

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN GARRETT,)	
)	
Plaintiff)	
)	
v.)	Civil No. 00-384-P-H
)	
TANDY CORPORATION)	
d/b/a RADIOSHACK,)	
)	
Defendant)	

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

In the wake of a First Circuit remand, defendant Tandy Corporation d/b/a RadioShack (“Tandy”) moves for summary judgment as to the two claims remaining against it in this action alleging that Tandy subjected plaintiff John Garrett to both racial discrimination and slander during and after a December 1998 shopping trip to a RadioShack store. See Defendant’s Motion for Summary Judgment, etc. (“S/J Motion”) (Docket No. 47) at 1; *Garrett v. Tandy Corp.*, 295 F.3d 94, 96 (1st Cir. 2002).¹ In connection therewith, Tandy also moves to strike all or portions of three

¹ Garrett filed the instant action on November 30, 2000, alleging violation of 42 U.S.C. §§ 1981 and 1982 (Count I), violation of the Maine Human Rights Act (“MHRA”) (Count II) and defamation (Count III). See Complaint and Demand for Jury Trial (Docket No. 1). Tandy moved to dismiss Counts I and III of the complaint as well as Garrett’s request for injunctive relief. See Defendant’s Rule 12(b)(6) Motion To Dismiss, etc. (“Motion To Dismiss”) (Docket No. 3). The complaint subsequently was amended. See First Amended Complaint and Demand for Jury Trial (“Amended Complaint”) (Docket No. 7). By decision dated June 12, 2001 the court granted the Motion To Dismiss as to Counts I and III of the Amended Complaint and denied it as to injunctive relief. See Memorandum Decision and Order on Defendant’s Motion To Dismiss Counts I and III of the Amended Complaint (Docket No. 10). Count II, a pendent state claim, eventually also was dismissed for lack of a remaining basis for federal jurisdiction, and final judgment was issued in favor of Tandy as to all counts. See Order Dismissing Count II of the Amended Complaint (Docket No. 26); Judgment (*continued on next page*)

affidavits submitted by Garrett in opposition to summary judgment. *See generally* Defendant’s Motion To Strike Affidavit of William Carter, Jr. (“Carter Motion”) (Docket No. 69); Defendant’s Motion To Strike Portions of the Affidavits of Jeffrey Neil Young and John Garrett (“Young/Garrett Motion”) (Docket No. 70). For the reasons that follow, I grant Tandy’s motion to strike the Carter affidavit, grant in part and deny in part its motion to strike portions of the Young and Garrett affidavits and recommend that its summary judgment motion be granted.

I. Summary Judgment Standards

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*

(Docket No. 27). Garrett filed a notice of appeal to the First Circuit, which by decision dated July 9, 2002 affirmed dismissal of Count I, reversed dismissal of Count III and remanded the case for further proceedings. *See* Notice of Appeal (Docket No. 28); Judgment (*continued on next page*)

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).

II. Factual Context

A. Carter Motion

Tandy moves to strike, in its entirety, an affidavit of plaintiff’s expert William M. Carter, Jr., on grounds that Carter is not qualified to offer the testimony in issue and that the testimony is, in any event, both unreliable and unhelpful to a trier of fact. *See generally* Carter Motion; Affidavit of William M. Carter, Jr. (Docket No. 62). I grant the motion, although on a different basis: that the affidavit is nowhere referenced in Garrett’s statement of material facts. *See generally* Plaintiff’s Opposition to Defendants’ [sic] Statement of Material Facts and Plaintiff’s Statement of Material Facts Not in Dispute (“Plaintiff’s Opposing SMF”) (Docket No. 56).² Hence, per Local Rule 56(e), it is not cognizable. *See* Loc. R. 56(e); *see also, e.g., Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995) (“The parties are bound by their [Local Rule 56] Statements of Fact and cannot challenge the court’s summary judgment decision based on facts not properly presented therein.”). Moreover, even assuming *arguendo* that the affidavit were cognizable, its inclusion would not be outcome-determinative.³

B. Young/Garrett Motion

(Docket No. 30).

² For ease of reference, I term Garrett’s separately numbered statement of additional facts, which begins on page 9 of this document, “Plaintiff’s Additional SMF.”

³ My disposition of the Carter affidavit has no bearing on a separate pending motion *in limine* to preclude Carter from testifying as an expert witness at trial. *See* Defendant’s Motion To Exclude Expert Witness Testimony Under *Daubert* and *Kumho* (Docket No. 41).

Tandy also moves to strike portions of the affidavits of plaintiff Garrett and his attorney, Jeffrey Neil Young. *See generally* Young/Garrett Motion; Affidavit of Jeffrey Neil Young in Support of Plaintiff's Response to Defendant's Statement of Material Facts ("Young Aff."), Tab 3 to Plaintiff's Opposing SMF; Affidavit of John Garrett ("Garrett Aff."), Tab 1 to Plaintiff's Opposing SMF. With respect to this motion, I rule as follows:

1. Paragraph 3 of Young Aff.: Overruled. Although, as discussed below, I agree with Tandy that the Maine Human Rights Commission ("MHRC") finding issued in this case lacks probative value, I have found it necessary to take it into consideration for purposes of summary judgment analysis – a context in which there is no danger of unfair prejudice to the defendant or confusion on the part of a jury.

