bailey’s section 1983 claims.²

² Technically, McCarthy seeks qualified immunity as to Bailey’s section 1983 claims. *See* Motion at 1 (moving for summary judgment on basis that McCarthy “violated no clearly established constitutional right of the Plaintiff”). However, the Supreme Court has directed that “[a] court required to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.” *Saucier v. Katz*, 121 S. Ct. 2151, 2156 (2001). In this case, there is no need to proceed beyond this threshold inquiry.

1. Fourth Amendment Claim: Initial Traffic Stop

A traffic stop, which constitutes a “seizure” implicating Fourth Amendment protections, “must be supported by a reasonable and articulable suspicion of criminal activity[.]” *United States v. Chhien*, 266 F.3d 1, 5-6 (1st Cir. 2001). “Reasonable suspicion, as the term implies, requires more than a naked hunch that a particular person may be engaged in some illicit activity.” *Id.* at 6. “By the same token, however, reasonable suspicion does not require either probable cause or evidence of a direct connection linking the suspect to the suspected crime.” *Id.*

McCarthy stopped Bailey’s vehicle because he suspected that its window tint might violate Maine law, which provides in relevant part: “A person may not operate a motor vehicle required to be registered in this State . . . if . . . [a] side window or rear window is composed of, covered by or treated with a material that has a light transmittance of less than 50%[.]” 29-A M.R.S.A. § 1916(1)(C).

McCarthy’s suspicion was not unreasonable. Bailey’s windows were dark enough to have required a certificate of compliance – a document intended to be presented upon inquiry to law enforcement officers. *See* 29-A § 1916(5) (if operator fails to produce certificate on request of law enforcement officer, vehicle is presumed not to meet tinted-window requirements). Indeed, the statute presupposes both that it will be difficult to ascertain, by visual inspection alone, whether a vehicle is in compliance and that vehicles that actually comply with the law nonetheless will be stopped. *See also, e.g., United States v. Wallace*, 213 F.3d 1216, 1220 (9th Cir. 2000) (noting, in tinted-windows case, “We don’t call upon the officers to be scientists or carry around and use burdensome equipment to measure light transmittance[.]”) (citation and internal quotation marks omitted). The initial stop was lawful.³

³ As McCarthy points out, Motion at 7, his subjective reasons for stopping Bailey’s car are irrelevant for purposes of Fourth (continued on next page)

2. Fourth Amendment Claim: Vehicle Search

I turn next to the search of Bailey's vehicle, which McCarthy argues was legitimized by Bailey's consent. Motion at 8-10. As the First Circuit has made clear, "[t]he warrant and probable cause requirements of the Fourth Amendment are not absolutes." *United States v. Laine*, 270 F.3d 71, 74 (1st Cir. 2001). "One recognized exception is for searches authorized by valid consent." *Id.* at 74-75. In the context of a criminal prosecution, "[w]hen this exception is in play, the government bears the burden of showing that consent was validly obtained[.]" which "typically reduces to a question of voluntariness." *Id.* at 75. However, this is not a criminal prosecution, but rather a section 1983 action pressed by Bailey. Inasmuch as appears, the First Circuit has not had occasion to address the question of whether, in this context, the government continues to shoulder the full burden of proof. However, the majority of circuit courts of appeals that have confronted the issue have "prefer[ed] to assign to the plaintiff in a civil action the traditional burden of proving each element of his claim." *Valance v. Wisel*, 110 F.3d 1269, 1278 (7th Cir. 1997).

In a thoughtful opinion, the reasoning of which I believe would be embraced by the First Circuit were the issue to arise, the United States Court of Appeals for the Seventh Circuit outlined the following as the "proper allocation of the parties' burdens in a section 1983 action alleging a Fourth Amendment violation":

Even if a presumption of unreasonableness arises from the fact of a warrantless search, that does not serve in a civil case to shift the burden of proof in the sense of the risk of nonpersuasion. The presumption merely serves to impose on the defendant the burden of going forward with evidence to meet or rebut the presumption, which a defendant would do by presenting evidence that the plaintiff consented to the search. In order to prove that the search was unreasonable, then, the plaintiff would be required to show

Amendment search and seizure analysis, *see, e.g., Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). In any event, there is no cognizable evidence that McCarthy harbored any intention other than to check the status of the tinted windows.

either that he never consented or that the consent was invalid because it was given under duress or coercion.

