

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>TAMMY DENNING,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<i>v.</i>	)	<b><i>Docket No. 04-04-B-H</i></b>
	)	
<b>MICHAEL POVICH, individually and</b>	)	
<b>in his capacity as Hancock County</b>	)	
<b>District Attorney,</b>	)	
	)	
<b><i>Defendant</i></b>	)	

**RECOMMENDED DECISION ON MOTION TO DISMISS**

The defendant, Michael Povich, seeks dismissal of most of the claims asserted against him in this action alleging federal constitutional violations arising out of workplace conduct. I recommend that the motion be granted in part and denied in part.

**I. Applicable Legal Standard**

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(1) and (b)(6). Defendant’s Motion to Dismiss, etc. (“Motion”) (Docket No. 5) at 1. When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). The court does not draw inferences favorable to the pleader. *Hogdon v. United States*, 919 F. Supp. 37, 38 (D. Me. 1996). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may

establish the actual existence of subject-matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); see *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).<sup>1</sup>

In contrast, “[i]n ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiff[.]” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); see also *Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

## II. Factual Background

The complaint includes the following relevant factual allegations.

The plaintiff was hired on December 14, 1999 to work as a victim witness advocate in the office of the Hancock County District Attorney. Complaint and Demand for Jury Trial (“Complaint”) (Docket No.

1) ¶ 6. The defendant, the elected district attorney for Hancock and Washington Counties, was her supervisor. *Id.* ¶¶ 3, 7. During the plaintiff’s employment in this capacity, which continued until March 18,

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<sup>1</sup> The plaintiff contends that “the parties in the present case should be given the opportunity to do discovery and develop relevant factual evidence before the court rules on [the question whether the defendant is a state or county official]. This issue would be more appropriately resolved on summary judgment.” Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion to Dismiss (“Opposition”) (Docket No. 17) at 7 n.3. In fact, this issue is appropriate for resolution in the context of a motion to dismiss, *Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742, 748 (1st Cir. 1995), and, given the fact that it is the plaintiff’s burden to show subject-matter jurisdiction, the plaintiff must demonstrate what additional factual material is necessary and can only be gleaned through discovery. See *Jazini v. Nissan Motor Co.*, 148 F.3d 181 185 (2d Cir. 1998) (conclusory factual assertions insufficient when subject-matter jurisdiction challenged). The plaintiff has not moved for leave to conduct discovery on this issue nor has she provided the necessary details about the discovery that she would pursue. She is not entitled to deferral of this issue on the showing made in her footnote. See *Berrios v. Department of the Army*, 884 F.2d 28, 33 (1st Cir. 1989).

2002, the defendant made several sexually suggestive comments to the plaintiff. *Id.* ¶¶ 8-9. He also repeatedly referred to female crime victims as “bitches” or “whores.” *Id.* ¶ 9. He did not engage in such conduct with male employees. *Id.* ¶ 10.

On March 20, 2002 the plaintiff filed a grievance with the Hancock County board of commissioners, setting forth some of the conduct described in the complaint. *Id.* ¶ 15. The commissioners upheld the grievance and offered to find another position for the plaintiff as a county employee. *Id.* ¶ 16. The plaintiff accepted a series of positions with the county that were not under the defendant’s direct supervision. *Id.* ¶ 17. The defendant “work[ed] to defeat plaintiff’s reassignment as a County employee, such that some of the divisions to which plaintiff was reassigned refused to accept her and other divisions made her working life quite difficult, leading to her constructive discharge on January 29, 2003.” *Id.* ¶ 18.

### **III. Discussion**

#### **A. Official Capacity Claims**

Both of the counts in the plaintiff’s complaint appear to be alleged against the defendant in both his individual and official capacities. Count I alleges that the defendant violated the plaintiff’s “substantive rights to equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution.” Complaint ¶ 9. Count II alleges that the defendant retaliated against the plaintiff “for her exercise of her right to petition the County Commissioners for a redress of her grievances.” *Id.* ¶ 18. The defendant contends that the claims against him must be dismissed “[t]o the extent that the plaintiff seeks money damages from the defendant in his official capacity.” Motion at 5.<sup>2</sup> This is so, he asserts, because he is a “full-time officer