2. Paragraph 4 of Young Aff.: Sustained. Garrett offers a newspaper article publicizing the MHRC decision in his case as evidence that he suffered reputational harm by virtue of Tandy's allegedly defamatory statements. *See* Young Aff. ¶ 4 & Exh. B thereto; Plaintiff's Opposition to Defendant's Motion To Strike Portions of the Affidavits of Jeffrey Neil Young and John Garrett (Docket No. 73) at 3-4; Plaintiff's Opposing SMF ¶ 31. However, there is no evidence that Tandy had anything to do with the article in question, which purports to report, *inter alia*, Garrett's own comments. *See* Exh. B to Young Aff. Under Maine law, a plaintiff may not be compensated for damages flowing from voluntary self-publication of allegedly defamatory statements. *See, e.g., Carey v. Mt. Desert Island Hosp.*, 910 F. Supp. 7, 11-12 (D. Me. 1995) (applying Maine law); *Farrell v. Kramer*, 159 Me. 387, 390-91 (1963).

Concededly, Garrett himself may not have responsible for the entire content of this article, and courts have recognized liability for damages flowing from foreseeable republication (apart from voluntary self-publication). *See, e.g., Carey*, 910 F. Supp. at 12 & n.5; *Oberman v. Dun*

& *Bradstreet, Inc.*, 586 F.2d 1173, 1175 (7th Cir. 1978) (noting that “in many jurisdictions, the author of a libelous statement may be held liable for a republication that is a natural and probable consequence of the original publication”) (citations and internal quotation marks omitted). However, Garrett neither argues, nor is it clear to me, that the republication in question (describing the MHRC ruling) fairly can be described as the natural and probable consequence of Tandy’s original report to the police.

3. Paragraph 7 of Young Aff.; Paragraph 3 of Garrett Aff.: Sustained. The web-page printouts to which Young and Garrett refer constitute inadmissible hearsay inasmuch as they are offered for the truth of the matter contained therein and fit no discernible hearsay exception.

B. Factual Background

Taking into account the above disposition of Tandy’s motions to strike, the parties’ statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56 and viewed in the light most favorable to Garrett as the non-moving party, reveal the following relevant to this recommended decision:

Garrett is a black male. Plaintiff’s Additional SMF ¶ 1; Defendant RadioShack Corporation’s Opposition to Plaintiff’s Statement of Material Facts (“Defendant’s Reply SMF/Additional”) (Docket No. 67) ¶ 1. On December 21, 1998, unaccompanied by anyone else, Garrett visited RadioShack’s Cook’s Corner store in Brunswick, Maine in the hope of purchasing a police scanner and a telephone answering machine. *Id.* ¶ 2.⁴

Upon entering the store, Garrett was immediately greeted by store clerk Adam Rinko. *Id.* ¶ 3. While Garrett was in the store two other employees were working there: store manager Steven Richard and another unidentified store clerk. *Id.* Garrett was within sight of the store clerks and

⁴ Tandy attempts to raise a question whether Garrett was unaccompanied, *see* Defendant’s Reply SMF/Additional ¶ 2; however, I (*continued on next page*)

manager at all times. *Id.* While Garrett was in the store, several other patrons were shopping there. *Id.* ¶ 4.⁵ It was Christmas season, and the store was busy. Defendant RadioShack Corporation’s Statement of Material Facts in Support of Motion for Summary Judgment (“Defendant’s SMF”) (Docket No. 43) ¶ 3; Plaintiff’s Opposing SMF ¶ 3. Garrett was the only black individual in the store. Plaintiff’s Additional SMF ¶ 4; Deposition of John Garrett (“Garrett Dep.”), attached to Defendant’s SMF, at 54-55.⁶

Rinko accompanied Garrett throughout his fifteen- to thirty-minute visit to the store. Plaintiff’s Additional SMF ¶ 5; Defendant’s Reply SMF/Additional ¶ 5.⁷ Garrett considered it unusual that Rinko did not attempt to assist any other customers. Plaintiff’s Additional SMF ¶ 6; Garrett Dep. at 57. Although Garrett did not see other customers asking questions, he could hear them asking questions. Plaintiff’s Additional SMF ¶ 7; Defendant’s Reply SMF/Additional ¶ 7.⁸

Prior to Garrett’s visit to the store, he had learned that the manufacturer had discontinued making a Pro-64 police scanner model. *Id.* ¶ 8. He believed that RadioShack discounted discontinued models and went there hoping to purchase the scanner to replace a broken model he had at home. *Id.* ¶ 9. He asked Rinko if the store had the model in stock. *Id.* ¶ 10. Rinko said he knew nothing about it and asked Richard. *Id.* Richard directed Rinko to ask the unidentified clerk in the back to check if the model was in inventory. *Id.* ¶ 11. While this search was in progress Garrett, accompanied by Rinko, went to a table containing discounted merchandise at the back of the store. *Id.* ¶ 12. He asked Rinko

view the record in the light most favorable to Garrett.

⁵ Garrett’s further assertion that the other patrons were “all white,” Plaintiff’s Additional SMF ¶ 4, is disregarded inasmuch as it is neither admitted nor supported by the citations given.

⁶ Tandy denies that Garrett was the only black customer in the store at the time, *see* Defendant’s Reply SMF/Additional ¶ 4; however, for purposes of summary judgment, I view the record in the light most favorable to Garrett.

⁷ Tandy qualifies this statement, noting that Garrett followed Rinko throughout the store as Rinko attempted to assist him. *See* Defendant’s Reply SMF/Additional ¶ 5; Garrett Dep. at 67, 112; *see also* Defendant’s SMF ¶ 9; Plaintiff’s Opposing SMF ¶ 9.

