

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANIEL BUCHANAN, as Personal)
Representative of the Estate of)
Michael Buchanan, et al.,)
)
Plaintiffs)
)
v.) Civil No. 04-26-B-W
)
STATE OF MAINE, et al.,)
)
Defendants)

***ORDER ON MOTION TO AMEND AND
RECOMMENDED DECISION
ON MOTION TO DISMISS BY STATE DEFENDANTS***

Daniel Buchanan is pursuing this civil action seeking redress for his son's death by police gun fire. The shooting took place after officers responded to a neighbor's call indicating that Michael Buchanan was in crisis and had attempted to set the neighbor's wood pile on fire. The neighbor told the police that she did not want Michael arrested but did want him checked on. After a sequence of interactions between Michael and the two responding officers, Michael began to stab one of the officers, who then called out "He's killing me, he's killing me," and the other officer shot and killed Michael.¹ Presently before the court is a motion by one set of defendants -- the State of Maine, Lynn Duby, Sabre Burdick, Julianne Edmonson, and Joel Gilbert -- seeking dismissal of the federal and state law claims against them. (Docket No. 15.) Prior to the fatal incident, Buchanan was a patient at the Augusta Mental Health Institute (AMHI) and was a party to a class action state civil suit that generated a consent decree that required the provision of certain

¹ This summary description is derived from the allegations of Buchanan's complaint.

mental health services to the class members. DUBY and BURDICK are sued as Commissioner and Acting Commissioner of the Maine Department of Behavioral and Developmental Services (MDBDS), GILBERT is sued as Michael's case worker (who Buchanan claims should have been more proactive in monitoring and caring for Michael), and EDMONSON is sued as Gilbert's supervisor. Also before the court is a motion to amend the complaint; some of the proposed amendments pertain to the claims against these defendants. (Docket Nos. 31&32.)

I now deny the motion to amend Count VII to the extent that it tries to allege an ADA Title II claim against these defendants because such an amendment would be futile. I grant the amendment to the extent that it seeks to substitute John Nicholas, the Commissioner of the Maine Department of Health and Human Services in the stead of Burdick, formally the acting commissioner for MDBDS. I recommend that the Court grant the motion to dismiss as to Count VII as it is currently pled, for Buchanan in seeking the amendment concedes that it was improperly brought as a Title III ADA claim. With respect to Counts I, II, and III, brought pursuant to 42 U.S.C. § 1983, I recommend that the Court dismiss those counts save for Counts II and III pertaining to the alleged equal protection violation. Finally, I recommend that the Court deny the motion to dismiss as to the state law claims. The necessary discussion follows.

ADA Claim against State Defendants and Motion to Amend

In his complaint Buchanan framed his ADA claim as arising under 42 U.S.C. § 12182(a), Title III of the act, forbidding public accommodation discrimination. The parties agree that Count VII as currently pled is a non-starter.

In his motion to amend Buchanan seeks to rephrase this count as arising under Title II of the ADA, which provides: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The State defendants' first line of attack on Buchanan's motion to amend is that the amendment would be futile as to the official capacity claims because Congress cannot abrogate the State's sovereign immunity vis-à-vis an ADA Title II claim of this ilk.²

Although the parties beckon the court to the post- Tennessee v. Lane, ___ U.S. ___, 124 S. Ct. 1978 (May 17, 2004) headland to explore the question of whether applying Title II to this case exceeds Congress's power under § 5 of the Fourteenth Amendment, I think that foray is better avoided. Lane, in adopting a case-by-case, right-dependant approach to the question, provides a compass but not a map for adjudicating the sovereign immunity question vis-à-vis Title II claims that do not involve, as did Lane, a denial of access to the courts.

And, the First Circuit Court of Appeal's treatment of the pre and post Lane Title II abrogation inquiry suggests that the terrain is yet to be charted sufficiently in this circuit to allow the court to proceed on such a course with confidence. In Kiman v. New Hampshire Department of Corrections the plaintiff brought a Title II count claiming that, when he was a state inmate, prison officials discriminated against him when they failed to

² With respect to the claims against these defendants in their individual capacity the defendants argue that Buchanan cannot get monetary damages because the individuals are not public entities, see Miller v. King, 384 F.3d 1248, 1276-78 (11th Cir. 2004); Reise v. Wall, Civ. No. 04-158, 2004 WL 2287813, *2 n.1 (D.R.I. Sept. 27, 2004) (recommended decision), which is the relief Buchanan seeks through this count. Therefore, the amendment as to these individual capacity claims would also be futile. In his reply memorandum Buchanan clarifies that he is only seeking monetary damages against the State. (Reply Mem. Opp'n Mot. Amend at 2-3.)