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<sup>2</sup> The complaint also seeks “equitable relief enjoining defendant from such conduct in the future.” Complaint at 3, 5. The defendant points out that the plaintiff does not seek reinstatement to employment with the county and that the complaint does not include any allegations of wrongful conduct toward other employees. Motion at 2 n.1. Nor does the plaintiff seek to represent a class of similarly-situated employees. Under these circumstances, no basis for injunctive relief is  
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of the State” and state officials acting in their official capacities are not subject to suit under 42 U.S.C. § 1983, the statutory vehicle by which the plaintiff’s constitutional claims are and must be brought. *Id.*

The defendant relies on 30-A M.R.S.A. § 256, *id.*, which provides, in relevant part, that “[a]ll district attorneys . . . are full-time officers of the State.” The plaintiff responds that the defendant is nonetheless a “county official” for purposes of the claims she asserts against him in his official capacity. Opposition at 3-11. Since official-capacity claims “generally represent only another way of pleading an action against an entity of which an officer is an agent,” *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Burrell v. Hampshire County*, 307 F.3d 1, 7 (1st Cir. 2002), it is curious that the plaintiff has not named the county as a party defendant in this case. Because the county’s interests were potentially affected by the plaintiff’s argument, I held a conference of counsel after which I invited counsel for the county to submit a memorandum of law on this issue. Report of Conference of Counsel and Order (Docket No. 15). The county has done so; in general, its position supports the defendant on this issue. Hancock County’s Response to the Assertion that an Official Capacity Claim Against the District Attorney Constitutes a Claim Against Hancock County (Docket No. 19).

The plaintiff cites two decisions of the Maine Law Court which she contends support her position, *Withee v. Lane & Libby Fisheries Co.*, 113 A. 22 (Me. 1921), and *Paine v. State*, 258 A.2d 266 (Me. 1969), and correctly points out that the Law Court in *Ingraham v. University of Maine*, 441 A.2d 691, 692 (Me. 1982), decided only that district attorneys enjoy absolute immunity from suit under section 1983 for actions taken in their prosecutorial capacities.

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alleged. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-05 (1983). The defendant is entitled to dismissal of all claims for injunctive relief. The discussion in this recommended decision is accordingly limited to that plaintiff’s only other demand for relief, for compensatory and punitive damages. Complaint at 3, 5.

While I am inclined to agree with the defendant and the county that the defendant is a state official for purposes of the claims asserted here, it is not necessary to resolve that issue. If the defendant is a state official, he clearly cannot be sued in federal court in his official capacity under section 1983. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 609 n.10 (2001) (damages); *Will v. Michigan*, 491 U.S. 58, 71 n.10 (1989) (injunctive relief).<sup>3</sup> If the defendant is a county official, any claim against him in his official capacity is a claim against the county. The county may only be sued under section 1983 in an official-capacity action when the plaintiff alleges that a policy or custom of the county played a part in the violation of federal law. *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Burrell*, 307 F.3d at 7. The complaint in this action cannot reasonably be read to allege the existence of any such policy or custom. The defendant is accordingly entitled to dismissal of all claims asserted against him in his official capacity.

## **B. Count II**

The defendant contends that he is entitled to dismissal of the claims asserted against him in his individual capacity in Count II because the complaint does not allege violation of a constitutional right or an adverse employment action and, in the alternative, he was entitled to qualified immunity. Motion at 6-15. That count alleges that the defendant retaliated against the plaintiff for her exercise of her First Amendment rights in filing a grievance against him with the county commissioners. Complaint ¶ 18.

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<sup>3</sup> The plaintiff asserts that she “does not concede Defendant’s Eleventh Amendment argument,” citing *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972 (2003). Opposition at 3 n.2. However, she offers no suggestion of the manner in which Congress may have abrogated the states’ Eleventh Amendment immunity for claims arising under the First and Fourteenth Amendments, the bases of her claims. 538 U.S. at \_\_\_, 124 S.Ct. at 1976 (“Congress may . . . abrogate [Eleventh Amendment] immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute . . .”). In the absence of any developed argument, this legal assertion must be deemed to have been waived. *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990).

