

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SHARON L. FORBIS,)
)
 Plaintiff)
)
 v.) **Docket No. 02-135-P-H**
)
 CITY OF PORTLAND, et al.,)
)
 Defendants)

**MEMORANDUM DECISION ON MOTIONS TO EXCLUDE TESTIMONY, TO STRIKE,
AND FOR LEAVE TO FILE ADDITIONS TO STATEMENT OF MATERIAL FACTS
AND RECOMMENDED DECISION ON DEFENDANTS’ MOTIONS FOR
SUMMARY JUDGMENT**

The defendants, the City of Portland, the Portland Police Department, Michael Chitwood, Wayne McGinty, Robin A. Gauvin, and Richard R. Vogel,¹ move to exclude the testimony of Dennis Waller, designated as an expert witness by the plaintiff. Defendants City of Portland, Portland Police Department and Chief Michael Chitwood’s (City Defendants)² Motion *in limine* to Exclude Expert Testimony by Dennis Waller (“Expert Motion”) (Docket No. 12); Defendants’ Motion to Join the Municipal-Defendants’ Motion to Exclude Expert Testimony (Docket No. 29). The defendants move for summary judgment on all counts of the complaint. Docket Nos. 13 & 19. The plaintiff moves to strike the first twenty paragraphs of the statement of material facts submitted by the officer defendants in support of their motion for summary judgment. Plaintiff’s Motion to Strike Portions of Defendant

¹ The parties have stipulated to the dismissal of John Larivee, named as a defendant in the complaint. Docket No. 21.

² In accordance with the practice of the parties, I will refer to the City of Portland, Portland Police Department and Chitwood jointly as (continued on next page)

Officers Statement of Supporting Material Facts (“Motion to Strike”) (Docket No. 26). The plaintiff has also filed a request for leave to amend the statement of additional material facts it submitted in opposition to the city defendants’ motion for summary judgment to include references to a document that became available only after its statement of additional material facts was submitted. Plaintiff’s Motion to Amend Plaintiff’s Statement of Facts in Opposition to City Defendants’ Motion for Summary Judgment to Include New Evidence (“Motion to Amend”) (Docket No. 38).

I deny the motion to exclude the testimony of Dennis Waller, grant the motion to strike portions of the officer defendants’ statement of material facts in part and grant the motion for leave to amend the plaintiff’s statement of material facts. I recommend that the court grant the defendants’ motions for summary judgment in part and deny them in part.

I. Motion to Exclude Expert Testimony

The defendants contend that the proffered testimony of Dennis Waller, identified by the plaintiff as an expert witness, should be excluded because Waller is not qualified to offer opinions on the topics he is expected to address and because his proffered opinions are without foundation and based on a “flawed” methodology, citing *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Expert Motion at 4-9.

Federal Rule of Evidence 702 imposes an important gatekeeper function on judges by requiring them to ensure that three requirements are met before admitting expert testimony: (1) the expert is qualified to testify by knowledge, skill, experience, training, or education; (2) the testimony concerns scientific, technical, or other specialized knowledge; and (3) the testimony is such that it will assist the trier of fact in understanding or determining a fact in issue.

the “city defendants” and to McGinty, Gauvin and Vogel jointly as the “officer defendants.”

Correa v. Cruisers, 298 F.3d 13, 24 (1st Cir. 2002) (citing *Daubert* and *Kumho*). Here, the defendants contend that Waller’s proposed testimony does not meet the first and second requirements. Expert Motion at 4.

It is now clear that the trial judge’s general “gatekeeping” function with respect to expert testimony that was set forth in *Daubert* applies to all expert testimony, not just that based on scientific knowledge. *Kumho*, 536 U.S. at 148. It is also clear that the specific analytic factors listed in *Daubert* “neither necessarily nor exclusively appl[y] to all experts or in every case.” *Id.* Relevant reliability concerns may focus on personal knowledge or experience, not just scientific principles. *Id.* at 151. “[T]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” *Id.* at 150 (quoting with approval from the brief for the United States as *Amicus Curiae*). “[W]hether *Daubert*’s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.” *Id.* at 153.

The defendants argue that Waller “lacks the requisite knowledge, skill, experience, training, or education” to offer opinions about proper police disciplinary or internal affairs practices and customs because “he has no specialized knowledge, skill, training, or education pertaining to disciplinary or internal affairs practices or customs.” Expert Motion at 4. They assert that Waller “obviously has not dealt with the range of disciplinary and other personnel problems” as has defendant Chitwood and that he bases his opinion on “only one memorandum drafted by Sargent [sic] John Goodman” and one other matter; that he “has absolutely no background in disciplinary or internal affairs practices and customs” because he never worked as an internal affairs investigator and was involved in only one internal affairs investigation that was initiated by his predecessor as chief of “a very small police department;” and that he does not remember being the target of an internal affairs investigation himself.

Id. at 5-6. The plaintiff responds that Waller’s opinions are actually based on “the totality of his training, education and experience in law enforcement,” and are based on several other acts and omissions of several members of the defendant Department. Plaintiff’s Objection to Defendant City of Portland’s [sic] Motion in Limine to Exclude Testimony of Dennis Waller (“Expert Opposition”) (Docket No. 27) at 1-2.

In general, “a witness with an academic background in a given area but no practical experience may still qualify as an expert.” C. Wright & V. Gold, 29 *Federal Practice and Procedure* (1997) § 6265 at 245. “The degree of ‘knowledge, skill, experience, training, or education’ sufficient to qualify an expert witness is only that necessary to insure that the witness’s testimony ‘assist’ the trier of fact.” *Id.* at 249. “Gaps in an expert witness’s qualifications or knowledge generally go to the weight of the witness’s testimony, not its admissibility.” *Id.* at 251. Here, the plaintiff has provided evidence that Waller has received training and education “on the internal affairs function” from several sources, taught college-level courses that “include content on the internal affairs function,” has developed and taught police training courses that include “significant content on the internal affairs function and procedures,” has a bachelor’s degree in police administration, Affidavit of Dennis Waller (“Waller Aff.”) (Exh. 3 to Expert Opposition) ¶¶ 2-5, 7; has served as a police officer, detective, supervisor and administrator in police departments varying in size from that of Ripon, Wisconsin, where he served as chief, to Miami, Florida, where he was a police officer, and South Miami, Florida, where he was a police sergeant, Curriculum Vitae (attached to Exh. 1 to Expert Opposition) at 1, and has published several articles and contributed to several books in the area of police training and practices, *id.* at 2-3. While there is little evidence of direct experience, training or education in the area of internal affairs practices in a police department comparable in size to that of Portland, such a requirement for admissibility of Waller’s testimony would interpret the case law too narrowly.

The defendants rely primarily on *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994), to support their argument. Expert Motion at 4; Defendants City of Portland, Portland Police Department and Chief Michael Chitwood's (City Defendants) Reply to Plaintiff's Opposition to Motion *in limine*, etc. (Docket No. 33) at 2-3. In that case, the plaintiff was awarded damages by a jury for the fatal shooting of her son by a Detroit police officer. *Id.* at 1343. The plaintiff claimed that the city "pursued a deliberate policy of failing to train or discipline adequately its police officers in the proper use of deadly force, which failures caused the violation of [the plaintiff's son's] constitutional rights." *Id.* at 1344. Specifically, she claimed that these failures, in violation of the department's written policy, amounted to deliberate indifference to the rights of city residents. *Id.* at 1346. The court held that the evidence presented at trial was insufficient to support the jury's finding that the city pursued an official custom of failing to train its officers adequately, *id.* at 1347, and that the plaintiff's expert witness was not qualified to testify concerning the alleged failure to impose adequate discipline, *id.* at 1348. It noted that the witness held degrees in sociology and education and "also took courses in criminal justice, but how many and what kind was never revealed;" that he served as a deputy sheriff for two years without any formal training and that during his tenure he did general patrol and investigation work and taught defensive tactics; served as sheriff for four years, although "not one question was asked during trial to elicit what [the witness] did or learned during his four years as sheriff, a job for which the only necessary qualification is the ability to get elected;" that he next worked for four years for the Justice Department where he "developed the training criteria to train sheriffs and managers of large sheriffs['] departments," although "exactly why he got this assignment is difficult to understand;" and thereafter he "appears to have conducted seminars in police management techniques." *Id.* at 1348-49. The court concluded that the witness did not have any formal training that would allow him to testify "on how failure to discipline officer 'A' would impact on the conduct

of his peer, officer ‘B’,” and that no foundation thus had been laid “based upon the witness’s firsthand familiarity with disciplining police officers and the effect of lax discipline on the entire force.” *Id.* at 1350. The court also noted that the witness had not written any publications regarding policy procedure or policy. *Id.* at 1350-51. The court held that the witness’s

credentials *as set forth in the record* do not qualify him to know any more about what effect claimed disciplinary shortcomings would have on the future conduct of 5,000 different police officers than does any member of the jury. Among other things, [his] testimony assumes that all 5,000 police officers would know enough about the facts of each *claimed* event to evaluate the sufficiency of the discipline, and that the officers would formulate their future course of conduct accordingly. It also assumes, without any basis in fact or logic, that police officers will be extravagant in their use of deadly force if they know discipline will not be severe if a shooting occurs. We are not talking about cheating on overtime here, or some other minor peccadillo; we are talking about the taking of the life of another person.

Id. at 1352 (emphasis in original).

Berry is distinguishable on its facts. There is significantly more evidence in the record here concerning Waller’s education, training and experience. He worked as a police officer in departments both larger and smaller than the Portland police department, and his opinion applies to a department with 150-160 officers, Expert Motion at 5, a much smaller group than the 5,000 officers apparently employed in the city of Detroit. In addition, deadly force is not at issue in this case.

Waller is qualified to testify as an expert in this case; his qualifications may well not be ideal, but that is a matter that goes to the weight rather than the admissibility of his opinions, a matter that the defendants may address on cross-examination.

With respect to Waller’s methodology, the defendants maintain that his theory that failure to properly investigate and discipline police officers led to the alleged misconduct in this case is “flawed” and not based on acceptable methodology because he offered no evidence that it had been tested, subjected to peer review, or generally accepted by other police experts. Expert Motion at 7.

They also contend that Waller “only reviewed a fraction of [the] documents” produced by the city defendants, “never even reviewed the entire Internal Affairs’ file for this specific investigation,” “never analyzed past excessive force internal affairs complaints and investigative files,” and “never attempted to analyze and compare the rate of complaints lodged versus complaints sustained.” *Id.* at 9. The plaintiff responds that Waller did review the entire file concerning the investigation of this claim, the majority of documents “generated in this case,” all of the depositions of the plaintiff and the defendants, and used the same methodology as that employed by the city defendants’ expert. Expert Opposition at 1-5. She contends that the statistical analyses proposed by the defendants are “meaningless” because they do not differentiate between internal and outside complaints. *Id.* at 5.

In reviewing the reliability of proffered expert testimony, the trial court conducts a flexible inquiry, which includes consideration of the verifiability of the expert’s theory or technique, the error rate inherent therein, whether the theory or technique has been published and/or subjected to peer review, and its level of acceptance within the scientific community. Acceptance of the methodology by the other party’s expert may give additional credence to the reliability of the proffered testimony.

Correa, 298 F.2d at 26 (citation and internal quotation marks omitted). Here, the apparent acceptance of Waller’s methodology by the defendants’ expert witness counsels against exclusion of his opinions.

Challenges to the methodology used by an expert witness are usually adequately addressed by cross-examination. *United States v. Diaz*, 300 F.3d 66, 76-77 (1st Cir. 2002). *See also Seahorse Marine Supplies, Inc. v. Puerto Rico Sun Oil Co.*, 295 F.3d 68, 81 (1st Cir. 2002). The defendants have not shown why that cannot be the case here.

The motion to exclude Waller’s testimony is denied.