⁸ Tandy qualifies this statement, noting that Garrett does not know which customers asked the sales clerks questions, what questions were asked or how much time any of the customers spent with the sales clerks. *See* Defendant’s Reply SMF/Additional ¶ 7; Garrett Dep. at 199-200; *see also* Defendant’s SMF ¶ 4; Plaintiff’s Opposing SMF ¶ 4.

about the condition of certain items on the clearance table. Defendant's SMF ¶ 10; Deposition of Steven Richard ("Richard Dep."), attached to Defendant's SMF, at 79.⁹

Garrett found a broken telephone answering machine at the discount table that he ultimately purchased. Plaintiff's Additional SMF ¶ 13; Defendant's Reply SMF/Additional ¶ 13. He did not ask any questions about what was wrong with the machine. *Id.* ¶ 14. The unidentified store clerk subsequently advised Garrett and Rinko that the desired scanner was not in stock. *Id.* ¶ 15. The clerk suggested they check the computer to see whether another RadioShack store had the item in stock. *Id.* ¶ 16. Garrett and Rinko proceeded to the sales counter, where Rinko asked Richard to run a computer check for the model. *Id.* ¶ 17. Richard did so but could not locate it elsewhere. *Id.* ¶ 18. After paying for the telephone answering machine, a book and some batteries, Garrett left the store at approximately 7 p.m. and went home. *Id.* ¶ 19.

Shortly after Garrett's departure from the store, Richard discovered that a \$2,000 Compaq Presario laptop computer was missing. *Id.* ¶ 20; *see also* Defendant's SMF ¶ 16; Plaintiff's Opposing SMF ¶ 16. The computer had been secured by a cable device. Plaintiff's Additional SMF ¶ 21; Defendant's Reply SMF/Additional ¶ 21. Richard had seen the computer in the store some time after it opened at 8 or 9 a.m.; he cannot recall exactly when. *Id.* ¶ 22. Richard asked Rinko and the other store clerk whether they knew the computer's whereabouts. *Id.* ¶ 23. He searched the store and the backroom to determine whether the computer had been misplaced. Defendant's SMF ¶ 16; Plaintiff's Opposing SMF ¶ 16. When the computer could not be found, he called the Brunswick Police Department. Plaintiff's Additional SMF ¶ 24; Defendant's Reply SMF/Additional ¶ 24.

⁹ Garrett's objection that this statement is supported by inadmissible hearsay (Richard's testimony concerning what Rinko told him), *see* Plaintiff's Opposing SMF ¶ 10, is overruled. As Tandy points out, *see* Defendant RadioShack Corporation's Reply to Plaintiff's Opposition to Defendant's Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 66) ¶ 10, Rinko's statement falls within the present-sense exception to the hearsay rule inasmuch as made to Richard as, or soon after, these events were unfolding, *see* Fed. R. Evid. 803(1) (listing, as among statements not excluded by the hearsay rule even though the declarant is available as a witness, *(continued on next page)*)

RadioShack's policies require that thefts of merchandise be reported to the police. Defendant's SMF ¶ 16; Plaintiff's Opposing SMF ¶ 16.

Officer Clifford Braley responded to Richard's call. Plaintiff's Additional SMF ¶ 25; Defendant's Reply SMF/Additional ¶ 25. Braley asked Richard what was missing. Defendant's SMF ¶ 17; Plaintiff's Opposing SMF ¶ 17. Richard replied that a Compaq Presario 1237 laptop computer had been taken from its display on the wall across from the cash registers. *Id.* Richard also gave Braley the serial number of the missing computer so that it could be entered into the NCIC national database for lost and stolen goods. *Id.*

Braley asked Richard if any customers had engaged in any suspicious activity. Plaintiff's Additional SMF ¶ 26; Defendant's Reply SMF/Additional ¶ 26.¹⁰ Richard responded that the only person he could think of was a black male who had been asking a lot of questions. *Id.* ¶ 27.¹¹ Richard explained that RadioShack's employees are trained to be aware of customers who take up a lot of time and attention because that might be a distraction to occupy the sales clerks. Defendant's SMF ¶ 18; Richard Aff. ¶ 5. Richard obtained Garrett's name from customer receipts and identified Garrett by name to Braley. Plaintiff's Additional SMF ¶ 28; Defendant's Reply SMF/Additional ¶ 28. Richard

a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.").

¹⁰ Tandy qualifies this statement, observing that, according to Braley, he asked Richard if any customers "stood out." *See* Defendant's Reply SMF/Additional ¶ 26; Affidavit of Clifford A. Braley ("First Braley Aff."), attached to Defendant's SMF, ¶ 5.

¹¹ Tandy qualifies this statement, *see* Defendant's Reply SMF/Additional ¶ 27, asserting that (i) Richard stated that he was not aware of any specific suspicious activity, *see* Richard Dep. at 20, (ii) Richard told Braley that the only individual who stood out in his mind was a gentleman who asked a number of questions and consumed a lot of the clerk's time, *see* Affidavit of Steven Richard ("Richard Aff."), attached to Defendant's SMF, ¶ 5, (iii) Richard denies that he identified Garrett to Braley because of Garrett's race, *see id.*, (iv) Richard's identification of Garrett as a black male was merely an accurate physical description, *see* Garrett Dep. at 55, and (v) it is common practice for Braley to ask for a physical description of someone who has been identified to him, *see* Affidavit of Clifford A. Braley ("Second Braley Aff."), Tab 1 to Defendant's District of Maine Local Rule 26(c) List of Documents ("Defendant's Documents") (Docket No. 68) ¶ 5.

identified Garrett only in response to a specific question from Braley about which customers stood out. Defendant's SMF ¶ 24; Plaintiff's Opposing SMF ¶ 24.¹²