In order to state a claim based on the First Amendment, the plaintiff must show that her conduct was constitutionally protected and that the conduct was a substantial factor contributing to the alleged adverse employment action. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Tang v. State of Rhode Island, Dep't of Elderly Affairs*, 163 F.3d 7, 12 (1st Cir. 1998). The defendant argues first that the plaintiff's grievance was not entitled to First Amendment protection because it did not relate to a matter of public concern, as required by *Connick v. Myers*, 461 U.S. 138, 146-47 (1983). Motion at 7. The plaintiff in response contends that "a pattern of sexual harassment against the Plaintiff and others" is a matter of public concern and that the defendant's alleged repeated references to female victims as "bitches" and "whores" is "clearly a matter of public concern." Opposition at 12.<sup>4</sup>

The complaint cannot reasonably be read to allege "a pattern of sexual harassment" against anyone other than the plaintiff. The First Circuit has not determined whether an employee's allegations of sexual harassment against that employee alone constitute a matter of public concern. I find persuasive on this issue the opinions of the circuit courts that have held that such allegations do not. *E.g., David v. City & County of Denver*, 101 F.3d 1344, 1356-57 (10th Cir. 1996); *Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 143 (2d Cir. 1993); *Stewart v. Parish of Jefferson*, 951 F.2d 681, 683 (5th Cir. 1992); *Rice v. Ohio Dep't of Transp.*, 887 F.2d 716, 719-20 (6th Cir. 1989), *rev'd on other grounds* 497 U.S. 1001 (1990). The complaint also alleges that the defendant "repeatedly referred to female victims as 'bitches' and 'whores,'" Complaint ¶ 9(f), and a reasonable inference may be drawn from the allegations in the

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<sup>4</sup> The plaintiff also contends that "[w]ithout having the specific content of the grievance before it, the Court cannot adequately address the issue of whether Plaintiff's grievance in fact addressed a matter of public concern," and that the motion to dismiss should therefore be denied "without prejudice to Defendant's right to later raise this issue on a motion for summary judgment." Opposition at 12. This argument again misconstrues the role of a motion to dismiss. When the asserted basis for dismissal is Rule 12(b)(6), as is the case with this portion of the defendant's motion, Motion at 1, the court considers only the allegations in the complaint and construes them reasonably in favor of the plaintiff. In this case, (continued on next page)

complaint that this conduct was included in the grievance at issue in Count II, *id.* ¶ 15. The defendant's motion does not address this assertion, which cannot be characterized as alleging sexual harassment against the plaintiff. The plaintiff relies on this allegation in her opposition to the motion. Opposition at 15-16. The defendant responds that this allegation is not constitutionally protected because, if it was included in the grievance, the grievance nonetheless "primarily related to [the plaintiff's] own working conditions." Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss ("Reply") (Docket No. 18) at 4. He understandably cites no authority in support of this argument to the effect that constitutional protection of speech depends on whether the speech at issue is expressed together with a greater number of words that are not protected. It is not the role of this court in connection with a motion to dismiss to determine whether the statement at issue was actually included in the grievance. I conclude that the allegation concerning the defendant's repeated offensive characterization of female victims does constitute speech on a matter of public concern.

The defendant next argues that the complaint fails to allege that the defendant took adverse action against her. Motion at 8-9.<sup>5</sup> This is so, he asserts, because the complaint does not allege that he himself "terminated the plaintiff, demoted the plaintiff, reduced her salary, failed to promote her, or divested her of significant job responsibilities." Motion at 10. The complaint alleges only that the defendant "work[ed] to defeat plaintiff's reassignment as a County employee, such that some of the divisions to which plaintiff was reassigned refused to accept her and other divisions made her working life quite difficult, leading to her constructive discharge." Complaint ¶ 18. The defendant contends that "such conduct falls short of the

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I accordingly construe the allegations in the complaint to assert that any or all of the specific instances of allegedly discriminatory conduct by the defendant were included in the plaintiff's grievance.

<sup>5</sup> The plaintiff's first response, that "this is not a matter which should be decided on a motion to dismiss," Opposition at 16, again evinces a basic misunderstanding of the nature of a motion to dismiss. The sufficiency of the allegations in a  
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threshold necessary to establish an adverse employment action.” Motion at 10. He also asserts that the plaintiff cannot hold him liable for the actions of third parties under a *respondeat superior* theory. *Id.* at 11. Finally, he argues that the retaliation claim in general “fails to meet the pleading standard established by the First Circuit in a First Amendment retaliation case.” *Id.* at 12.