II. Motion to Strike

The plaintiff moves to strike the first twenty paragraphs of the statement of material facts filed by the officer defendants, contending that they are not material because they deal with the arrest history

of the plaintiff and her children, invoking Fed. R. Civ. P. 12(f). Motion to Strike at 1-2. The officer defendants respond that the facts at issue are material because “they explain the Plaintiff’s conduct when dealing with the Police Officers who ultimately became the defendants in this case and, when combined with other undisputed factors, belie the Plaintiff’s claims.” Defendants’ Reply Memorandum in Opposition to Plaintiff’s Motion to Strike Portions of the Defendants’ Opposing [sic] Statement of Supporting Material Facts (Docket No. 28) at 2. “A fact is material if its resolution would affect the outcome of the suit under the governing law.” *Burbank v. Davis*, 227 F. Supp.2d 176, 178 (D. Me. 2002) (citation and internal quotation marks omitted).

The paragraphs at issue refer to an arrest of the plaintiff in 1978, Defendants’ Statement of Supporting Material Facts (“Officers’ SMF”) (Docket No. 20) ¶¶ 1-4; a fight in 1993 between the plaintiff’s sons whose fight led to the call to police that resulted in the plaintiff’s claims in this case, *id.* ¶¶ 5-14; a letter written by the plaintiff to the Portland Police Department in 1994 complaining about the arrest that year of one of her sons and her alleged harassment by police officers in connection with that arrest, *id.* ¶¶ 15-18; imprisonment of one of the plaintiff’s sons at an unspecified time, *id.* ¶ 19; and contact in August 2001 between the Portland Police Department and the plaintiff’s daughter regarding an incident of domestic violence, *id.* ¶ 20. The latter two paragraphs have nothing to do with the facts of the instant case and could have no apparent effect on the outcome of this suit because the facts are not sufficiently similar to the events at issue here to allow a factfinder to draw any reasonable inferences from them about what happened in this case. Those paragraphs are accordingly stricken. The remaining paragraphs do present sufficient similarities to the facts in this case to allow a reasonable factfinder to conclude that the plaintiff’s allegations in this case may be less than fully credible, thereby possibly affecting the outcome of the suit, although credibility assessments are not made in the summary judgment context. The plaintiff does not dispute these facts,

offering only the “qualification” that she “did not harbor any ill will toward law enforcement as a result of her children’s interaction with law enforcement but is scared of law enforcement” and “[s]he was neutral about the Portland Police Department she encounter [sic] the defendants.” Plaintiff’s Response to Defendants’ Robin Gauvin, Wayne McGinty, and Richard Vogel’s Statement of Material Facts, etc. (“Plaintiff’s Responsive Officers’ SMF”) (Docket No. 25) ¶¶ 1-20. Accordingly, paragraphs 1-18 of the officers’ statement of material facts will remain part of the summary judgment record. This ruling does not necessarily mean that the court will rely on any of these facts in resolving the motions for summary judgment.

The motion to strike is granted as to paragraphs 19 and 20 of Docket No. 20 and otherwise denied.

III. Motion to Amend

On April 7, 2003, approximately five weeks after filing her statement of material facts in opposition to the defendants’ motions for summary judgment on February 24, 2003 (Docket No. 23), the plaintiff filed a motion requesting leave to amend her statement of material facts “to include relevant portions of the United States Justice Department’s investigation of the Portland Police Department that came out March 27, 2003 and was provided to the Plaintiff by the City Defendants on April 1, 2003.” Motion to Amend at 1. The city defendants oppose the motion, contending that the letter in question is preliminary and incomplete, is not relevant to the plaintiff’s claims and is not admissible as an adoptive admission under Fed. R. Evid. 801(d)(2) because implementation of changes recommended in the letter would be inadmissible under Fed. R. Evid. 407 as subsequent remedial measures. Defendants City of Portland, Portland Police Department and Chief Michael Chitwood’s (City Defendants) Objection to Plaintiff’s Motion to Amend Her Statement of Material Facts (“City’s Amendment Opposition”) (Docket No. 39) at 1-3.

Specifically, the plaintiff seeks to change her responses to two paragraphs of the city defendants' statement of material facts from qualifications to denials, to supplement her denials of six other paragraphs of the city defendants' statement of material facts, and to add twenty-two new paragraphs to her statement of additional material facts filed in opposition to the city defendants' motion for summary judgment. Plaintiff's Proposed Amendments to Material Facts at 1-7. All of the changes and additions cite to a letter from Shanetta Y. Brown Cutlar of the United States Department of Justice to Gary Wood, corporation counsel for the City of Portland, dated March 31, 2003, a copy of which is Exhibit 1 to the motion to amend. I conclude that it would be inappropriate to allow the plaintiff to change her responses to specific paragraphs of the city defendants' statement of material facts at this late date and accordingly will deny the motion as to paragraph 7 of the proposed amendments to the plaintiff's responses and as to the change from "qualify" to "deny" in the plaintiff's response to paragraph 33 of the city defendants' statement of material facts. The additional factual material provided in support of the new "denial" of paragraph 33 more appropriately serves as amplification of the initial qualification. The additional factual material provided in support of the new "denial" of paragraph 7 changes entirely the plaintiff's position in response to that paragraph. This change is inconsistent with the plaintiff's previous stated position in response to the motion for summary judgment. The city defendants should not be required to respond to such a significant change in the plaintiff's position at this stage of the proceedings.

With respect to the city defendants' objections to the motion, the facts that the conclusions set forth in the letter at issue are preliminary and that the investigation itself is not complete are set forth in the letter and go to the weight of the letter as evidence rather than to its admissibility. There is no evidence in the summary judgment record that the city has adopted any of the recommendations included in the letter, so I cannot reach the city defendants' objection based on subsequent remedial

measures. There is no question that the letter was not available to the plaintiff at the time she filed her responses to the city defendants' statement of material facts and her own statement of material facts in opposition to the motion. Many of the assertions included in her newly proposed supplements to her earlier denials and her additional factual assertions appear relevant to her claims. Accordingly, the motion for leave to amend is granted with the exception of the proposed amendments to paragraphs 7 and 33 of the plaintiff's response to the city defendants' statement of material facts as discussed above. *See generally Aybar v. Crispin-Reyes*, 118 F.3d 10, 16 (1st Cir. 1997) (discussing newly discovered evidence in connection with motion for reconsideration of court's granting of motion to dismiss).

IV. Motions for Summary Judgment

A. 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.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

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. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no

genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Factual Background

The parties’ statements of material facts include the following undisputed material facts, appropriately supported as required by this court’s Local Rule 56.

Defendant City of Portland is a municipal corporation and political subdivision of the state of Maine. Defendants’, City of Portland, Michael Chitwood and Portland Police Department (“City Defendants”), Statement of Material Facts (“City SMF”) (Docket No. 14) ¶ 1; Plaintiff’s Response to Defendant City of Portland, Michael Chitwood and Portland Police Department (City Defendants) Statement of Material Facts, etc. (“Plaintiff’s Responsive City SMF”) (Docket No. 23) ¶ 1. On April 10, 2001 defendant Chitwood was the chief of police of the Portland Police Department. *Id.* ¶ 3. On that date the defendant officers responded to a call made to them by Andrew Forbis (“Andrew”), the plaintiff’s youngest son. *Id.* ¶ 8. Andrew placed this call from the basement apartment at 260 Veranda Street, where he resided. Officers’ SMF ¶¶ 22, 54; Plaintiff’s Responsive Officers’ SMF ¶¶ 22, 54. The plaintiff resided in the first floor apartment at this address. *Id.* ¶ 21. On April 10, 2001 James Forbis (“James”) was staying at the plaintiff’s apartment. *Id.* ¶ 23. Victoria Forbis, the plaintiff’s daughter, and Michael Burch resided in the second floor apartment at this address. *Id.* ¶ 24.

James and Andrew were in the plaintiff's apartment when she returned home from work on April 10, 2001. *Id.* ¶ 27. An argument between James and Andrew ensued. *Id.* ¶ 28. The argument resulted in a physical altercation between James and Andrew. *Id.* ¶ 31. Some of James's blood was spilled during the altercation. *Id.* ¶ 37. There was some swelling on Andrew's body as a result of the altercation. *Id.* ¶ 41. The plaintiff intervened in the altercation. *Id.* ¶ 44. There was some blood visible on the floor and wall in the kitchen-hallway area of the plaintiff's apartment after the altercation. *Id.* ¶ 43. After separating James and Andrew and directing Andrew to return to his apartment and James to go to the bedroom he had been occupying in her apartment, the plaintiff attempted to clean the blood from the floor and wall. *Id.* ¶¶ 45-46, 48, 51. Andrew called the Portland Police Department's emergency telephone line from his apartment at approximately 7:20 p.m. on April 10, 2001. *Id.* ¶ 54. Andrew requested police assistance regarding an assault and indicated that he was the victim of a recent assault. *Id.* ¶¶ 55, 58. He identified James as his assailant and said that James was still at 260 Veranda Street, in his mother's apartment. *Id.* ¶¶ 57, 60, 72. After Andrew called the police department, he called the plaintiff in her apartment and told her that he had called the police. *Id.* ¶ 77.

Shortly after Andrew's call was received, a Portland Police Department dispatcher advised the defendant officers that a person in apartment 1 at 260 Veranda Street had complained of an assault and that the assailant was in apartment 2 at the same location. *Id.* ¶ 79. Defendant Vogel and Officer Larivee arrived at 260 Veranda Street at approximately 7:23 p.m. *Id.* ¶ 82. Vogel went to the door of the plaintiff's apartment, through which he could see her talking on the telephone. *Id.* ¶¶ 85-86. The plaintiff was talking with Andrew. *Id.* ¶ 89. Vogel rang the doorbell and did not receive an immediate response. *Id.* ¶¶ 93-94. After the plaintiff completed her telephone conversation, she opened the door. *Id.* ¶ 97.

In response to Vogel's questions, the plaintiff said that she had not called the police, identified herself as Sharon Forbis and confirmed that her address was 260 Veranda Street. *Id.* ¶¶ 101, 103-04. The plaintiff told Vogel that she wanted him to leave and closed the door on his right knee and foot, which foot Vogel had placed on the threshold of the door when the plaintiff originally opened it. *Id.* ¶¶ 105-07. The plaintiff told Vogel that she would not allow the officers to enter without a warrant. *Id.* ¶¶ 114. She also said that she would sue the officers if they did not leave. *Id.* ¶ 115.

Vogel contacted a Portland police dispatcher at approximately 7:25 p.m. and asked for the name of the complainant at 260 Veranda Street. *Id.* ¶ 116. In response, a dispatcher notified Vogel that the complainant's name was "Andrew" and that he was in apartment 1. *Id.* ¶ 117. Vogel then asked the dispatcher to contact Andrew and ask him to meet Vogel outside 260 Veranda Street. *Id.* ¶ 118. A dispatcher telephoned Andrew at approximately 7:26 p.m. and asked him to meet the officers outside 260 Veranda Street. *Id.* ¶ 119. A dispatcher notified Vogel by radio at approximately 7:27 p.m. that the complainant would meet him outside 260 Veranda Street. *Id.* ¶ 120. Andrew then left his apartment and met Vogel and Larivee near the side door to the plaintiff's apartment. *Id.* ¶ 121. Vogel noticed that Andrew had a swollen left eye. *Id.* ¶ 122. Andrew told Vogel that his brother's name was James. *Id.* ¶ 127. Larivee noticed that Andrew had visible injuries. *Id.* ¶ 129. Larivee remained with Andrew outside the plaintiff's apartment until Andrew, James and the plaintiff left 260 Veranda Street. *Id.* ¶ 128.

At approximately 7:28 p.m. Vogel requested by radio that McGinty respond quickly to 260 Veranda Street. *Id.* ¶¶ 141-44. Vogel knew that Gauvin was also responding to the scene. *Id.* ¶ 145. Vogel also learned by radio that there were no outstanding warrants for the arrest of James. *Id.* ¶¶ 146, 150. Gauvin and McGinty arrived at 260 Veranda Street at approximately 7:31 p.m. *Id.* ¶¶ 153-54. It is standard operating procedure in the Portland police department for an officer to

consult with a supervisor after being refused entry to a residence. *Id.* ¶ 158. This was appropriate police procedure. City SMF ¶ 20; Plaintiff’s Responsive City SMF ¶ 20. Almost immediately after he arrived, McGinty replaced Vogel at the door to the plaintiff’s apartment on instructions from Gauvin. Officers’ SMF ¶¶ 160-61; Plaintiff’s Responsive Officers’ SMF ¶¶ 160-61. Vogel explained the situation to Gauvin. *Id.* ¶ 162. Gauvin and Vogel then spoke to Andrew. *Id.* ¶ 164. During this conversation Gauvin and Vogel detected an odor of alcohol coming from Andrew. *Id.* ¶¶ 165-66. Andrew told Gauvin and Vogel that he did not want to press charges against James, saying that he would rather “just forget about it and let it go.” *Id.* ¶ 168. He told Vogel that James was fine. *Id.* ¶ 178.

