

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JAMES CUMMINGS, ET AL.,)
)
)
)
)
PLAINTIFF)
)
v.)
)
)
OFFICER ALLEN McINTIRE, ET AL.)
)
)
)
DEFENDANT)

Civil No. 00-211-P-H

**MEMORANDUM DECISION AND ORDER
AFFIRMING IN PART AND REJECTING IN PART THE
RECOMMENDED DECISION OF THE MAGISTRATE JUDGE**

The United States Magistrate Judge filed with the court on January 11, 2001, with copies to counsel, his Recommended Decision on Defendants’ Motion for Summary Judgment. The defendants filed an objection to the Recommended Decision on January 26, 2001. I have reviewed and considered the Recommended Decision, together with the entire record; I have made a *de novo* determination of all matters adjudicated by the Recommended Decision; and I affirm in part and reject in part the recommendations of the United States Magistrate Judge.

As presented on the motion for summary judgment, this case involves a police officer’s conduct against an innocent citizen. The officer’s conduct was unprofessional, deplorable, unjustified and offensive, but it does not “shock the conscience,” the standard for a constitutional violation.

The background facts are basically undisputed and I quote from the Recommended Decision:

At approximately 9:20 a.m. [the plaintiff] Cummings came to the intersection of Washington and Ocean avenues looking for Arcadia Street. When he saw the road race going on, he pulled into a Cumberland Farms store on Washington Avenue. He approached a volunteer on the street to ask directions. She said that they had had a couple of close accidents or some runners getting hit and she was busy. She also told Cummings that she was not familiar with Arcadia Street, stating, “[T]here’s a policeman right over there. He’d know.”

Cummings approached [the defendant policeman] McIntire with the intention of asking directions and crossed the road where the officer was directing traffic. He was two-and-a-half to three feet away from the officer as he crossed the street. Cummings did not go as far as the curb, staying approximately twelve to eighteen inches in the street for no more than a minute and a half. McIntire, who was approximately four feet from the middle of Washington Avenue, had stopped car traffic, and there were runners coming. Just before Cummings asked McIntire his question, McIntire was facing Cumberland Farms, and his head was going right to left checking the traffic. At that time runners were starting to come through the intersection. The officer was essentially back to Cummings, with his head swiveling watching the traffic and runners. Cummings moved only a step forward and began to ask the officer for directions. From behind, Cummings said, “Excuse me sir,” waited for perhaps two seconds and repeated, “Excuse me, sir.” When no traffic was moving and it was perfectly quiet, Cummings began to ask his question, holding his right arm out straight from his body at approximately a forty-five degree angle. Cummings was standing approximately four feet away from the officer.

Recommended Decision on Defs.’ Mot. for Summ. J. at 3-5 (footnotes and record citations omitted). It is what happened next that raises the constitutional issue.

According to the plaintiff’s own Affidavit:

18. Before I could complete my question, Officer McIntire turned towards me and shoved me hard toward the far curb of Washington Avenue.

19. As Officer McIntire shoved me, he was verbally abusive to me. He yelled “IF YOU DON’T HAVE A GODAMMED [sic] EMERGENCY GET THE HELL OUT OF HERE.”

20. The force of the blow propelled me backwards and I twisted violently in an effort to maintain my balance.

Aff. of James Cummings at 2. Cummings had a previously existing medical condition that made his neck vulnerable to herniation, Aff. of James Cummings at 3, and as a result of McIntire's forceful shove he underwent back surgery and has "suffered stabbing pain, and permanent impairment." Aff. of James Cummings at 4.

I agree with the Magistrate Judge that Supreme Court caselaw and First Circuit caselaw make clear that only police conduct that is so extreme that it shocks the conscience is constitutionally actionable in a case like this that does not involve a seizure, such as an arrest, or a prison inmate. Hasenfus v. LaJeunesse, 175 F.3d 68, 72 (1st Cir. 1999). Neither Fourth Amendment nor Eighth Amendment rights are at stake, but instead substantive due process rights under the Fourteenth Amendment.¹

Substantive due process is not "a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." County of Sacramento v. Lewis, 523 U.S. 833, 848 (1998). It does not supplant traditional tort law. Id. (quoting Daniels v. Williams, 474 U.S. 327, 332 (1986)). Instead, it applies only to "conduct that is truly outrageous, uncivilized, and intolerable." Hasenfus, 175 F.3d at 72. In County of Sacramento, the Supreme Court also