Id. at 1279 (citations and internal quotation marks omitted).⁴

McCarthy fulfills his burden of rebutting the presumption that the warrantless search of the Honda was unreasonable, adducing evidence that Bailey consented to the search and, incidentally, that he (McCarthy) did not damage the vehicle. However, Bailey's side of the ledger is bereft of cognizable evidence of the lack, invalidity or scope of his consent. Bailey accordingly raises no triable issue as to the lawfulness of the Honda search.⁵

3. Fourth Amendment Claim: Arrest

Pursuant to Maine law, a law enforcement officer may arrest a person without a warrant if that person commits a Class D or Class E offense in the officer's presence. 17-A M.R.S.A. § 15(1)(B). In Maine, it is a Class E crime to possess a schedule Z drug. *Id.* § 1107(1) & (2)(C). Schedule Z drugs include certain prescription drugs. *Id.* § 1102(4)(A). There are certain exceptions; for example, a person for whom a prescription is written may possess the drugs prescribed so long as they remain in the original container. *Id.* § 1107(1); 22 M.R.S.A. § 2383-B(1). Unlawful possession of drugs "need not always be exclusive nor need it be actual physical possession. It is sufficient proof of possession if it can be established beyond a reasonable doubt that the drugs involved were subject to [the defendant's] dominion or control." *State v. Ellis*, 502 A.2d 1037, 1040 (Me. 1985) (citations and internal quotation marks omitted).

In this case, McCarthy's search turned up an unlabeled prescription bottle containing twenty capsules. Inasmuch as the bottle was found in Bailey's car, it was in his "possession" in the sense that it was subject to his dominion and control. Further, Bailey told McCarthy that the pill bottle belonged

⁴ Per my research, *Valance* remains the most recent published circuit court of appeals decision considering this point.

⁵ As McCarthy notes, Motion at 8, an officer's subjective reasons for seeking consent to search are irrelevant to Fourth Amendment (continued on next page)

to Robinson. Under the circumstances, McCarthy had reason to believe that Bailey was committing a Class E crime in his presence: *i.e.*, possession of prescription (schedule Z) drugs in violation of 17-A M.R.S.A. § 1107. Therefore, McCarthy could lawfully arrest Bailey without a warrant. *See State v. Rand*, 430 A.2d 808, 820 (Me. 1981) (“Given facts supportive of probable cause to arrest, no arrest warrant was required in the instant case, whether the officers believed that Rand had actually participated in the commission of the burglary and was fleeing with the stolen property, a Class C crime (17-A M.R.S.A. § 15(1)(A)(2)), or whether they believed he was committing in their presence the crime of theft of the Class E variety (Id. § 15(1)(B)).”).⁶

4. Fourteenth Amendment/Equal Protection Claim

Although, as discussed above, Bailey’s claim of racial animus does not bear on his Fourth Amendment claims, it can be construed as stating a claim under the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Holland*, 102 F.3d at 11 (“*Whren* itself strongly implies that an equal protection challenge to an arrest, despite probable cause existing, might yet be entertained[.]”). However, to avoid summary judgment against him on such a claim, Bailey would have “to tender competent evidence that a state actor intentionally discriminated against [him] because [he] belonged to a protected class.” *Alexis v. McDonald’s Rests. of Mass., Inc.*, 67 F.3d 341, 354 (1st Cir. 1995). This Bailey does not do. For purposes of the instant motion, the only cognizable evidence is that McCarthy harbored no such discriminatory intent. McCarthy accordingly is entitled to summary judgment as to this claim, as well.⁷

analysis, *see, e.g., United States v. White*, 706 F.2d 806, 808 (7th Cir. 1983).

⁶ An officer’s subjective motives for arresting someone – like his or her subjective motives for making a traffic stop or seeking consent to search – play no part in analyzing whether an arrest conforms to the dictates of the Fourth Amendment. *See, e.g., Holland v. City of Portland*, 102 F.2d 6, 10 (1st Cir. 1996) (“The decision to arrest, where probable cause exists, is a discretionary one informed by many considerations. And any attempt to untangle the ascribed motive from a skein of others, in prompting an arrest justified by objective probable cause, would invite exactly the inquiry into police motivation condemned by *Whren*.”).

⁷ McCarthy also correctly notes that, to the extent Bailey presses a claim for violation of his right to substantive due process, the Fourth Amendment, rather than Fourteenth Amendment substantive due process, is implicated by the facts alleged in the Complaint. *See (continued on next page)*

Inasmuch as I find McCarthy entitled to summary judgment on Bailey's section 1983 claims (Count I), I recommend that the court decline to exercise its supplemental jurisdiction over the remaining state-law claims (Counts II and III), which I recommend be dismissed without prejudice. *See Camelio v. American Fed'n*, 137 F.3d 666, 672 (1st Cir. 1998) (“[T]he balance of competing factors ordinarily will weigh strongly in favor of declining jurisdiction over state law claims where the foundational federal claims have been dismissed at an early stage in the litigation.”).

V. Conclusion

For the foregoing reasons, I **GRANT** McCarthy's request to disregard Bailey's papers filed in opposition to the instant motion and recommend that the court **GRANT** the Motion as to Count I, which asserts federal claims pursuant to 42 U.S.C. § 1983, and decline to exercise its supplemental jurisdiction as to the remaining state-law claims (set forth in Counts II and III), which I recommend that the court **DISMISS** without prejudice.

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.

Motion at 11-12; *Albright v. Oliver*, 510 U.S. 266, 273-74 (1994) (“Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims. . . . The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.”) (citation and internal quotation marks omitted).

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