Both Vogel and Gauvin were concerned about the wellbeing of James. Officers’ SMF ¶¶ 181-82.³ Vogel and Gauvin returned to the door of the plaintiff’s apartment and Gauvin told the officers that they had an obligation to ascertain the wellbeing of James. Officers’ SMF ¶¶ 183, 185; Plaintiff’s Responsive Officers’ SMF ¶ 183.⁴ The plaintiff overheard the officers talking about whether they had an obligation to ascertain the wellbeing of James. Officers’ SMF ¶ 186; Plaintiff’s Responsive Officers’ SMF ¶ 186. It was appropriate police procedure for an officer to discuss this issue with a supervisor. City SMF ¶ 23; Plaintiff’s Responsive City SMF ¶ 23. The plaintiff continued to refuse to allow the officers into her home. Officers’ SMF ¶ 188; Plaintiff’s Responsive Officers’ SMF ¶ 188. The plaintiff told the officers that nobody inside her home was injured. *Id.* ¶ 191. The officers wanted to avoid breaking down the plaintiff’s door if a forced entry became necessary. Officers’

³ The plaintiff purports to deny these paragraphs of the officer defendants’ statement of material facts, Plaintiff’s Responsive Officers’ SMF ¶¶ 181-82, but the factual allegations and citations presented in those paragraphs do not directly address the assertions in those paragraphs of the officers’ statement of material facts. The paragraphs, which are supported by the citations to the record given by the officers, are accordingly deemed admitted.

⁴ Again, the plaintiff purports to deny paragraph 185 of the officer defendants’ statement of material facts, Plaintiff’s Responsive Officers’ SMF ¶ 185, but the denial is not responsive and the paragraph is accordingly deemed admitted.

SMF ¶ 196.⁵ The plaintiff knew before the officers attempted to enter her home that they were trying to ascertain the wellbeing of James. Officers' SMF ¶ 199; Plaintiff's Responsive Officers' SMF ¶ 199.

An officer informed the plaintiff that they were going to enter her apartment in order to ascertain the wellbeing of James. Defendants Officers' SMF ¶ 205.⁶ Gauvin decided to enter the plaintiff's apartment without her consent. Officers' SMF ¶ 209; Plaintiff's Responsive Officers' SMF ¶ 209. The plaintiff repeated that she was an American citizen, the officers were not coming in without a warrant, there was absolutely nothing going on and "we will handle the situation ourselves."

Plaintiff's Statement of Additional Facts in Opposition to Defendant Officers' Motion for Summary Judgment ("Plaintiff's Officers' SMF") (included in Plaintiffs' Responsive Officers' SMF, beginning at page 27) ¶ 54; Defendants' Response to Plaintiff's Statement of Additional Material Facts ("Officers' Responsive SMF") (Docket No. 35) ¶ 54. She attempted to prevent the officers from entering her apartment by holding the door. Officers' SMF ¶ 215; Plaintiff's Responsive Officers' SMF ¶ 215. The officers were entering the apartment as the plaintiff was offering to bring James to the door. *Id.* ¶ 217. The plaintiff began yelling as the officers gained entry. *Id.* ¶ 221. The plaintiff landed on the floor as the officers gained entry. *Id.* ¶ 222. She felt a sharp pain on the left side of her rib cage as the officers gained entry and, after landing on the floor, began yelling for James and Andrew to help her. *Id.* ¶¶ 223, 225.

⁵ The plaintiff purports to deny this paragraph of the defendant officers' statement of material facts, Plaintiff's Responsive Officers' SMF ¶ 196, but the denial is not responsive and the paragraph is accordingly deemed admitted.

⁶ The plaintiff purports to deny the relevant portion of this paragraph of the defendant officers' statement of material facts, Plaintiff's Responsive Officers' SMF ¶ 205, but the denial is not supported by any citation to the summary judgment record and the assertion is accordingly deemed admitted.

Upon entry to the apartment, Gauvin and Vogel saw blood smears on the floor and wall of a hallway located near the kitchen. Officers' SMF ¶ 226.⁷ After the plaintiff began yelling James walked down the hallway toward the kitchen area of the apartment. Officers' SMF ¶ 231; Plaintiff's Responsive Officers' SMF ¶ 231. James asked the officers what was going on. *Id.* ¶ 232. He said, "What are you doing to my mother?" or "Leave my mother alone!" *Id.* ¶ 241. James grabbed Vogel's right wrist. *Id.* ¶ 243. Vogel pulled away. *Id.* ¶ 245. Vogel told James that he was under arrest. Officers' SMF ¶ 247.⁸ Gauvin assisted Vogel in his attempts to take James into custody. Officers' SMF ¶ 250; Plaintiff's Responsive Officers' SMF ¶ 250. James was charged with refusing to submit to arrest and assault on Vogel. *Id.* ¶ 252. He pleaded guilty to these charges. *Id.* ¶ 253.

Vogel assisted McGinty in handcuffing the plaintiff after a brief struggle. *Id.* ¶¶ 259, 261. The plaintiff was charged with two counts of assault, disorderly conduct, obstructing government administration and refusal to submit to arrest or detention. Plaintiff's Officers' SMF ¶ 122; Officers' Responsive SMF ¶ 122. The state agreed to dismiss the charges brought against the plaintiff. Officers' SMF ¶ 263; Plaintiff's Responsive Officers' SMF ¶ 263. James never requested medical attention. Officers' SMF ¶ 265. After the plaintiff and James were taken into custody, Gauvin went outside the building and arrested Andrew in the presence of Larivee. *Id.* ¶ 268.⁹ After the plaintiff was arrested, she complained that she was experiencing pain in the area of her ribcage and her back. Officers' SMF ¶ 276; Plaintiff's Responsive Officers' SMF ¶ 276; Plaintiff's Officers' SMF ¶ 100; Officers' Responsive SMF ¶ 100. Gauvin contacted a police dispatcher at approximately 7:43 p.m. and requested that paramedics be dispatched to 260 Veranda Street; the paramedics arrived at

⁷ The plaintiff purports to deny this paragraph of the defendant officers' statement of material facts, Plaintiff's Responsive Officers' SMF ¶ 226, but the denial is not responsive and the paragraph is accordingly deemed admitted.

⁸ The plaintiff purports to deny all of this paragraph of the defendant officers' statement of material facts, but her response admits that Vogel told James he was under arrest, Plaintiff's Responsive Officers' SMF ¶ 247.

⁹ The plaintiff purports to qualify paragraphs 265 and 268 of the defendant officers' statement of material facts, Plaintiff's Responsive (continued on next page)

approximately 7:50 p.m. Officers' SMF ¶¶ 277, 279.¹⁰ At approximately 8:02 p.m. McGinty left 260 Veranda Street following a MEDCU ambulance containing the plaintiff and James. *Id.* ¶ 280.¹¹ The ambulance arrived at Mercy Hospital at approximately 8:07 p.m. *Id.* ¶ 282.¹² The plaintiff complained to the paramedics of wrist pain from the handcuffs. Plaintiff's Officers' SMF ¶ 102; Officers' Responsive SMF ¶ 102. At approximately 8:05 p.m. Vogel and Larivee left 260 Veranda Street, arriving at Mercy Hospital at approximately 8:18 p.m. Officers' SMF ¶¶ 283, 285.¹³ At approximately 8:09 p.m. Vogel advised Gauvin that the plaintiff had grabbed Vogel's arm at her apartment. *Id.* ¶ 284.¹⁴ Stephen Gallagher, M.D., treated the plaintiff at Mercy Hospital. *Id.* ¶ 286.¹⁵ Dr. Gallagher diagnosed the plaintiff's injury as three left rib fractures. Officers' SMF ¶ 287; Plaintiff's Responsive Officers' SMF ¶ 287. Dr. Gallagher completed a hospital form known as Emergency Physician Record (Trunk Injury) on which he noted that the plaintiff's complaint was moderate chest pain and that the injury was caused when the plaintiff "tried to break up a fight at home with sons." *Id.* ¶¶ 288-90.

As of the date of her deposition, the plaintiff had not been examined or treated by a psychiatrist, psychologist or licensed clinical social worker regarding the alleged emotional distress purportedly caused by the events of April 10, 2001. *Id.* ¶¶ 293-95. The plaintiff was 58 years old on April 10, 2001. Plaintiff's Officers' SMF ¶ 48; Officers' Responsive SMF ¶ 48. It took a year for the

Officers' SMF ¶¶ 265-275, but the qualification does not address the factual assertions in these paragraphs and they are accordingly deemed admitted.

¹⁰ The plaintiff purports to qualify paragraphs 277 and 279 of the defendant officers' statement of material facts, Plaintiff's Responsive Officers' SMF ¶¶ 277-286, but she provides no citation to the summary judgment record in support of the qualification, and the paragraphs are accordingly deemed admitted.

¹¹ See footnote 10.

¹² See footnote 10.

¹³ See footnote 10.

¹⁴ See footnote 10.

¹⁵ See footnote 10.

plaintiff's ribs to heal. *Id.* ¶ 118. At work, she has "been put on light duty ever since" April 11, 2001. *Id.* ¶ 117.

The first officers responding to 260 Veranda Street considered the call to be a domestic violence call. City SMF ¶ 11.¹⁶ Domestic violence is one of the highest priority calls that the Portland police department encounters, and the Portland police have set procedures to follow in responding to such a call. City SMF ¶¶ 12-13; Plaintiff's Responsive City SMF ¶¶ 12-13. These procedures are set forth in Portland Police Standard Operating Procedure # 41F. *Id.* ¶ 14. Exigent circumstances are required in order to enter a person's dwelling without a warrant, and Portland Police Standard Operating Procedure #41F addresses exigent circumstances. *Id.* ¶¶ 16-17. One factor in determining whether exigent circumstances exist is the fact that someone inside the house in question may be seriously injured. *Id.* ¶ 18.

McGinty filed a Use of Control report regarding the plaintiff which indicated that the plaintiff had been diagnosed with a broken rib. *Id.* ¶¶ 26, 28. Based on the information known to him, defendant Chitwood did not regard the information about the plaintiff's broken rib as requiring the removal of any officer involved from his regularly scheduled duties. *Id.* ¶ 31. The internal affairs investigation of this case began in January 2002. *Id.* ¶ 32. Sergeant Jonathan Goodman was the only internal affairs officer assigned to this case. *Id.* ¶¶ 34, 37. In the course of his investigation, Goodman made repeated attempts by telephone and certified mail to set up interviews with Andrew and James but he received no cooperation from either of them and was unable to interview them. *Id.* ¶¶ 38-39. As he developed the facts, Goodman sent them to his superior officers, pursuant to the policies and procedures of the Portland Police Department. *Id.* ¶ 40. Chitwood's subsequent

¹⁶ The plaintiff denies this paragraph of the city defendants' statement of material facts, Plaintiff's Responsive City SMF ¶ 11, but the denial consists of an argument that the situation presented did not meet the definition of a domestic violence incident set forth in the defendant department's written policies. The denial does not address what the officers believed at the time, based on the information (*continued on next page*)

decision that the plaintiff's allegations were not sustained was, in his view, consistent with the facts, department procedures and the law. *Id.* ¶ 43.¹⁷ If Chitwood ever became aware that the internal affairs department was “whitewashing” investigations or otherwise slanting its investigations toward the subject police officer's point of view, the internal affairs officers would be fired immediately. *Id.* ¶ 48.¹⁸ Chitwood sets the tone for the Portland Police Department. *Id.* ¶ 63. His options for disciplinary action run from oral reprimand through termination. *Id.* ¶ 66. Officers who have not followed the policies and procedures of the Portland Police Department have, after internal affairs investigations, been disciplined by Chitwood, including termination and 30 to 90 day suspensions. *Id.* ¶ 69.