¹ The plaintiffs agree that no Fourth Amendment right is at stake in the "unprovoked attack." Pls.' Mem. in Opp'n to Defs.' Mot. for Summ. J. at 2; see also Rodriguez v. Phillips, 66 F.3d 470, 476 (2d Cir. 1995).

stated that “behavior at the other end of the culpability spectrum [from negligence] would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscious-shocking level.” 523 U.S. at 849. It was this statement that led the Magistrate Judge to find that a reasonable jury could conclude that Officer McIntire’s conduct violated substantive due process. But it is too far a stretch on the summary judgment record to conclude that Officer McIntire “intended” to injure Mr. Cummings. A hard shove coupled with a profanity by a police officer focused on maintaining the safety of an intersection with runners coming through is not the type of conduct the Supreme Court was describing when it made the County of Sacramento statement and followed it with a citation to Daniels and the quotation “[h]istorically this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property.” County of Sacramento, 523 U.S. at 849 (quoting Daniels, 474 U.S. at 331) (emphasis in Daniels). The plaintiffs’ lawyer argues that a jury could find that Officer McIntire intended to injure Mr. Cummings. See Pls.’ Mem. in Opp’n to Defs.’ Mot. for *De Novo* Review at 4. I disagree. Officer McIntire did yell profanely at Mr. Cummings and did push him hard, but he was in the middle of dealing with an intersection that involved vehicular traffic and runners, and as Mr. Cummings states in his deposition: “It was an open hand. It wasn’t a punch.” Dep. of James Cummings at 37.

To repeat, Officer McIntire's conduct was deplorable, unprofessional, offensive and deserving of discipline. It may even be appalling. It does not, however, "shock the conscience" in the way the Supreme Court or the First Circuit has used those terms. Rochin v. California, 342 U.S. 165, 172-73 (1952) (involving forced stomach pumping); Hasenfus, 175 F.3d at 72 (referring to the "few" cases from other circuits that have found or posited possible liability under this test as involving rape by a police officer in connection with a car stop, and a 57-day unlawful detention over repeated requests for release); Harrington v. Almy, 977 F.2d 37, 43 (1st Cir. 1992) (involving forced choice between submitting to penile plethysmograph and being reinstated as police officer).²

With the failure of the substantive liability claim, the request for punitive damages and loss of consortium also fail.

I **AFFIRM** the Magistrate Judge's recommendation granting the defendants' motion for summary judgment as to Counts III and IV of the Complaint, which the plaintiffs have not opposed, and I **REJECT** the recommendation that would deny summary judgment as to Counts I and II. Instead, I **GRANT** summary judgment to the defendants on the Complaint in its entirety.

SO ORDERED.

DATED: FEBRUARY 12, 2001.

² It is also unlike the 1981 Fifth Circuit decision that the Magistrate Judge found most analogous. In that case the innocent civilian was "a tourist, photographing the incident. [The civilian] Shillingford was holding the camera to his face. [Policeman] Holmes struck the camera and Shillingford with his nightstick, destroying the camera, smashing it into Shillingford's face and lacerating his forehead." Shillingford v. Holmes, 634 F.3d 263, 264 (5th Cir. 1981).

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

U.S. District Court
District of Maine (Portland)
Civil Docket For Case #: 00-CV-211

JAMES W. CUMMINGS
plaintiff

MICHAEL J. WAXMAN, ESQ.
P.O. BOX 375
PORTLAND, ME 04104-7410
(207) 772-9558

DEBORAH CUMMINGS
plaintiff

MICHAEL J. WAXMAN, ESQ.
(See above)

v.

PORTLAND POLICE OFFICERS,
Allen McIntyre in his official
capacity as a Portland Police
Officer
defendant

MARK E. DUNLAP, ESQ.
NORMAN, HANSON & DETROY
P.O. BOX 4600
PORTLAND, ME 04112
(207) 774-7000

POLICE CHIEF OF CITY OF
PORTLAND, Michael Chitwood, in
his official capacity as City
of Portland Chief of Police
defendant

MARK E. DUNLAP, ESQ.
(See above)

CITY OF PORTLAND
defendant

MARK E. DUNLAP, ESQ.
(See above)