RadioShack's policies recognize that shoplifters often work in teams, with one person occupying the sales clerk's attention so that the other is able to remove merchandise from the store without being observed. Defendant's SMF ¶ 22; Plaintiff's Opposing SMF ¶ 22. Richard received loss-prevention training, including training on common shoplifting techniques, on an annual basis. *Id.* He received loss-prevention training during the last quarter of 1998, just prior to the incident involving the loss of the laptop on December 21, 1998. *Id.*

Braley understood that Richard had the names of other customers who had made purchases at the RadioShack store on December 21, 1998. *Id.* ¶ 23. However, he did not ask for a list of those customers and did not record the names of any other customers. *Id.*

Braley contacted the Bath Police Department to interview Garrett. Plaintiff's Additional SMF ¶ 29; Defendant's Reply SMF/Additional ¶ 29. The Bath Police Department report described Garrett as "a suspect in a theft from the RadioShack in Brunswick approximately one hour ago." Plaintiff's Additional SMF ¶ 30; Plaintiff's Document Production, Bates No. 68, Tab 7 to Plaintiff's Opposing SMF.¹³ Braley told the Bath Police Department to ask Garrett "if he witnessed anything at the store and also to keep an eye out for the computer, in case it may be there." Plaintiff's Additional SMF ¶ 30; Defendant's Reply SMF/Additional ¶ 30.¹⁴

¹² Tandy asserts that Richard did not identify Garrett to Braley based on his race but rather solely because of his unusual behavior in the store. *See* Defendant's SMF ¶ 19; Richard Aff. ¶ 5. Garrett denies this, *see* Plaintiff's Opposing SMF ¶ 19, asserting that (i) Richard specifically referred to him as a "black male," *see* First Braley Aff. ¶ 5, (ii) Richard identified him alone as "standing out" among all customers in the store that day, *see id.*, (iii) and asking questions about electronics products is not unusual and is consistent with RadioShack's motto of, "You've got questions, we've got answers," *see* Telephonic Deposition of James Wright, Tab 5 to Plaintiff's Opposing SMF, at 24; Telephone Deposition of Roger H. Schmedlen, Tab 4 to Plaintiff's Opposing SMF, at 151.

¹³ Garrett's further assertion that Braley identified Garrett as such, *see* Plaintiff's Additional SMF ¶ 30, is disregarded inasmuch as it is neither admitted nor supported by the record citation given. This obviates the need to reach a hearsay objection lodged by Tandy regarding this sentence. *See* Defendant's Reply SMF/Additional ¶ 30.

¹⁴ Although Tandy lodges a hearsay objection regarding statements allegedly made to the Bath police by Braley, *see* Defendant's Reply (continued on next page)

The Bath police officer who arrived at Garrett's home asked Garrett for consent to a search of his home for the computer, which Garrett gave. *Id.* ¶ 33.¹⁵ According to Garrett, the police "went through everything," including pulling out drawers. Plaintiff's Additional SMF ¶ 34; Garrett Dep. at 79.¹⁶ When the officer did not find the computer in Garrett's home, he asked for, and Garrett gave, consent to a search of his vehicle. Plaintiff's Additional SMF ¶ 35; Defendant's Reply SMF/Additional ¶ 35. Again, the missing computer was not found. *Id.* ¶ 36. The Bath police officer then called Braley to report that he had conducted a search and did not see a computer. *Id.* ¶ 37.

Garrett subsequently called the store and spoke with store manager Richard. *Id.* ¶ 38. He asserted that he thought RadioShack had singled him out in the theft because of his race, and denied stealing the computer. *Id.* ¶ 39.¹⁷ Garrett questioned whether RadioShack had identified anyone else to the police. *Id.* ¶ 40. Richard claimed to have identified three or four other white customers. *Id.* Richard also told Garrett that if he did not take the computer, he had nothing to complain about with respect to the police search of his home. *Id.*¹⁸ When Garrett continued to press his complaint, Richard hung up the phone on him. Plaintiff's Additional SMF ¶ 41; Garrett Dep. at 83.

Following this conversation, Garrett called the Brunswick Police Department. Plaintiff's Additional SMF ¶ 42; Defendant's Reply SMF/Additional ¶ 42. Garrett complained to Braley that he

SMF/Additional ¶ 30, it is unclear whether that objection extends to the second sentence of paragraph 30 of the Plaintiff's Additional SMF, which it admits. Giving Garrett the benefit of the doubt, I have credited the statement.

¹⁵ Garrett cites his own deposition testimony in support of a further statement that the Bath police officer who arrived at his home told him RadioShack had accused him of the theft. *See* Plaintiff's Additional SMF ¶ 31 (citing Garrett Dep. at 77). Tandy not only denies that the officer made this statement but also objects on hearsay grounds, noting that the Bath officer never spoke directly with anyone at RadioShack or even with Braley of the Brunswick Police Department. *See* Defendant's Reply SMF/Additional ¶ 31; Second Braley Aff. ¶ 6; Affidavit of Joel Bruce, Tab 2 to Defendant's Documents, ¶ 8. The objection is sustained. *See Scott v. Macy's East, Inc.*, No. Civ.A.01-10323-NG, 2002 WL 31439745, at * 6 (D. Mass. Oct. 31, 2002) (excluding, as inadmissible hearsay, plaintiff's testimony that American Express representative told him that, according to a second American Express representative, Macy's employee had reported that two black men were fraudulently using credit card).

¹⁶ Tandy denies that the officer pulled out Garrett's drawers, *see* Defendant's Reply SMF/Additional ¶ 34; however, for purposes of summary judgment I view the record in the light most favorable to Garrett.

¹⁷ Tandy qualifies this statement, noting that, according to Garrett's testimony, Richard denied having singled him out. *See* Defendant's Reply SMF/Additional ¶ 39; Garrett Dep. at 204.