The plaintiff's designated expert witness found the written policies and procedures of the Portland Police Department to be adequate. *Id.* ¶ 53. Chitwood does not think that it is a conflict of interest for an internal affairs investigator to have to investigate someone he worked with in the past. Plaintiff's Statement of Additional Material Facts . . . in Support of Her Opposition to Summary Judgment (“Plaintiff's City SMF”) (included in Plaintiff's Responsive City SMF, beginning at page 21) ¶ 8; Defendants', City of Portland, Michael Chitwood and Portland Police Department (“City Defendants”), Response to Plaintiff's Statement of Additional Material Facts (“City's Responsive SMF”) (Docket No. 32) ¶ 8. Internal affairs keeps a record of disciplinary action for up to seven years. Plaintiff's City SMF ¶ 11.¹⁹ Chitwood believes that the practice of destroying disciplinary records would not impede his ability to ferret out officers with a history of problems affecting their ability to enforce the law. Plaintiff's City SMF ¶ 14; City's Responsive SMF ¶ 14. On October 29,

available to them.

¹⁷ The plaintiff purports to deny this paragraph of the city defendants' statement of material facts, but that denial attacks the reasonableness of Chitwood's belief, not whether he held this belief. Plaintiff's Responsive City SMF ¶ 43.

¹⁸ The plaintiff purports to deny this paragraph of the city defendants' statement of material facts, but that denial contains no citation to the record, Plaintiff's Responsive City SMF ¶ 48, and the paragraph is accordingly deemed admitted.

2002 Chitwood could not recall a 1997 excessive force complaint against Gauvin. *Id.* ¶ 19. If a civilian says that he or she has been assaulted by an officer, that is not sufficient to put an officer on administrative leave; if a police officer says another officer used excessive force against a civilian, that is sufficient for Chitwood to put the accused officer on administrative leave. *Id.* ¶¶ 23-24.²⁰

As a result of the Cummings and Dorazio cases, the police department initiated or had under consideration as of January 11, 2002 a series of measures to increase accountability of front line officers and supervisors. *Id.* ¶ 32. In the Cummings case, a jury awarded the plaintiff damages against a Portland police officer for a claim of excessive force that occurred in July 2000. *Id.* ¶ 34. On or about November 11, 2002 Chitwood said “we have to make sure the sergeants are responsible for what the officers are doing on the street . . . make sure arrests are legal, reports are truthful . . . make sure lieutenants are doing their job . . . and I’m doing my job.” *Id.* ¶ 38. In or about January 2002, Chitwood asked the United States Department of Justice to come in and review the department as a result of several cases, media attention and “just something we needed an outside review on.” *Id.* ¶ 44. Chitwood wrote a letter to the Department of Justice saying that the request was in response to concerns raised by the public, the media and elected leaders that Portland police officers were engaged in improper uses of force and the department was unwilling or unable to supervise, investigate and appropriately discipline those officers. *Id.* ¶ 45.

The Civil Rights Division of the Department of Justice is conducting a pattern or practice investigation of the Portland Police Department pursuant to 42 U.S.C. § 14141. Plaintiff’s Amended Statement of Material Facts in Support of Her Motion for Summary Judgment [sic] (“Plaintiff’s Amended City SMF”) (included in Plaintiff’s Proposed Amendments to Material Facts beginning at p.

¹⁹ The city defendants purport to deny this paragraph of the plaintiff’s statement of material facts, but the denial is unaccompanied by any citation to the record, City’s Responsive SMF ¶ 11, and the paragraph is therefore deemed admitted.

²⁰ The city defendants purport to deny paragraph 24 of the plaintiff’s statement of material facts, but the denial does not include any
(continued on next page)

4) ¶ 58; City Defendants [sic] Response to Plaintiff’s Amended Statement of Additional Material Facts (“City’s Response to Amended SMF”) ¶ 58. As a result of its preliminary investigation the Department of Justice identified several areas of significant concern. *Id.* ¶ 62. The Department of Justice stated that the department’s use-of-force policy needs revision to include a comprehensive list of actions that are considered uses of force and to provide more specific guidelines to officers in determining appropriate responses to the actions of a subject and to emphasize alternatives to more significant uses of force. *Id.* ¶¶ 63, 65. The Department of Justice also recommended that the department revise its use of force reports to better track and identify force patterns and that all witnesses to a use of force should be interviewed by the supervisory officer rather than only the officer who files the report. *Id.* ¶¶ 66, 68. The Department of Justice concluded that use of force reports were not being scrutinized properly because a number of incidents where force had been used by officers did not trigger internal affairs investigations and that the current complaint system raised concerns about consistency and fairness of department discipline. *Id.* ¶¶ 70, 74. The Department of Justice further concluded that the current department complaint form encouraged officers to give an assessment of the complainant’s mental state and thus allowed for misuse of the form. *Id.* ¶ 76. It found that the internal affairs officers and command staff who reviewed internal affairs investigations had not been adequately trained and that there were significant differences between practices required by the department’s written policies and actual practices. *Id.* ¶¶ 77, 79.

B. Discussion

1. The officer defendants. The officer defendants seek summary judgment on all counts of the complaint.

a. Count I

citation to the record, City’s Responsive SMF ¶ 24, and the paragraph is accordingly deemed admitted.

Count I alleges violation of 42 U.S.C. § 1985 by concerted action and agreement to deny the plaintiff the protections of the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Complaint (Docket No. 1) ¶¶ 38-40. The officer defendants contend that the plaintiff cannot establish that the alleged conspiracy was motivated by some class-based discriminatory animus, a necessary element of a claim under section 1985. Defendant's [sic] Motion for Summary Judgment, etc. ("Officers' Summary Judgment Motion") (Docket No. 19) at 2. The plaintiff does not respond to this argument, thereby waiving any opposition. However, the court must still "inquire whether the moving party has met its burden to demonstrate undisputed facts entitling it to summary judgment as a matter of law." *Lopez v. Corporación Azucarera de Puerto Rico*, 938 F.2d 1510,1517 (1st Cir. 1991) (citations, internal quotation marks and brackets omitted).

The complaint does not specify the subsection of 42 U.S.C. § 1985 pursuant to which the plaintiff brings this claim, but only subsection 3 of that statute, which imposes liability for conspiracy to deprive a person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, is arguably applicable. 42 U.S.C. § 1985(3).²¹

To state a claim under § 1985(3), a plaintiff must, among other requirements, allege the existence of a conspiracy intended to deprive an individual or class of persons of protected rights based on some racial, or perhaps otherwise class-based, invidiously discriminatory animus.

Burns v. State Police Ass'n of Massachusetts, 230 F.3d 8, 12 (1st Cir. 2000) (citation and internal punctuation omitted) (affirming grant of summary judgment). In this case, the plaintiff offers no evidence of any racial or otherwise class-based discriminatory animus on the part of the officers. They are therefore entitled to summary judgment on Count I. *See also McDermott v. Town of Windham*, 204 F.Supp.2d 54, 59 n.9 (D. Me. 2002).

²¹ Subsections 1 and 2 of section 1985 create liability for conspiracies to prevent any federal officer from accepting office or performing his or her duties and for conspiracies to intimidate any party, witness or juror with respect to proceedings in federal court.

b. Count II

Count II asserts a claim under 42 U.S.C. § 1983, alleging that the defendant officers violated the plaintiff's clearly established constitutional rights to free speech, bodily integrity, freedom from the use of excessive force, due process and freedom from illegal search and seizure. Complaint ¶¶ 41-48. The defendants contend that they are entitled to qualified immunity from all of these charges. Officers' Summary Judgment Motion at 3-11. In the context of section 1983 claims, the doctrine of qualified immunity provides that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

When a defendant seeks qualified immunity, the Supreme Court has directed that a ruling on that issue should be made by the court in advance of trial. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). The initial inquiry must be: "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?" *Id.* at 201. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* This inquiry must be undertaken in light of the specific facts of the case. *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. These three inquiries must be made in sequence, and a single negative answer is sufficient to defeat the plaintiff's claim. *Hatch v. Department for Children, Youth & Their Families*, 274 F.3d 12, 20 (1st Cir. 2001).

"The threshold inquiry is whether the plaintiff's allegations, if true, establish a constitutional violation." *Suboh v. District Attorney's Office Suffolk Dist.*, 298 F.3d 81, 90 (1st Cir. 2002)

(citation omitted). Two of the plaintiff's specific allegations in Count II fail at this level. The plaintiff contends that she has submitted sufficient evidence of a First Amendment violation because "Plaintiff testified at her deposition²² that the officers physically restrained her from calling her lawyer or Chief Chitwood;" the officers entered the apartment and struck the plaintiff because they were angry that she had refused to allow them entry; and McGinty told the plaintiff to "shut up" and "smashed" her face into the floor "to get her to stop protesting" their illegal entry and use of force. Plaintiff's Memorandum of Law in Opposition to Defendant Officers' Motion for Summary Judgment ("Plaintiff's Officers' Opposition") (Docket No. 24) at 5. The second of these assertions is not supported by any reasonable inferences that may be drawn from any paragraph or paragraphs in the plaintiff's statement of material facts. She alleges that "[t]he officers were angry and came inside like a steamroller," Plaintiff's Officers' SMF ¶ 65, but not that they struck her because she had refused to let them enter. The third of these assertions is similarly unsupported; she alleges that McGinty "told her to 'shut up,' 'I don't want to hear any more of this,' grabbed the top of her head and deliberately slammed her head onto the floor," Plaintiff's Officers' SMF ¶ 94, but those statements do not lead to the conclusion that the alleged actions were undertaken "to get [the plaintiff] to stop protesting" the allegedly illegal entry and use of force. The first assertion is supported by paragraphs 86 and 87 of the plaintiff's statement of material facts. However, in order to avoid summary judgment on a First Amendment claim arising out of these facts, the plaintiff must prove that she would not have been arrested, or would not have been struck as she claims, but for her statement that she was going to call her lawyer or Chitwood. *Tatro v. Kervin*, 41 F.3d 9, 18 (1st Cir. 1994). The plaintiff alleges that McGinty and Gauvin "jumped" her and beat her "[w]hen [she] told the officers to stop hitting J. Forbis and tried to use the

²² Of course, the court will not consider the plaintiff's testimony at deposition in connection with a motion for summary judgment unless factual material therefrom is included and properly supported in a statement of material facts submitted in accordance with Local Rule 56.

phone to call her lawyer or Chief Chitwood.” Plaintiff’s Officers’ SMF ¶ 87. The plaintiff here alleges, by reasonable inference, that she was beaten because she told the officers to stop hitting her son and because she was trying to use the telephone. This does not establish that she would not have been beaten but for her statement that she was going to call her lawyer or Chitwood. *See Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1230-31 (D. Me. 1996). The officer defendants are entitled to summary judgment on Count II insofar as it is based on alleged violation of the First Amendment.

The plaintiff’s other threshold problem arises in connection with her claim of a due process violation as a basis for section 1983 liability. “[A]ll claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.” *Graham v. Connor*, 490 U.S. 386, 395 (1989). Substantive due process claims are appropriate when the objectionable conduct occurred “outside of a criminal investigation or other form of governmental investigation or activity.” *Poe v. Leonard*, 282 F.3d 123, 136 (2d Cir. 2002). The officer defendants contend that the plaintiff’s “bodily integrity” and due process claims are barred by the circumstances she alleges, which give rise to a Fourth Amendment claim, if any claim at all. Officers’ Summary Judgment Motion at 5-6. The plaintiff responds, agreeing that her “bodily integrity” claims arise under the due process clause, but states that she “suffered injuries before she was arrested or seized,” apparently contending that her due process claim applies only to the minutes before she was actually arrested. Plaintiff’s Officers’ Opposition at 14-15. This argument draws too fine a distinction. The very few minutes in which the plaintiff alleges that she was injured by the officers before she was arrested cannot reasonably be characterized as not having been “in the course of” an arrest or seizure of the plaintiff, nor as having

occurred outside of a police investigation. The officer defendants are entitled to summary judgment on that portion of Count II that arises out of any substantive due process claim.²³

With respect to the remaining allegations in Count II, the officer defendants argue that they had probable cause to enter the plaintiff's apartment and that exigent circumstances justified their entry, and that they had probable cause to arrest the plaintiff, entitling them to qualified immunity. Officers' Summary Judgment Motion at 6-11. The plaintiff responds that there are disputed material facts that prevent summary judgment on this ground. Plaintiff's Officers' Opposition at 6-13. I will address the entry and the arrest separately.

"Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984). Here, the officers contend that they decided to enter the plaintiff's apartment without her consent in order to check on the physical wellbeing of James. Officers' Summary Judgment Motion at 6-10. The entry²⁴ therefore cannot be analyzed through application of principles developed in case law involving warrantless entries for purposes of arrest. Exigent circumstances justifying a warrantless search of a private residence typically include hot pursuit of a fleeing felon, threatened destruction of evidence, risk of escape of a suspect and a threat posed by a subject to the lives or safety of the public, the officers or an occupant. *United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995). More generally, exigent circumstances exist where "there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." *Fletcher v. Town of Clinton*, 196 F.3d 41, 49 (1st Cir. 1999) (citation omitted).

²³ None of the parties refers to the plaintiff's allegation that the officer defendants violated her "right to action to pursue a claim for the deprivation of these [other enumerated] rights," Complaint ¶ 44, and I accordingly express no opinion on that issue.

²⁴ Contrary to the plaintiff's suggestion, Plaintiff's Officers' Opposition at 8, the placing of an officer's foot on the threshold of her (continued on next page)

An officer's *reasonable* belief that the delay needed to obtain a warrant would pose a threat to police or the public safety is sufficient to create exigent circumstances. The Supreme Court's standard of reasonableness is comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present.

Id. (citations and internal quotation marks omitted; emphasis in original). "Evidence of extreme danger in the form of shots fired, screaming, or blood is not required for there to be some reason to believe that a safety risk exists." *Id.* (citing and quoting *United States v. Brown*, 64 F.3d 1083, 1086 (7th Cir. 1995) ("We do not think that the police must stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they can hear screams.")). In *Fletcher*, the First Circuit concluded that officers who entered the plaintiff's home out of concern for her safety after seeing a man against whom they knew she had obtained a protective order enter her home were entitled to qualified immunity. *Id.* at 47, 49-53.

Here, the undisputed evidence in the summary judgment record establishes that: James and Andrew engaged in a physical altercation, Officers' SMF ¶ 31, Plaintiff's Responsive Officers' SMF ¶ 31; some of James's blood was spilled as a result, *id.* ¶ 37; there was swelling on Andrew's body as a result, *id.* ¶ 41; blood was visible on the floor and wall in the kitchen-hallway of the plaintiff's apartment after the altercation, *id.* ¶ 43; after separating James and Andrew the plaintiff attempted to clean blood from this area, *id.* ¶ 51; Andrew called the police emergency number after the altercation and requested assistance regarding an assault of which he was the victim, *id.* ¶¶ 54-55, 58; during this telephone call Andrew reported that his brother James, the assailant, was still at 260 Veranda Street, *id.* ¶¶ 57, 60, 62; during this telephone call Andrew reported that part of his body was swollen, *id.* ¶ 65; Andrew also reported that James had "grabbed a hold of me" and that they had thereafter "tumbled

apartment was not itself an entry. *United States v. Santana*, 427 U.S. 38, 42 (1976).

down” to the floor and “went through or to the wall,” *id.* ¶¶ 67-68, 69;²⁵ Andrew reported to the police dispatcher that the fight started because “when [James] gets drinking, he drinks, something like brandy, . . . [m]akes him wild sometimes,” *id.* ¶ 74;²⁶ Vogel, McGinty and Gauvin were advised by the dispatcher that a person in apartment 1 at 260 Veranda Street had complained of an assault and that the assailant was in apartment 2 at the same location, *id.* ¶ 79; the plaintiff told the officers to leave, *id.* ¶¶ 106, 111; the plaintiff closed the door to her apartment on Vogel’s knee and foot, *id.* ¶ 107; the plaintiff told the officers that she would not allow them to enter her apartment without a warrant, *id.* ¶¶ 114, 133; McGinty got the impression that the plaintiff was the mother of Andrew and James and heard her say that she would take care of the situation, Plaintiff’s Officers’ SMF ¶ 46, Officers’ Responsive SMF ¶ 46; Andrew came out of his apartment to talk with the officers, all of whom noted an odor of alcohol coming from him, Officers’ SMF ¶¶ 121, 165-67, Plaintiff’s Responsive Officers’ SMF ¶¶ 121, 165-67; Vogel noticed that Andrew had a swollen left eye, *id.* ¶ 122; Andrew told Vogel that his brother had attacked him for no reason, *id.* ¶ 123;²⁷ Andrew told the officers that he would rather “just forget about it and let it go,” *id.* ¶ 168; Andrew told the officers that James was “fine,” *id.* ¶ 178; Gauvin and Vogel were concerned about the wellbeing of James, *id.* ¶¶ 181-82;²⁸ Gauvin told Vogel and McGinty that they had an obligation to ascertain the wellbeing of James, *id.* ¶ 185;²⁹ the plaintiff told the officers that no one inside her apartment was injured and that James was “fine,” *id.* ¶¶ 191,

²⁵ The plaintiff purports to deny paragraph 69 of the officers’ statement of material facts, but I have used the statement of the actual content of the telephone call that is presented in her denial. Plaintiff’s Responsive Officers’ SMF ¶ 69.

²⁶ The plaintiff’s response to this paragraph of the officers’ statement of material facts is a qualification, assertion that “[n]o one was drinking in Ms. Forbis’ apartment.” Plaintiff’s Responsive Officers’ SMF ¶ 74. For the purpose of a qualified immunity analysis, what is relevant is not what actually happened, but rather what the officers knew or had been told.

²⁷ The plaintiff purports to deny this paragraph of the officers’ statement of material facts, but the factual assertions in that denial do not address the assertions made in the initial paragraph. Plaintiffs’ Responsive Officers’ SMF ¶ 124. The paragraph is accordingly deemed admitted.

²⁸ The plaintiff purports to deny these paragraphs of the officers’ statement of material facts, but the objection goes to the reasonableness of the officers’ belief, not whether they held it. Plaintiff’s Responsive Officers’ SMF ¶¶ 181-182. The reasonableness of that belief is a matter to be determined by the court.

²⁹ The plaintiff purports to deny this paragraph of the officers’ statement of material facts, but the denial is not responsive, Plaintiffs’ (continued on next page)

202; Gauvin decided to enter the apartment without the plaintiff's consent primarily to ascertain the wellbeing of James, *id.* ¶¶ 209, 211;³⁰ and domestic violence calls are among the highest priority calls encountered by the Portland police department, and the department has set procedures to be followed in responding to such calls, City's SMF ¶¶ 12-13, Plaintiff's Responsive City SMF ¶¶ 12-13.

The plaintiff argues that the defendants knew that they were not facing a domestic violence situation because the definitions of a domestic violence situation and of family and household members in 15 M.R.S.A. § 321(1) do not include adult relatives who do not live in the same household, and Andrew lived in a separate apartment from the plaintiff. Plaintiff's Officers' Opposition at 9.³¹ However, that statutory definition applies only to the issuance of protective orders by Maine courts. The police department's written operating procedure for domestic violence contains no such limiting definition. Portland Police Department Standard Operating Procedure Number 41F, Exh. 11 to Deposition of Michael Chitwood ("Chitwood Dep."). Police officers faced with a reported assault of one brother by another cannot be expected to determine on the spot, in the absence of any former instruction on the issue, from the fact that one brother lives in a different apartment in the same three-unit building where his mother lives and the other brother is located that the brothers are not members of the same household and therefore the incident does not involve domestic violence. It cannot be said, under the circumstances presented, that the officers' conclusion that they were faced with a domestic violence situation was unreasonable.

Responsive Officers' SMF ¶ 185, and the paragraph is therefore deemed admitted.

³⁰ The plaintiff purports to deny paragraph 211 of the officers' statement of material facts, but the record citations given do not support that denial, Plaintiff's Responsive Officers' SMF ¶ 211, and the paragraph is accordingly deemed admitted.

³¹ The only reference to James's residence in the summary judgment record is an assertion that he "was staying for the evening" in "his mother's guest bedroom." Plaintiff's Officers' SMF ¶ 16; Officers' Responsive SMF ¶ 16.

It would not be clear to a reasonable officer in the position of McGinty, Gauvin or Vogel that entry into the plaintiff's apartment under the circumstances presented above was unlawful. They had received conflicting information from James about the assault and its results; the plaintiff had denied that anyone was injured despite the presence of blood on the walls and floor; and James was known to be in the plaintiff's apartment. Deference to police judgments "may be particularly warranted in domestic disputes. In those disputes, violence may be lurking and explode with little warning. Domestic violence victims may be intimidated" *Fletcher*, 196 F.3d at 50. "Domestic violence situations require police to make particularly delicate and difficult judgments quickly." *Id.* Here, the officers' decision not to delay long enough to seek a warrant was, on balance, objectively reasonable. *See id.* at 50-52; *Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir. 1985). The officer defendants are therefore entitled to qualified immunity as to the entry.

The same is not true as to the claims of excessive force and unlawful arrest, however. The officers contend that there was probable cause for the arrest of the plaintiff on the assault charge because she assaulted Vogel. Officers' Summary Judgment Motion at 11. However, that factual assertion is vigorously disputed by the plaintiff. Plaintiff's Responsive Officers' SMF ¶¶ 239-40, 242, 254-56; Plaintiff's Officers' SMF ¶¶ 83, 90. The same is true of the other charges for which the plaintiff was arrested: disorderly conduct, obstructing government administration and refusal to submit to arrest. Plaintiff's Responsive Officers' SMF ¶¶ 214, 217, 239-40, 254-55, 257-58, 260-61; Plaintiff's Officers' SMF ¶¶ 57, 62-63, 65, 83, 90. If the plaintiff's version of these events is credited, there was no probable cause for the arrests and no reasonable police officer in the defendants' position would have believed that the arrests were lawful. The police defendants are not entitled to qualified immunity on these claims.