The complaint cannot reasonably be read to allege liability in Count II on a theory of *respondeat superior*. It can be read to allege that the defendant caused the constructive discharge of the plaintiff. Constructive discharge is an adverse employment action. *See, e.g., Paquin v. MBNA Marketing Sys., Inc.*, 233 F.Supp.2d 58, 68-69 (D. Me. 2002). “[T]he standard for showing an adverse employment action is lower in the First Amendment retaliation context than it is in other contexts.” *Rivera-Jiménez v. Pierluisi*, 362 F.3d 87, 94 (1st Cir. 2004). While the court need not credit “bald assertions, unsupported conclusions, and opprobrious epithets” in determining the sufficiency of a First Amendment claim as pleaded, *Campagna v. Massachusetts Dep’t of Env’tl. Prot.*, 334 F.3d 150, 155 (1st Cir. 2003), the Supreme Court has held that no heightened pleading standard may be applied to employment discrimination suits, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002), and the First Circuit has expressly adopted this holding for claims brought under section 1983, as is the case here, *Pena-Borrero v. Estremada*, \_\_\_ F.3d \_\_\_, 2004 WL 758426 (1st Cir. Apr. 9, 2004), at \*2. *See also Gorski v. New Hampshire Dep’t of Corrections*, 290 F.3d 466, 473 (1st Cir. 2002). While the complaint in this case veers perilously close to expressing this element of the retaliation claim as a “bald assertion,” I conclude that an adverse employment action is adequately pleaded.

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complaint is the essence of the matter at issue when a motion to dismiss is filed.

The defendant's final attack on Count II as pleaded is an assertion that he is entitled to qualified immunity against the claim. Motion at 12-15.

For a plaintiff to overcome a qualified immunity defense, [s]he must show that h[er] allegations, if true, establish a constitutional violation; that the right was clearly established; and that a reasonable official would have known that his actions violated the constitutional right at issue.

*Mihos v. Swift*, 358 F.3d 91, 98-99 (1st Cir. 2004) (First Amendment retaliation case). Here, I have already determined that the complaint alleges violation of a constitutional right. The defendant asserts that this right was not clearly established at the time of the events giving rise to the complaint. Motion at 13-14. In *Rivera-Jiménez*, the First Circuit held that the unconstitutionality of retaliation for a public employee's speech on a matter of public concern has been clearly established in this circuit at least since 1993. 362 F.3d at 95. The defendant contends that this case nonetheless presents a situation in which the constitutional right was not clearly established because a "double" violation is alleged — that the defendant did not directly cause the constructive discharge but rather caused others to act in a manner that caused the constructive discharge. Motion at 13-14. However, this argument deals with the manner in which the violation of the right occurred, not the question whether the right itself was clearly established. There can be no doubt that the answer to the question when properly posed is that the right itself was clearly established.<sup>6</sup>

The defendant also contends that "[t]his is not a case in which a reasonable district attorney would have known that the plaintiff's internal grievance was protected by the First Amendment or that he/she was acting unconstitutionally by speaking to third parties, as the plaintiff apparently alleges." Motion at 14. This challenge to the complaint on the final element of a qualified immunity defense also fails. A reasonable

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<sup>6</sup> See generally *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), cited in *Rivera-Jiménez*, 362 F.2d at 95, in which the Supreme Court held that employment actions based on political affiliation, directed by governor but carried out by others, violated First Amendment.

lawyer serving as a district attorney would have known in 2002 and 2003 that retaliation for a public employee's exercise of her right to free speech was not protected by the Constitution and that some internal grievances are protected by the First Amendment. The complaint does not allege that the defendant acted unconstitutionally by speaking to others, although that may have been the means by which "working to defeat plaintiff's reassignment . . . leading to her constructive discharge," Complaint ¶ 18, may possibly have been accomplished. It is the retaliation, not any alleged speech by the defendant, if it occurred, that is unlawful. The complaint need not allege what the defendant knew at the relevant time. Retaliation has been adequately alleged.

The defendant contends both that the constitutional right at issue in this case could not have been clearly established and that he could not reasonably have known that that his alleged conduct violated that right because the implicated First Amendment right "necessarily involves the balancing of competing rights." Motion at 13. All of the case law cited by the defendant in his "balancing" argument arose in the context of summary judgment and was necessarily tied to the facts of each case. *O'Connor v. Steeves*, 994 F.2d 905, 906, 913-17 (1st Cir. 1993); *Bartlett v. Fisher*, 972 F.2d 911, 912, 916-18 (8th Cir. 1992); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1322, 1323-24 (11th Cir. 1989); *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1023-25 (5th Cir. 1988). It may well be that the defendant is entitled to summary judgment based on the facts. The facts underlying the defense of qualified immunity are not before the court at this time, however. The only question before the court is whether, based on the allegations in the complaint, the plaintiff would not be able to recover under any set of facts due to the defendant's qualified immunity. That question must be answered in the negative.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED** as to any claims asserted against him in his official capacity and as to any claims for injunctive relief 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 3rd day of May, 2004.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

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V.

**Defendant**

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