¹⁸ Tandy qualifies these statements, noting among other things that Richard made available to Braley the names of other customers who
(continued on next page)

had been accused of stealing the computer (which he denied having done). *Id.* ¶ 43. Braley told Garrett that he was not being accused of anything and that he did not have to allow the Bath Police Department to search his home and car. Defendant's SMF ¶ 26; Plaintiff's Opposing SMF ¶ 26. Garrett indicated that he wanted to file a discrimination complaint against RadioShack. Plaintiff's Additional SMF ¶ 44; Defendant's Reply SMF/Additional ¶ 44. Braley told Garrett that this was not a criminal matter and that Garrett would need to contact a lawyer. *Id.* ¶ 45. Garrett subsequently saw the Brunswick Police Department report prepared by Braley and discovered that RadioShack had only provided Braley with his name and no names of white customers. *Id.* ¶ 46. Although there had been other customers in the store at the same time Garrett was there, Braley did not take the names or addresses of any other identifiable customer. *Id.* ¶ 49.

When Garrett filed a charge of discrimination with the MHRC, he did not know who had accused him of stealing the computer. Defendant's SMF ¶ 30; Plaintiff's Opposing SMF ¶ 30. To this day, he still does not know who accused him of theft. *Id.*

Prior to the incident on December 21, 1998 Garrett had shopped at RadioShack stores for years and had never had any problems. Defendant's SMF ¶ 27; Plaintiff's Opposing SMF ¶ 27. Since then, Garrett has not returned to the Cook's Corner RadioShack store. *Id.* However, he has shopped at other RadioShack stores without incident. *Id.* Since December 1998 he has made multiple additional purchases at RadioShack stores in Maine and has even returned one item. *Id.* ¶ 28. Within days after the December 21, 1998 incident he threw away the answering machine, making it impossible for him to return that item. *Id.* He was not dissatisfied with the answering machine, but rather with the incident on December 21, 1998. *Id.*¹⁹

had made purchases on the evening of December 21, 1998. *See* Defendant's Reply SMF/Additional ¶ 40; Richard Dep. at 14-16.
¹⁹ Garrett qualifies these statements, *see* Plaintiff's Opposing SMF ¶ 28, noting that he did not understand that he could return the answering machine to a RadioShack store other than the one from which he bought it, *see* Garrett Aff. ¶ 2, and that Richard's
(continued on next page)

Garrett was not prevented, on December 21, 1998, from entering the RadioShack store. *Id.*

¶ 6. While Garrett was in the store, he had an opportunity to look at everything he wanted to see. *Id.* ¶

11. In addition, the store manager and sales clerks tried to answer all of his questions and attempted to locate the police scanner for him at another RadioShack store. *Id.* Garrett was not prevented from making any purchases at the store. *Id.* ¶ 12. After Garrett made his purchases, he left the store. *Id.* ¶

13. No one walked him to the door, and no one tried to stop him on his way out the door. *Id.*

testimony was equivocal as to whether one can receive a refund for a broken item sold on clearance, *see* Richard Dep. at 142-43.

III. Analysis

Tandy seeks summary judgment as to Counts II and III of Garrett’s complaint on a variety of bases; alternatively, it presses the court to narrow the scope of damages and other relief (including injunctive relief) available. *See generally* S/J Motion. I find Tandy entitled to summary judgment as to both counts and, accordingly, do not reach its arguments concerning the scope of available relief.

A. Count II: Public-Accommodation Provision of MHRA

In Count II of his complaint, Garrett alleges that Tandy violated the MHRA “when it singled [him] out . . . because of his race and reported to the Brunswick Police Department that it suspected him of theft, thereby denying him equal access to a public accommodation.” Amended Complaint ¶ 30.

The MHRA provides, in relevant part:

It is unlawful public accommodations discrimination, in violation of this Act:

1. Denial of public accommodations. For any public accommodation . . . to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color, . . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.

5 M.R.S.A. § 4592(1).

Garrett suggests – and my research confirms – that no reported case considers whether conduct similar to that about which he complains violates section 4592(1). *See* Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (“S/J Opposition”) (Docket No. 55) at 11 & n.2.

Tandy falls back, *inter alia*, on caselaw construing section 4592’s federal analogue, Title II of the Civil Rights Act of 1964 (“Title II”), *codified in relevant part at* 42 U.S.C. § 2000a, *see, e.g.*, S/J Motion at 5 n.1, while Garrett devotes considerable attention to arguing that application of federal caselaw is inappropriate, *see* S/J Opposition at 6-11.

As Tandy observes, *see* S/J Motion at 5 n.1, Maine courts generally follow relevant federal law in interpreting the MHRA, *see, e.g., Nakai v. Wickes Lumber Co.*, 906 F. Supp. 698, 702-03 n.5 (D. Me. 1995); *Winston v. Maine Technical Coll. Sys.*, 631 A.2d 70, 74-75 (Me. 1993) (“[B]ecause the MHRA generally tracks federal anti-discrimination statutes, it is appropriate to look to federal precedent for guidance in interpreting the MHRA.”). However, as Garrett points out, *see* S/J Opposition at 10-11, there are exceptions, *see, e.g., Maine Human Rights Comm’n v. Kennebec Water Power Co.*, 468 A.2d 307, 310 (Me. 1983) (“To the extent that there exists an identity of purpose and objectives as between the Maine and federal provisions, reference to the latter in construing the former is entirely appropriate. We hasten to add, however, that where the provisions of the Maine statute differ substantively from their federal counterparts, as is the case here, deference to construction of the federal version is unwarranted.”) (citation and internal quotation marks omitted).