With respect to the claims of use of excessive force, the officer defendants offer no argument specific to Count II but rather rely on their argument in support of summary judgment on Count IV, Officers' Summary Judgment Motion at 6, which alleges the use of excessive force independent of section 1983. Essentially, the officers contend that the plaintiff's alleged injuries were suffered when she intervened in the altercation between her sons, she fell to the floor in her apartment rather than being pushed, she assaulted two of the officers and resisted arrest, and that the extent of her injuries is not consistent with her claims about the force used against her, all of which compel the conclusion that excessive force was not used. *Id.* at 12-16. The latter argument goes to the weight of the evidence and is not helpful in the summary judgment context. The evidence in the summary judgment record could be interpreted as the officers suggest, but it is very much in dispute. The right to be free of the use of excessive force under the circumstances as the plaintiff portrays them is clearly established, and no reasonable police officer would think otherwise if the circumstances in fact were as she describes them. *See generally McLain v. Milligan*, 847 F. Supp. 970, 976-77 (D. Me. 1994). The officer defendants are not entitled to qualified immunity from the claims of use of excessive force raised in Count II.

c. Count III

Count III of the complaint alleges violation of the Maine Civil Rights Act, 5 M.R.S.A. § 4682. Complaint ¶¶ 59-61. The officer defendants contend that they are entitled to summary judgment on this count because “the Plaintiff has not produced any evidence whatsoever supporting the existence of an illegal conspiracy” and any use of force and the entry into the plaintiff's apartment “was objectively reasonable under the facts and circumstances.” Officers' Summary Judgment Motion at 11-12. The plaintiff appears to agree that the legal standards applicable to her section 1983 claims set forth in Count II are equally applicable to the state-law claims set forth in Count III. Plaintiff's Officers'

Opposition at 15-16. Accordingly, the officer defendants are entitled to summary judgment on so much of Count III as is based on allegations concerning the entry into the plaintiff's apartment, alleged due process violations and free speech claims, and not to any other allegations in Count III.

d. Count IV

Count IV alleges civil conspiracy, a state common-law claim. Complaint ¶¶ 62-65. The officer defendants merely argue that there is insufficient evidence to establish the elements of such a claim. Officers' Summary Judgment Motion at 12. Maine law requires "the actual commission of some independently recognized tort" in order to support a claim for civil conspiracy. *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 708 A.2d 283, 286 (Me. 1998). The plaintiff identifies the independent torts in this case as assault, trespass, false imprisonment and intentional infliction of emotional distress. Plaintiff's Officers' Opposition at 16-17. It is the tort, "and not the fact of combination," that is the foundation of civil liability. *Cohen v. Bowdoin*, 288 A.2d 106, 110 (Me. 1972). "In Maine, conspiracy is not a separate tort but rather a rule of vicarious liability." *McNally v. Mokarzel*, 386 A.2d 744, 748 (Me. 1978). Here, each of the officer defendants is alleged to have committed directly the underlying torts identified by the plaintiff. Complaint ¶¶ 67-69, 71, 73-75, 77-79. The complaint does not contain any allegations of vicarious liability against the officers, nor could it under the circumstances. The officer defendants are accordingly entitled to summary judgment on Count IV.

e. Count V

Count V alleges assault and the use of excessive force. Complaint ¶¶ 66-69. For the reasons already discussed, the officer defendants are not entitled to summary judgment on this excessive force

claim. They make no separate argument concerning the allegation of assault. The plaintiff has submitted sufficient evidence to allow her assault claim to proceed to trial.

f. Count VI

Count VI alleges that the defendants unlawfully restrained and detained her. Complaint ¶¶ 70-71. The officer defendants contend, in conclusory fashion, that they are entitled to summary judgment on this claim for the reasons set forth in their discussion of the claims of excessive force and probable cause to arrest. Officers' Summary Judgment Motion at 16. As I have discussed above, the officers are not entitled to summary judgment on the basis of either of those arguments. Accordingly, they have not established that they are entitled to summary judgment on this claim.

g. Count VII

Count VII alleges intentional infliction of emotional distress. Complaint ¶¶ 72-75. The officer defendants contend that the plaintiff has not produced proof of severe emotional distress. Officers' Summary Judgment Motion at 16. The plaintiff offers a cursory opposition. Plaintiff's Officers' Opposition at 18-19. Under Maine law,

[t]he tort theor[y] of intentional . . . infliction of emotional distress . . . require[s] proof of severe emotional distress. Serious emotional distress exists where a reasonable person normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the event.

McDermott, 204 F.Supp.2d at 70 (citations and internal quotation marks omitted). Here, the plaintiff relies, Plaintiff's Officers' Opposition at 19, on allegations that she was upset, crying and hyperventilating when she arrived at the hospital after her arrest, with high blood pressure and wrist pain, Plaintiff's Officers' SMF ¶ 103; she was given narcotics at the hospital "to help calm her down," *id.* ¶ 105; her life has been "destroyed" because she has chronic pain from a permanent back injury

caused by the officers, *id.* ¶ 109; and she suffers nightmares, episodes of crying, extreme fear, sorrow and anxiety attacks, which she characterizes as “extreme psychological distress,” *id.* ¶ 115. The plaintiff does not claim that she has any training or experience that would allow her to diagnose “extreme psychological distress,” and her factual allegations otherwise are factually indistinguishable from those found insufficient by this court in *McDermott*. 204 F.Supp.2d at 70-71. The officer defendants are accordingly entitled to summary judgment on Count VII.

h. Count VIII

Count VIII alleges trespass and illegal entry. Complaint ¶¶ 76-79. The officer defendants contend, in conclusory fashion, that they are entitled to summary judgment on these claims because their entry was justifiable under the Fourth Amendment. Officers’ Summary Judgment Motion at 17. The plaintiff appears to agree with the officers’ legal position, arguing only that the lack of probable cause and exigent circumstances means that the officers committed criminal trespass³² by holding the door to her apartment open with their feet and again when they entered her apartment. Plaintiff’s Officers’ Opposition at 19-20. Under Maine law, common-law trespass involves unpermitted entry onto the property of another, “even if the trespasser had no knowledge that he was on the land of another and had no intention of harming the owner of that land.” *Royal Ins. Co. v. Pinette*, 756 A.2d 520, 523 (Me. 2000). The plaintiff offers no argument or authority to the effect that a landowner may recover damages for civil trespass in circumstances where a police officer’s entry was not violative

³² Whether the officer defendants committed *criminal* trespass, which is defined at 17-A M.R.S.A. § 402 and was the issue in the only case cited by the plaintiff, *State v. Boilard*, 488 A.2d 1380 (Me. 1985), Plaintiff’s Officers’ Opposition at 19, is irrelevant here. The criminal statute creates no private, civil cause of action. The plaintiff’s claim can only be one for civil, common-law trespass. She does not suggest that her claim of “illegal entry” is in any way a separate claim from her trespass claim, and I am not aware of any distinct common-law claim for illegal entry.

of the Constitution, and such a result would severely undermine the concept of qualified immunity. The officer defendants are entitled to summary judgment on Count VIII.

i. Count IX

The final count of the complaint alleges that the defendant officers violated 15 M.R.S.A. § 704.

Complaint ¶¶ 80-82. That statute provides, in relevant part:

Every . . . police officer shall arrest and detain persons found violating any law of the State . . . until a legal warrant can be obtained . . . ; but if, in so doing, he acts wantonly or oppressively, or detains a person without a warrant longer than is necessary to procure it, he shall be liable to such person for the damages suffered thereby.

15 M.R.S.A. § 704. The officer defendants contend that they are entitled to summary judgment on this claim because “it is clear that the Defendants had justifiable cause under the Fourth Amendment . . . to make an emergency entry into the Plaintiff’s apartment” and it was not possible to obtain a warrant under the circumstances. Officers’ Summary Judgment Motion at 17-18. However, the statute by its terms applies to wanton or oppressive acts in the course of arresting a person without a warrant, not merely unjustifiable delay in obtaining a warrant. *See Creamer v. Sceviour*, 652 A.2d 110, 115 (Me. 1995). Whether the entry was lawful is not particularly relevant to consideration of whether the arrest itself involved wanton or oppressive acts. On the showing made, the officer defendants are not entitled to summary judgment on Count IX.

2. *The City Defendants’ Motion.* The city and police department seek summary judgment on all counts of the complaint applicable to them on the grounds that “there was no underlying constitutional violation by any individual defendant” and that the plaintiff has not generated any evidence that would subject these defendants to liability. Defendants City of Portland, Portland Police Department and Chief Michael Chitwood’s Motion for Summary Judgment (“City Summary Judgment Motion”) (Docket No. 13) at 1. I have already determined that certain constitutional allegations against the

individual defendants remain for trial and therefore will not discuss the city defendants' first argument further. Chitwood seeks summary judgment on all applicable counts on the grounds that there is no subordinate liability, there is no evidence that he was aware or should have been aware of any constitutionally inadequate custom or practice and there is no evidence that the supervision and training he provided to police officers was constitutionally inadequate and a proximate cause of harm to the plaintiff. *Id.* at 2. Again, I have already concluded that the plaintiff should be allowed to proceed with some of her constitutional claims against the officer defendants, so I will not consider further the contention that Chitwood is entitled to summary judgment because his subordinates are not liable to the plaintiff.

a. Count I

To the extent that Count I of the complaint may reasonably be construed to make allegations against any or all of the city defendants, they are entitled to summary judgment for the reasons set forth in my discussion of this count with respect to the officer defendants.

b. Count II

i. The City and the Department. Count II alleges that the city (and presumably the police department, to the extent that the plaintiff intends to sue them as two separate entities) “acquiesced in a police custom, culture³³ or policy that violates clearly established constitutional rights” that “are tantamount to a reckless, callous or deliberate indifference to the rights of the plaintiff” and caused the deprivation of the plaintiff’s constitutional and unspecified statutory rights. Complaint ¶¶ 56, 58. The city and the police department contend that the plaintiff has not presented sufficient evidence of the

³³ The plaintiff devotes considerable time to a discussion of an alleged “culture” in the police department, Plaintiff’s Memorandum of Law in Opposition to City Defendants’ Motion for Summary Judgment (“Plaintiff’s City Opposition”) (Docket No. 22) at 9-10, but culture is not mentioned in the case law cited by the plaintiff as an alternative to custom or policy as the basis for municipal liability under section 1983. To the extent that the evidence submitted and discussed by the plaintiff in this regard also applies to the custom or policy analysis, I will consider it, but I will not address any alleged police department “culture” as a separate basis for liability.

existence of a custom or policy that caused the alleged constitutional deprivations. City Summary Judgment Motion at 6-9. The plaintiff responds that she has submitted sufficient evidence of a failure to train police officers that resulted in the alleged constitutional violations and that she has submitted evidence of a pattern of similar violations and the “culture” of the police department and its history of inadequate discipline of officers which is adequate as well to make summary judgment unavailable. Plaintiff’s City Opposition at 4-14. In their reply, the city defendants assert that the plaintiff has identified no custom or policy that caused the alleged deprivations of constitutional rights and that there is no evidence in the summary judgment record of any failure to train Portland police officers adequately. Defendants’, City of Portland, Michael Chitwood and Portland Police Department (“City Defendants”), Objection and Reply Memorandum (“City’s Reply”) (Docket No. 31) at 2-3.

A plaintiff seeking to impose liability on a municipality under section 1983 must identify a municipal policy or custom that caused her injury. *Board of County Comm’rs of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 403 (1997).

The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the “moving force” behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Id. at 404 (emphasis in original). Inadequate training may be the basis for section 1983 liability in limited circumstances, *id.* at 407, “only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact,” *Canton v. Harris*, 489 U.S. 378, 388 (1989).

Existence of a [training] “program” makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the

consequences of their action — the “deliberate indifference” — necessary to trigger municipal liability. In addition, the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the “moving force” behind the plaintiff’s injury.

Bryan County, 520 U.S. at 407-08 (citations omitted). Here, the plaintiff clearly raises a claim of inadequate training, Plaintiff’s City Opposition at 5-10, and possibly a claim of a custom of protecting officers who violate the constitutional rights of city residents that led to the misconduct alleged in this case, *id.* at 10-14. She does not identify any policy of the city defendants that allegedly led to the injuries which she claims, and accordingly I will not consider further any possible policy of the city defendants in this regard.

In order to maintain a claim under section 1983 grounded on an unconstitutional municipal custom or practice, a plaintiff must meet two requirements.

First, the custom or practice must be attributable to the municipality, i.e., it must be so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice. Second, the custom must have been the cause of and the moving force behind the deprivation of constitutional rights.

Miller v. Kennebec County, 219 F.3d 8, 12 (1st Cir. 2000) (citation and internal quotation marks omitted). The plaintiff contends that the manner in which the police department’s internal affairs investigation of her complaint about the April 10, 2001 incident was conducted “is consistent with a practice of protecting officers engaged in misconduct.” Plaintiff’s City Opposition at 10. This investigation occurred after the events at issue, so it cannot be evidence of a pre-existing custom or practice, “so well settled and widespread that the policymaking officials . . . can be said to have either actual or constructive knowledge of it yet did nothing to end the practice.” As additional evidence to support her claim on this point, the plaintiff refers to (i) an incident in 1996 in which Gauvin and two other police officers while in uniform and in a marked police cruiser purchased and drank alcohol and

received only a written reprimand (“the second lowest form of punishment”) and (ii) a 1997 incident in which McGinty was also given a written reprimand following a complaint that he made racist comments after serving a criminal trespass notice to a black man. *Id.* at 12-13; Plaintiff’s City SMF ¶¶ 16-18;³⁴ 26, 28-31. The plaintiff also relies on another incident in which McGinty allegedly made inappropriate remarks toward two handicapped individuals for which he was not disciplined, Plaintiff’s City Opposition at 13, but that factual material is not appropriately presented in the summary judgment record and will not be considered here.³⁵

The plaintiff also contends that Chitwood has created a tone in the department which shows that “he condones violence, that his officers can do whatever they want and he will defend them.” *Id.* at 10. This assertion is based on an incident that occurred at the Portland airport after the events in question in this case, *id.*; that Chitwood’s nickname when he was an officer was “Dirty Harry” and that he has posed for pictures “menacingly” and stated that “you can’t out lie me,” *id.* at 9; that Chitwood “endorsed and ratified a totally inadequate investigation” of the plaintiff’s complaint about the events giving rise to this action, *id.*; and that Chitwood “comment[ed] in public” that a jury was wrong in finding an officer liable in *Cummings v. Libby*, 176 F.Supp.2d 26 (D. Me. 2001), and “defend[ed] the actions of the officers involved” in a case based on allegations of use of excessive

³⁴ The city defendants object to paragraph 17 of the plaintiff’s statement of additional material facts. City Defendants’ Responsive SMF ¶ 17. The response is confusingly stated, but the objection appears to be that the paragraph should be disregarded because it contains multiple factual assertions, each of which “is supposed to be in a separate numbered paragraph” under this court’s Local Rule 56. *Id.* This is an objection made repeatedly by the city defendants in their responses to the plaintiff’s statement of material facts. While the presentation sought by the defendants would have been preferable, no discernable confusion results from the plaintiff’s chosen method of presenting factual assertions and I will not strike any paragraphs of her submissions on this basis.

³⁵ The plaintiff cites paragraph 74 of her response to the city defendants’ statement of material facts and paragraph 15 of her statement of material facts. Plaintiff’s City Opposition at 13. Paragraph 74 of her response to the city defendants’ statement of material facts purports to be a denial, Plaintiff’s Responsive City SMF ¶ 74, but the facts presented there do not address the assertions made in that paragraph of the city defendant’s statement of material facts, City SMF ¶ 74, but rather seek to add facts that could be interpreted to undermine the credibility of the assertion made by Chitwood recited in that paragraph of the initial statement of material facts. The citation offered in support of paragraph 15 of the plaintiff’s statement of material facts, Plaintiff’s City SMF ¶ 15, shows only an attorney’s question as the source of the factual assertion, to which the deponent replied that he was not familiar with any such complaint, Chitwood Dep. at 68-69. It is basic hornbook law that an attorney’s question does not constitute evidence.

force that was settled by the city, *id.* As I have previously noted, events occurring after the events that gave rise to this lawsuit cannot reasonably be considered as evidence of a municipal custom or practice.³⁶ Accordingly, the incident that occurred at the Portland airport, Chitwood's involvement in the internal affairs investigation of the plaintiff's complaint and Chitwood's comments about two other cases³⁷ cannot be considered with respect to the claim of a municipal custom. The only remaining allegations, concerning Chitwood's nickname, posing for photographs and asserting that he could not be "out lied" are hardly the stuff of which a municipal custom of unconstitutional use of force is made.

The two incidents that did not involve Chitwood are similarly insufficient to establish a well-settled custom of inappropriate discipline for police misconduct that could have been the moving force behind the constitutional deprivations alleged in this case. As presented, neither incident involved a deprivation of constitutional rights. Neither involved the inappropriate use of force. *See Elliott v. Cheshire County, New Hampshire*, 940 F.2d 7, 12 (1st Cir. 1991) (discussing custom as the practice involved in the incident that gave rise to the lawsuit); *Bordanaro v. McLeod*, 871 F.2d 1151, 1156-57 (1st Cir. 1989) (same). *See generally Silva v. Worden*, 130 F.3d 26, 32 (1st Cir. 1997). The city and the police department are entitled to summary judgment on any section 1983 claim based on an alleged custom or practice.

With respect to her claim of inadequate training, the plaintiff relies on assertions that (i) Gauvin could not remember a course or program "where he was taught about the constitutional

³⁶ The plaintiff cites *Grandstaff v. City of Berger*, 767 F.2d 161, 171 (5th Cir. 1985), in support of her contention that a policymaker's "subsequent acceptance of dangerous recklessness . . . tends to prove his preexisting disposition and policy," Plaintiff's City Opposition at 9. The circumstances of that case are easily distinguishable from those present here. Nothing that the plaintiff alleges Chitwood to have "endorsed" approaches the circumstances of the "gross . . . abuse of the use of deadly weapons" present in *Grandstaff*. 767 F.2d at 171.

³⁷ The citations given by the plaintiff to support her assertions concerning Chitwood's "public" remarks about the Cummings case and his defense of the officers involved in another case are to Chitwood's deposition. Plaintiff's City Opposition at 9. Those citations establish only that Chitwood said at his deposition (and not "publicly") on October 29, 2002, that he thinks the jury was wrong in the *Cummings* case and that the city "made a mistake" in settling the other case. Chitwood Dep. at 115, 89. The plaintiff has made no showing that Chitwood expressed such opinions before April 10, 2001 or that his opinions were generally known to Portland police (*continued on next page*)

rights of citizens with respect to the law of arrests, use of force and warrantless entries into private dwellings;” (ii) Gauvin testified that the department did not respond to the lodging of a complaint against an officer with more training; (iii) officers are never tested to see if they understand the department’s standard operating procedures with respect to the constitutional rights of citizens; (iv) Chitwood admitted that the department only spent \$5000 per year to train 160 officers; and (v) there is a pattern of excessive force complaints against Portland police officers. Plaintiff’s City Opposition at 5-8.³⁸ The plaintiff supports this argument with citations to paragraphs 6 and 56 of her response to the city defendants’ statement of material facts and paragraphs 32, 38-42 and 44-46 of her own statement of material facts. *Id.* The city defendants object to the plaintiff’s citation to her response to paragraph 6 of their statement of material facts because it sets forth additional facts that should be included in a separate statement rather than in a response. City Reply at 1. I conclude that the portion of her response to paragraph 6 of the city defendants’ statement of material facts on which the plaintiff relies here is responsive to the assertion in the original document that “[t]he training given the Defendant Officers was adequate,” City SMF ¶ 6, and appropriately included in that response to demonstrate the existence of a factual dispute. However, with respect to the assertion that the police department “budgeted and spent \$5,000.00 a year to train 160 officers,” Plaintiff’s Responsive City SMF ¶ 6 at 3, the cited reference establishes only that in 2002, after the incident that gave rise to this case, the police department increased its budget for training from \$5,000 to \$30,000 a year, Chitwood

officers at that time.

³⁸ The plaintiff also responds to an argument made by the city defendants in their initial summary judgment motion by suggesting that a single incident may establish a municipal custom or practice, referring to *Willhauck v. Halpin*, 953 F.2d 689, 714 n. 25 (1st Cir. 1991). Plaintiff’s City Opposition at 4-5. The plaintiff’s contention that the incident in this case “involve[d] the concerted action of a large contingent of municipal employees,” *id.* at 5, and thus may provide the basis for a claim of inadequate training, is without merit. The footnote in *Willhauck* cites *Bordonaro* for the proposition that a single incident provides “some proof” of the existence of an underlying custom when the incident involves “the concerted action of a large contingent of individual municipal employees.” 871 F.2d at 1156-57. Here, the incident involved four of the department’s 150-160 officers, hardly “a large contingent.” If the definition of “a large contingent” were expanded beyond those involved in the incident itself to include those involved in the department’s “chain of command” and in the subsequent investigation of the incident, as the plaintiff contends, Plaintiff’s City Opposition at 5, it could be said (*continued on next page*)

Dep. at 130. This does not establish how much the department actually spent per year for this purpose before April 10, 2001, nor does it establish what the budgeted figure was before 2002. Nor does the plaintiff offer any evidence as to the minimum amount of municipal spending that would make police training adequate. The court therefore cannot rely on the plaintiff's fourth factual assertion with respect to her training claim.

Absent any showing that Gauvin's experience is typical of that of all Portland police officers, his testimony concerning his own training cannot serve to establish that the training offered by the department to its officers was sufficiently inadequate under *Canton*. Accordingly, the first and second of the plaintiff's factual assertions do not support her position on the training claim. The plaintiff's third factual assertion misrepresents the testimony cited in support; all that her response to paragraph 6 of the city defendants' statement of material facts says on this point is that *McGinty* was never tested on the department's standard operating procedures. Plaintiff's Responsive City SMF ¶ 6 at 3. Again, one officer's experience does not a custom or practice — or inadequate training — make.

That leaves the assertion concerning a pattern of excessive force complaints. The city defendants contend that the excessive force cases discussed at page 7 of the plaintiff's memorandum of law, with the exception of *Cummings* and *Dorazio*, "are not referred to anywhere in any party's Statement of Material Facts, have no record references and should be ignored by this court." City's Reply at 2. However, the plaintiff does provide references to all but one of those cases in support of her denial of paragraph 56 of the city defendants' statement of material facts. Plaintiff's Responsive City SMF ¶ 56. These references are responsive to the city defendants' initial assertion and the city defendants have made no objection to this paragraph of the plaintiff's response. Because the case referred to in the plaintiff's memorandum of law as "*Wellness* [sic] v. *City of Portland*, 1999 WL

that every incident in which excessive use of force is alleged involves a "large contingent" of the police department's personnel.

33117076 (D. Me. July 22, 1997),” Plaintiff’s City Opposition at 7-8, is not included in the paragraphs of the statements of material facts cited in her memorandum, the court will not consider that case or assertions concerning that case further.

While “[t]he liability criteria for failure to train claims are exceptionally stringent,” *Hayden v. Grayson*, 134 F.3d 449, 456 (1st Cir. 1998) (citation and internal quotation marks omitted), it appears from the record that the plaintiff may be able to meet this standard in this case. In *Okot v. Conicelli*, 180 F.Supp.2d 238, 241 (D. Me. 2002), “the sole issue presented to the jury was whether Defendant Conicelli[, a Portland police officer,] should be held liable for violating Plaintiffs’ constitutional rights by unlawfully detaining them, falsely arresting them, and using excessive force against them on the night of May 25, 1998.” The jury found that Conicelli had done so. *Id.* In *Burbank v. Davis*, 238 F.Supp.2d 317, 318-19 (D. Me. 2003), a jury returned a verdict for a plaintiff who claimed that on July 30, 2000 a Portland police officer had punched him in the back of the head, kicked him in the back of the knee and thrown him to the ground after he had been handcuffed. In *Cummings v. Libby*, 176 F.Supp.2d 26, 29 (D. Me. 2001), the court held that “the jury was entitled to conclude . . . that [the plaintiff], an innocent bystander, became a victim of Officer Libby’s use of constitutionally unreasonable force” in Portland. The plaintiff also asserts that the city settled two other excessive force cases, *Patterson v. Dolan*, 2001 WL 1154592 (D. Me. Oct. 1, 2001), and *Dorazio v. City of Portland*, “U. S. District Court Docket No. 01-206-P-S,” but its response to paragraph 56 of the city defendants’ statement of material facts provides no support for this assertion. The Westlaw citation given for *Patterson* is to a recommended decision on a motion for summary judgment. The citation given for *Dorazio* is not sufficient to allow the reader to determine whether that case has been settled as asserted. In any event, settlement generally does not involve any finding or admission of liability by a defendant. The three cases discussed above, along with the request for a Justice Department

review of his department by Chitwood, viewed from the perspective required in connection with a summary judgment motion, are sufficient under the *Bryan County* standard to require denial of the motion of the city and the police department for summary judgment on this aspect of the plaintiff's claim. The defendants suggest that they are entitled to summary judgment because the plaintiff provides "no analysis whatsoever as to whether that is a high incidence of verdicts and settlements for a city and police force the size and diversity of Portland [sic]," but cites no authority in support of this contention. City's Reply at 4. Certainly *Bryan County* does not suggest that some level of such events is acceptable based on the size of the municipality as a matter of law. The defendants take nothing by this argument for purposes of summary judgment.

The city also seeks summary judgment on the plaintiff's claim for punitive damages, City Summary Judgment Motion at 9, in connection with Count II, Complaint at 10. The plaintiff does not respond to this portion of the motion. A municipality is immune from punitive damages under section 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). This portion of the city defendants' motion should be granted.

ii. Chief Chitwood. Chitwood seeks summary judgment on Count II on the grounds that there is no evidence in the summary judgment record to support a claim that officers knew that they would not be disciplined for constitutional violations and that he has qualified immunity from the claims asserted by the plaintiff. City Summary Judgment Motion at 13-18.