Title II provides, in relevant part:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

42 U.S.C. § 2000a(a). In addition, per Title II:

No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 2000a or 2000a-1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a-1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a-1 of this title.

Id. § 2000a-2.

Garrett identifies two key distinctions between Title II and the MHRA that he argues counsel against application of federal law: (i) the MHRA’s definition of a “public accommodation” is broader than that of Title II and (ii) the MHRA is broader in scope inasmuch as it bans persons from “directly

or indirectly” or “in any manner” engaging in the proscribed discrimination. *See* S/J Opposition at 9-10. Garrett also argues that this court should defer to an implicit determination by the MHRC (the body charged with enforcing the MHRA) that section 4592(1) – unlike federal law – is broad enough in scope to encompass the conduct in issue in this case. *See id.* at 11. Neither point is persuasive.²⁰

As an initial matter, any difference between the Title II and MHRA definitions of “public accommodation” is of no import in this case. Tandy does not contest that its Cook’s Corner RadioShack store qualifies as a “public accommodation” for purposes of state or federal law. *See* S/J Motion at 5-6. Secondly, despite the wording differences that Garrett highlights, there is an identity of purpose and objectives between the state and federal statutes. The aim of both is to secure to all persons (regardless of, among other things, race or color) full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of places of public accommodation. *Compare* 5 M.R.S.A. § 4592(1) *with* 42 U.S.C. § 2000a(a); *see also* *Maine Human Rights Comm’n v. Le Club Calumet*, 609 A.2d 285, 286 (Me. 1992) (construing section 4592(1) as “establish[ing] three prerequisites in order to find unlawful discrimination: (1) the party charged is the owner, lessee, proprietor, manager, superintendent, agent or employee of a place of public accommodation who (2) refuses or withholds to any person, on account of race or color, sex, physical or mental disability, religion, ancestry or national origin, (3) any of the accommodations, advantages, facilities or privileges of public accommodation.”) (citation and internal quotation marks omitted).²¹

Finally, I reject the proposition that, under the circumstances of this case, the MHRC decision is entitled to deference. Susan Clark, investigator in the underlying MHRC case, undertook fact-

²⁰ I find it unnecessary to reach Tandy’s further assertion that a second body of federal caselaw, construing 42 U.S.C. § 1981, also bears on interpretation of the public-accommodations provision of the MHRA. *See* S/J Motion at 8 & n.2; Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (“S/J Reply”) (Docket No. 65) at 2-3.

²¹ As Tandy points out, *see* S/J Reply at 2 n.2, federal law also essentially prohibits indirect discrimination inasmuch as plaintiffs need not adduce so-called “direct,” or smoking-gun, evidence of discrimination to prevail, *see, e.g., Hornick v. Noyes*, 708 F.2d 321, 325 (*continued on next page*)

finding on the basis of which she recommended that the MHRC find in favor of Tandy. *See* Investigator’s Report, *Garrett v. Tandy Corp.*, No. PA99-0211 (Me. Human Rights Comm’n Dec. 28, 1999), Tab A to Affidavit of Susan Clark, Tab 3 to Defendant’s Documents. The MHRC rejected this recommendation, finding reasonable grounds to believe that unlawful discrimination had occurred. *See* Statement of Finding, *Garrett v. Tandy Corp.*, No. PA99-0211 (Me. Human Rights Comm’n Jan. 27, 2000), attached as Exh. A to Young Aff. However, its written statement of finding contains no rationale for its decision. *See id.* Here, as in *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 27 (1st Cir. 2002), “the right-to-sue letter states only a conclusory probability of discrimination, unsupported by any relevant facts, and thus on its surface lacks the probative content” of an investigative file containing statements and other evidence of alleged discrimination. In sum, the MHRC decision offers no reasoned interpretation of section 4592(1) to which the court could defer. *Compare, e.g., Berry v. Board of Trustees, Me. State Ret. Sys.*, 663 A.2d 14, 16 (Me. 1995) (“When the dispute involves an agency’s interpretation of a statute administered by it, the agency’s interpretation, although not conclusive on the Court, is entitled to great deference and will be upheld unless the statute plainly compels a contrary result.”) (citation and internal quotation marks omitted).

For these reasons, I conclude that the Law Court, if confronted with this question, would find recourse to relevant Title II decisions appropriate in the circumstances of this case.

As Tandy suggests, *see* S/J Motion at 5 & n.1, in MHRA cases (such as this) in which a plaintiff adduces no direct evidence of discrimination, the Law Court has applied the so-called *McDonnell Douglas* burden-shifting paradigm, *see, e.g., Doyle v. Department of Human Servs.*, No. KEN-02-479, 2003 WL 1956192, at ¶ 14 (Me. Apr. 28, 2003) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973)).

n.8 (7th Cir.1983) (recognizing applicability of burden-shifting test to Title II cases).
(continued on next page)

Under the *McDonnell Douglas* rubric, a plaintiff must first establish a *prima facie* case of discrimination. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). This raises a presumption that the defendant did unlawfully discriminate, which the defendant may rebut by adducing evidence that its actions were taken for legitimate, nondiscriminatory reasons. *See, e.g., id.* at 506-07. When rebutted, the presumption of discrimination falls away. *See, e.g., id.* at 507. This notwithstanding, the plaintiff ultimately must persuade a trier of fact, by a preponderance of the evidence, not only that the proffered reasons were pretextual but also that the real reasons were impermissible (*e.g.*, motivated by racial animus). *See, e.g., id.* at 507-08. Rejection of an employer's reasons as pretextual permits, but does not compel, a finding that the employer was in fact motivated by impermissible animus. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000); *Hicks*, 509 U.S. at 511.

In the public-accommodations context, a plaintiff establishes a *prima facie* case of discrimination by showing that he or she (i) is a member of a protected class, (ii) attempted to exercise the right to full benefits and enjoyment of a place of public accommodation, (iii) was denied those benefits and enjoyment and (iv) was treated less favorably than similarly situated persons who are not members of the protected class. *See, e.g., LaRoche v. Denny's, Inc.*, 62 F. Supp.2d 1366, 1370 (S.D. Fla. 1999). Tandy contends that Garrett fails even to make out a *prima facie* case, falling short of showing that he was denied the benefits or enjoyments of a place of public accommodation or was treated less favorably than similarly situated individuals. *See* S/J Motion at 6. I agree.²²

As to the first point, it is undisputed that on December 21, 1998 Garrett shopped at the Cook's Corner RadioShack store without incident, with the staff attending to him and attempting to answer his

²² I therefore do not reach Tandy's alternative argument that, even assuming *arguendo* Garrett makes out a *prima facie* case, he fails to prove pretext. *See* S/J Motion at 10-13.

questions, and that he purchased the available items he wanted to purchase and departed. Garrett contends that RadioShack nonetheless interfered at least indirectly with his right to return the answering machine in that, as alleged in paragraph 23 of his Amended Complaint, he was dissatisfied with that item, wanted to return it but did not do so for fear of being accused of shoplifting. *See* S/J Opposition at 12. The facts adduced on summary judgment simply do not bear this out. The only cognizable evidence touching on these events is that Garrett was not dissatisfied with the answering machine, but rather threw it out within a few days of the December 21, 1998 incident out of anger over the events of that day. Moreover, although Garrett has never again set foot in the Cook's Corner RadioShack store, he has continued to shop at RadioShack stores in Maine since the incident in question and has even returned one item to RadioShack. The cognizable evidence, even viewed in the light most favorable to Garrett, does not permit a reasonable trier of fact to conclude that Garrett was dissatisfied with the answering machine but refrained from attempting to exercise his right to return it for fear of being accused of shoplifting.

In any event, even assuming *arguendo* that the facts bore this scenario out, Garrett points to no caselaw standing for the proposition that the chilling effect of a bad experience is in itself sufficient to constitute a denial or refusal of the privileges or benefits of a public accommodation. *See* S/J Opposition at 12-13. Indeed, the caselaw tends to suggest that a plaintiff must show an actual denial or refusal of such services. *See, e.g., LaRoche*, 62 F. Supp.2d at 1371 (plaintiffs' failure to show that restaurant actually denied them service fatal to Title II claim); *Harrison v. Denny's Rest., Inc.*, No. C-96-0343 (PJH), 1997 WL 227963, at *3-*4 (N.D. Cal. 1997) (same); *Robertson v. Burger King, Inc.*, 848 F. Supp. 78, 81 (E.D. La. 1994) (same).

Garrett accordingly fails to make out a *prima facie* case of denial of the benefits or enjoyments of a place of public accommodation.

Nor does Garrett make out a *prima facie* case that he was treated differently from others similarly situated. As the First Circuit has explained:

The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the "relevant aspects" are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared with apples.

Conward v. Cambridge Sch. Comm., 171 F.3d 12, 20 (1st Cir. 1999) (citation and internal quotation marks omitted).

Viewing the evidence in the light most favorable to Garrett, a trier of fact could conclude that he was the only black in the store at the time, that other customers in the store also were asking questions and, indeed, that Tandy markets itself in such a manner as to encourage such questions. However, it is also critical to know whether Garrett's questions differed in any significant way from those of other customers in the store that day, *e.g.*, by virtue of type or number of questions asked or level of assistance required. There is no evidence whether any other customer in the store that day was similarly situated to Garrett in that material respect.²³

Garrett points out, *inter alia*, that Tandy has not "adduced any evidence that the type of questions which the white customers were asking was any different either in type or duration than that posted by Garrett." S/J Opposition at 13. However, as Tandy observes, it is Garrett's burden to prove himself a fair congener with the other customers in the store during the relevant time, not Tandy's burden to disprove it. *See* S/J Reply at 5-6; *see also, e.g., Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 21 (1st Cir. 1999) ("Rodriguez bears the burden of showing that the

²³ Garrett asserts that his single initial question concerning whether the store carried the discontinued radio-scanner model set all three store employees in a flurry of activity that he could not have foreseen. *See* S/J Opposition at 19. Nonetheless, the question did consume at least some of the time of all three employees during the busy holiday season, and the record evidence indicates that Garrett asked additional questions, as well.

individuals with whom he seeks to be compared have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.") (citation and internal quotation marks omitted). Garrett fails to carry this burden.

For the foregoing reasons, Tandy demonstrates its entitlement to summary judgment as to Count II of the Amended Complaint.

B. Count III: Defamation

In Count III of the Amended Complaint, Garrett alleges that Tandy defamed him "when, without having performed a reasonable investigation and in bad faith, it reported [him] of suspected theft of the computer to the Brunswick Police Department." Amended Complaint ¶ 33. Under Maine law, defamation consists of:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Lester v. Powers, 596 A.2d 65, 69 (Me. 1991) (citation and internal quotation marks omitted).

Tandy contends that it cannot be held liable, and presses for summary judgment as to Count III, on the bases that its statement to the police (i) constitutes opinion, not fact, (ii) is true, (iii) is protected by a conditional privilege, (iv) does not convey a defamatory message and (v) is not actionable irrespective of special harm. *See* S/J Motion at 14. I agree that its statement constitutes opinion and is, in any event, shielded by conditional privilege.