Respondeat superior liability is not available under section 1983. *Aponte Matos v. Toledo Dávila*, 135 F.3d 182, 192 (1st Cir. 1998). A supervisor may be held liable only for his own acts or omissions. *Id.* "There is supervisory liability only if (1) there is subordinate liability, and (2) the supervisor's action or inaction was affirmatively linked to the constitutional violation caused by the subordinate." *Id.* (citation and internal quotation marks omitted). The affirmative link "must amount

to . . . encouragement, condonation or acquiescence, or gross negligence amounting to deliberate indifference.” *Id.*

To demonstrate deliberate indifference a plaintiff must show (1) a grave risk of harm, (2) the defendant’s actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk. . . . [D]eliberate indifference alone does not equate with supervisory liability; a suitor must also show causation.

Camilo-Robles v. Hoyos, 151 F.3d 1, 7 (1st Cir. 1998). “[A] sufficient causal nexus may be found if the supervisor knew of, overtly or tacitly approved of, or purposely disregarded the conduct.”

Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 582 (1st Cir. 1994).

A causal link may also be forged if there exists a known history of widespread abuse sufficient to alert a supervisor to ongoing violations. When the supervisor is on notice and fails to take corrective action, say, by better training or closer oversight, liability may attach.

Id. Inadequate training of subordinates may be a basis for a claim against a supervisor under section 1983. *Id.* A supervisor may also be liable if he formulates a policy or engages in a practice that leads to a constitutional violation committed by a subordinate. *Camilo-Robles*, 151 F.3d at 7.

Here, the plaintiff apparently contends that Chitwood is liable on Count II only under the deliberate indifference alternative. Plaintiff’s City Opposition at 4. She has not submitted evidence of incidents that “form a pattern of police violence so striking as to allow an inference of supervisory encouragement, condonation, or even acquiescence,” *Voutour v. Vitale*, 761 F.2d 812, 820 (1st Cir. 1985), so that position is understandable. Nor does she suggest that Chitwood formulated a policy that led the defendant officers to violate her constitutional rights as alleged. While the question is a close one, given the standard applicable to a plaintiff’s proffered evidence in connection with a motion for summary judgment, the plaintiff has produced sufficient evidence to allow a reasonable factfinder to conclude that Chitwood knew or should have known that Portland police officers under his supervision were using excessive force, that training could have remedied this problem and that

Chitwood's failure to institute further training led to the plaintiff's alleged injuries. *See generally Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 92 (1st Cir. 1994).

Chitwood's invocation of qualified immunity also fails.

When a supervisor seeks qualified immunity in a section 1983 action, the "clearly established" prong of the qualified immunity inquiry is satisfied when (1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context.

Camilo-Robles, 151 F.3d at 6. I have already recommended that the court find that the officer defendants are not entitled to summary judgment on qualified immunity grounds with respect to at least one of the plaintiff's constitutional claims. Chitwood has offered no authority to suggest that it was not clearly established that a supervisor would be liable for constitutional violations perpetrated by those officers in that context. On the showing made, he is not entitled to qualified immunity.

Chitwood also seeks summary judgment on the plaintiff's claim against him for punitive damages under section 1983. City Summary Judgment Motion at 19. The standard applicable to this claim differs from that applicable to the claim against the city, and the plaintiff does argue against the motion. Plaintiff's City Opposition at 16-17. "[A] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). The plaintiff offers no evidence of evil motive or intent, but, as discussed above, some evidence that Chitwood was recklessly indifferent to the federally protected rights of those individuals whom Portland police officers encountered in the course of their work. If Chitwood knew or should have known before April 10, 2001 that the officers he supervised were repeatedly using excessive force, his failure to act to prevent further such incidents might constitute the requisite degree of indifference. Chitwood is not entitled to summary judgment on this claim.

c. Count III

Count III alleges violation of the Maine Civil Rights Act, 5 M.R.S.A. § 4682. Complaint ¶¶ 59-61. With respect to Chitwood, the city defendants contend that he is immune from suit on this claim because he is immune from liability on the federal section 1983 claim. City Summary Judgment Motion at 20. Because I have determined that Chitwood is not entitled to immunity from all of the plaintiff's claims against him under section 1983, I recommend that his motion for summary judgment on this count be denied. *See Jenness v. Nickerson*, 637 A.2d 1152, 1158-59 (Me. 1994). The city defendants do not address Count III with respect to the city and the police department. If the city and police department had made an argument similar to that made by Chitwood, the same result would obtain. *See Fowles v. Stearns*, 886 F. Supp. 894, 899 n.6 (D. Me. 1995). None of the city defendants are entitled to summary judgment on Count III.

d. Counts IV-VIII

Count IV of the complaint alleges civil conspiracy. Count V alleges assault. Count VI alleges false imprisonment. Count VII alleges intentional infliction of emotional distress. Count VIII alleges trespass. To the extent that the city defendants could conceivably be held liable on any of these state-law tort claims, they do not address the counts directly, arguing instead that they enjoy immunity from liability on all state-law claims asserted by the plaintiff by virtue of the Maine Tort Claims Act. City Summary Judgment Motion at 9-12, 19-20. The plaintiff apparently agrees with this approach. Plaintiff's City Opposition at 15-16.

i. The City and the Police Department. The city and the police department rely on 14 M.R.S.A. § 8103(1), which provides: "Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages." Exceptions to this immunity are set forth in 14 M.R.S.A. § 8104-A. The plaintiff "concedes that her

state claims do not fall into any of the four exceptions to immunity enumerated in 14 M.R.S.A. § 8104-A(1-4).” Plaintiff’s City Opposition at 15. She relies instead on the following relevant language from 14 M.R.S.A. § 8116:

[A]ny political subdivision may procure insurance against liability for any claim against it or its employees for which immunity is waived under this chapter If the insurance provides coverage in areas where the governmental entity is immune, the governmental entity shall be liable in those substantive areas but only to the limits of the insurance coverage.

The city contends that it is entitled to immunity from all of the plaintiff’s tort claims because it has not purchased insurance for the period including April 10, 2001. City Summary Judgment Motion at 11-12.³⁹ The plaintiff contends that the city’s self-insurance provides coverage for her claims under section 8116. Plaintiff’s City Opposition at 15-16. The plaintiff’s reading of the order establishing the city’s self-insurance program is clearly incorrect.

The city is self-insured. City SMF ¶ 2; Plaintiff’s Responsive SMF ¶ 2. A certified copy of the order establishing this self-insurance program is attached to the Affidavit of Linda Cohen (Docket No. 15). The order provides, in relevant part, that a fund is created to pay losses under the city’s self-insurance program, that the city has insured itself “against the obligations and liabilities imposed by the Maine Tort Claims Act,” and that “[t]he scope of liability assumed by the City is that imposed by the Act.” City of Portland in the City Council Order 215, Order Re: Self-Insured Liability Program, dated May 1, 2000. This self-insurance by its terms does not provide coverage in areas in which the city is immune under the Maine Tort Claims Act; it provides exactly the opposite, that the coverage does not exceed liability imposed by that statute. The city and the police department are entitled to summary judgment on any state-law claims asserted against them by the plaintiff. *See generally Comfort*, 924 F. Supp. at 1237-38; *Stretton v. City of Lewiston*, 588 A.2d 739, 740-41 (Me. 1991).

³⁹ To the extent that any of the plaintiff’s state-law tort claims against the city or the police department remain active, the plaintiff’s (continued on next page)

ii. Chief Chitwood. Chitwood contends that he is entitled to discretionary function immunity under the Maine Tort Claims Act from the state-law tort claims asserted against him by the plaintiff. City Summary Judgment Motion at 19-20. The applicable section of the Maine Tort Claims Act provides, in relevant part:

[E]mployees 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 . . . , who are required to exercise judgment or discretion in performing their official duties.

14 M.R.S.A. § 8111(1).

The plaintiff responds that Chitwood is not entitled to discretionary function immunity on her civil conspiracy claim, Count IV, and does not mention the remaining state-law counts. Plaintiff's City Opposition at 16. In determining whether an employee's action or failure to act is "encompassed within a discretionary function" under section 8111 a court must consider four factors:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

(2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective, as opposed to one which would not change the course or direction of the policy, program, or objective?

demand for punitive damages on those claims, Complaint at 11, 12, 13, 14 & 15, is barred. 14 M.R.S.A. § 8105(5).

(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Grossman v. Richards, 722 A.2d 371, 374 (Me. 1999) (citation and internal punctuation omitted).

Here, the allegation that Chitwood engaged in a conspiracy that led to the violation of the plaintiff's constitutional rights involves actions or omissions that are not essential to the accomplishment of any acceptable objective of municipal government in general or the Portland police department specifically. The circumstances raise issues of material fact as to whether Chitwood, if he acted as alleged with respect to the remaining claims under section 1983, clearly exceeded the scope of his discretion. Accordingly, on the showing made, he is not entitled to immunity under section 8111 from the claim asserted in Count IV. *See Comfort*, 924 F. Supp. at 1237.

To the extent that the remaining state-law tort claims included in the complaint may reasonably be construed to assert claims against Chitwood, he is entitled to summary judgment pursuant to section 8111.

Chitwood also seeks summary judgment on the plaintiff's demand for punitive damages on this claim. City Summary Judgment Motion at 20. The plaintiff opposes the motion, asserting without citation to authority that "the jury should be permitted to express their outrage against a public official that [sic] willfully violates the public's trust resulting in severe injuries to a citizen." Plaintiff's City Opposition at 17. Under Maine law, "[a]n award of punitive damages is justified where the plaintiff proves by clear and convincing evidence that the defendant acted with malice." *Boivin v. Jones & Vining, Inc.*, 578 A.2d 187, 189 (Me. 1990). The plaintiff has submitted no evidence that would allow a reasonable jury to conclude that Chitwood's alleged conduct was motivated by ill will toward

her. Accordingly, she must be relying on the alternative basis for an award of punitive damages under Maine law — “where deliberate conduct by the defendant . . . is so outrageous that malice toward a person injured as a result of that conduct can be implied.” *Id.* (citation omitted). The plaintiff’s allegations about Chitwood’s conduct do not meet this standard. He is entitled to summary judgment on her claim for punitive damages.

e. Count IX

Count IX purports to state a claim against all defendants under 15 M.R.S.A. § 704. Complaint ¶¶ 80-82. By its terms, that statute applies only to individual law enforcement officers. It is perhaps for this reason that the city defendants do not refer to this count in their motion for summary judgment. Because the count on its face purports to state a claim against the city, the police department and Chitwood, I recommend that the court enter summary judgment for those defendants on Count IX *sua sponte*.

V. Conclusion

For the foregoing reasons, I make the following rulings and recommendations:

- (i) The defendants’ motion to exclude the testimony of Dennis Waller is **DENIED**.
- (ii) The plaintiff’s motion to strike the first twenty paragraphs of the officer defendants’ statement of material facts (Docket No. 20) is **GRANTED** as to paragraphs 19 and 20 of that document and otherwise **DENIED**.
- (iii) The plaintiff’s motion for leave to amend her statement of additional facts submitted in opposition to the city defendants’ motion for summary judgment (included in Docket No. 23) is **GRANTED**.
- (iv) I recommend that the motion of the officer defendants for summary judgment (Docket No. 19) be **GRANTED** as to Counts I, IV, VII and VIII and as to those portions of Counts II and III as

present claims other than those based on allegations of unlawful arrest and the use of excessive force, and otherwise **DENIED**.

(v) I recommend that the motion of the city defendants for summary judgment (Docket No. 13) be **GRANTED** as to Counts I, V, VI, VIII and IX, and as to Count IV for the City of Portland and the Portland Police Department, and as to Counts II and III for the City of Portland and the Portland Police Department as to any claim other than that claim based on an alleged failure to train based on a pattern of excessive force complaints, and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 29th day of May 2003.

David M. Cohen
United States Magistrate Judge

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