The evidence, viewed in the light most favorable to Garrett, indicates that after officer Braley responded to store manager Richard's report of a stolen laptop computer, he asked Richard whether

any customer had engaged in suspicious activity. Richard responded that the only person he could think of was a black male who had been asking a lot of questions. He explained that RadioShack's employees are trained to take note of customers who consume a lot of time and attention because such conduct might be intended to distract the sales clerks. Richard then obtained Garrett's name from customer receipts and provided it to Braley.

“A comment is an opinion if it is clear from the surrounding circumstances that the maker of the statement did not intend to state an objective fact but intended rather to make a personal observation of the facts.” *Lester*, 596 A.2d at 71 (citation, footnote and internal punctuation omitted); *see also, e.g., Gray v. St. Martin's Press, Inc.*, 221 F.2d 243, 248 (1st Cir. 2000) (“If it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.”) (citation and internal punctuation marks omitted). From all that appears, Braley sought Richard's opinion – grounded in personal observation – whether any customer had been behaving suspiciously that day. Richard named Garrett, relating (essentially accurately) that Garrett had asked many questions and explaining why, in his opinion, a customer who does so can arouse clerks' suspicions. Under the circumstances, it was clear that Richard was conveying his subjective impression. *See, e.g., Lester*, 596 A.2d at 71 (defendant's letter, conveying her subjective evaluation that plaintiff professor was homophobic and that his manner was offensive, insensitive and occasionally intimidating, constituted personal observations, not statements of fact).

Further, although a statement of opinion may nonetheless be actionable to the extent it implies the existence of undisclosed defamatory facts, *see, e.g., id.*, Richard's comments did not. To the contrary, Richard disclosed the basis of his opinion that Garrett's conduct was “suspicious”: that Garrett had consumed a lot of attention and that, per Richard's training, such conduct may be intended

to create a diversion (thereby facilitating an accomplice's removal of items unobserved). Richard did not state or imply that he had any other basis for believing that Garrett might have had anything to do with the laptop theft (apart from the obvious basis that Garrett was among customers who were present in the store before the theft was discovered). In short, Richard relayed what was, in the circumstances, a reasonable suspicion.

The comments in question accordingly are not actionable.

In any event, as Tandy posits, *see* S/J Motion at 18-19, Richard's statements to Braley are protected by a qualified privilege shielding good-faith reports to the police, *see, e.g., Packard v. Central Me. Power Co.*, 477 A.2d 264, 268 (Me. 1984) (“[T]he accusation of crime is privileged if made in good faith and without actual malice, upon reasonable or probable cause after a reasonably careful inquiry, and for the public purpose of detecting and bringing a criminal to punishment.”) (citations and internal punctuation omitted). “Actual malice” is defined, for these purposes, as either actual ill will or reckless disregard of the truth or falsity of a statement. *See, e.g., Onat v. Penobscot Bay Med. Ctr.*, 574 A.2d 872, 874 (Me. 1990).

Garrett argues that Tandy forfeited the privilege by (i) publishing a defamatory statement implying that he acted as a decoy while others stole the computer, (ii) implying that the computer was stolen while he was in the store although it did not know when during the day the computer was stolen, (iii) implying that he acted in concert with others when it had no evidence that he had any association with the other patrons who were in the store, (iv) recklessly stating that he asked a lot of questions and (v) harboring malicious intent, *i.e.*, singling him out based on his race. *See* S/J Opposition at 21-22.

The cognizable evidence simply does not stretch far enough to permit a conclusion that Tandy abused the conditional privilege. Richard identified Garrett to Braley only in response to a question from Braley. Richard did not state that Garrett acted as a decoy, that the laptop was stolen while

Garrett was in the store or that Garrett had any association with other store patrons. He reported, essentially accurately, that Garrett had asked a lot of questions.²⁴ See *McCullough v. Visiting Nurse Serv. of So. Me., Inc.*, 691 A.2d 1201, 1204 (Me. 1997) (“It is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance.”). He then disclosed the basis for his opinion that asking a lot of questions and absorbing store clerks’ time can be considered suspicious.

Nor can a reasonable inference be drawn on this evidence that Richard’s report to Braley was made in spite or bad faith. Richard displayed no ill will toward Garrett while Garrett was in the store. After Richard discovered the laptop theft he reported it to police, as he was required to do by Tandy policy. He named Garrett only in response to a question from Braley and explained why Garrett’s conduct struck him as suspicious. That Richard described Garrett, accurately, as a “black male” does not in itself evince racial animus. One could indeed speculate that, inasmuch as Garrett was the only black customer in the store and the only person whose conduct was identified to Braley as suspicious, Richard identified him out of racial animus. However, speculation does not suffice to survive summary judgment. See, e.g., *Macone v. Town of Wakefield*, 277 F.3d 1, 5 (1st Cir. 2002) (“Appellants are entitled to all inferences which are fairly supported by the evidence, but are not permitted to build their case on mere opprobrious epithets of malice or the gossamer threads of whimsey, speculation and conjecture.”) (citation and internal punctuation omitted).

For these reasons, Tandy is entitled to summary judgment as to Count III of the Amended Complaint.

²⁴ While Garrett initially only asked one question (whether the store had the discontinued scanner) that happened to send all three store clerks into a flurry of activity, he also engaged in additional conversation with Rinko concerning items on the clearance table.

IV. Conclusion

For the foregoing reasons, I **GRANT** Tandy’s motion to strike the Carter affidavit, **GRANT** in part and **DENY** in part its motion to strike portions of the Young and Garrett affidavits and recommend that its summary judgment motion be **GRANTED**.

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 30th day of May, 2003.

David M. Cohen
United States Magistrate Judge

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