adequately respond to his medical needs as an inmate suffering from amyotrophic lateral sclerosis. Civ. No. 134-B, 2001 WL 1636431, *1 (D.N.H. Dec. 19, 2001.) The District Court dismissed the claim, being "satisfied that the Eleventh Amendment deprives the court of jurisdiction to consider plaintiff's Title II claim." Id. Over a dissent, the First Circuit reversed and remanded, concluding that Kiman had sufficiently alleged a violation of the Eighth Amendment and that this constitutional violation by the state was a sufficient basis for concluding that Congress acted within its power in abrogating the State's sovereign immunity vis-à-vis an ADA Title II claim. Kiman v. New Hampshire Dep't Corrections, 301 F.3d 13 (1st Cir. 2002). However, a petition for rehearing en banc was granted, Kiman v. New Hampshire Dep't Corrections, 310 F.3d 785 (1st Cir. 2002), and, eventually, the judgment of the district court (favoring sovereign immunity) was affirmed by an equally divided court, 332 F.3d 29 (1st Cir. 2002). On the petition for writ of certiorari to the United States Supreme Court that judgment was vacated and the case was remanded to the First Circuit for further consideration in light of Lane. Kiman v. New Hampshire Dep't of Corrections, 124 S. Ct. 2387 (2004). The First Circuit vacated the District Court judgment and remanded the case to the District Court for further consideration. (Civ. No. 01-134-B, Docket No. 24.) See also Badillo-Santiago v. Naveira-Merly, 378 F.3d 1, 7 (1st Cir. 2004) (remanding for resolution of the issue of whether the Eleventh Amendment and Lane foreclose an ADA Title II claim for a plaintiff claiming his disability was not accommodated in his civil trial). On October 13, 2004, an order entered by the District Court to set a follow-up on the discovery plan. (Civ. No. 01-134-B, Docket No. 25.)

Relegating Kimán's sorted past and unsettled future to a footnote, these defendants rely particularly on the Eleventh Circuit's post-Lane decision, addressing a claim paralleling the Kimán claim, concluding that the Title II of the ADA did not validly abrogate a state's sovereign immunity. See Miller, 384 F.3d at 1267-76. In a footnote the Miller Panel rejected the plaintiff's suggestion that it follow the First Circuit's Kimán version of the as-applied sovereign immunity inquiry by requiring that the Title II claimant demonstrate a constitutional violation, such as an Eighth Amendment claim, to proceed with the ADA claim. Id. at 1276 n.34.³ The Panel believed that Lane adopted:

a different as-applied approach in which the constitutionality of Title II is considered context by context without any mention of the ADA violations being circumscribed by or limited to what would otherwise constitute an actual constitutional violation. Instead, Lane reaffirmed (1) that Congress's § 5 authority includes the authority to prohibit "a somewhat broader swath of conduct," including that which is not forbidden by the Fourteenth Amendment, and (2) that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." Lane, 124 S.Ct. at 1985 (citations omitted). Therefore, under Lane, conduct does not need to be unconstitutional to be validly proscribed by Congress.

Id. Suffice it to say, the question of whether or not Congress validly abrogated the State of Maine's sovereign immunity with respect to a Title II ADA claim alleging the denial of adequate mental health treatment for a former inpatient of the Augusta Mental Health Institute is not easy to answer.⁴

Fortunately, the thorny constitutional determination necessitated by this first-line attack on Buchanan's ADA claim is readily avoidable in this case. It is clear to me that,

³ The First Circuit indeed reads Lane as holding "that Congress did validly abrogate states' sovereign immunity to certain constitutionally-based claims under Title II of the ADA, on an as-applied basis." Badillo-Santiago, 378 F.3d at 5.

⁴ The nature and constitutional stature of Michael's right is not as easy to peg as is an Eighth Amendment claim of a prisoner. The parties certainly have not adequately briefed the question of whether there is a constitutional or fundamental right implicated by this complaint as it relates to these defendants.

the sovereign immunity question aside, Buchanan has not and cannot state a Title II claim based on the theory he advances.

Here is why. "Pursuant to the plain language of Title II," the First Circuit has explained, Buchanan must establish apropos Michael "(1) that he [was] a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability." Parker v. Universidad de Puerto Rico, 225 F.3d 1, 5 (1st Cir. 2000).

There is a fatal logical flaw in Buchanan's theory apropos his ADA claim. For, even taking his factual allegations concerning the inadequate mental health services as true, the State cannot be deemed to be discriminating against mental health patients in the provision of mental health services that they provide only to mental health patients. Non-mental health patients who do not have this disability have no rights to mental health service under the 1990 AMHI consent decree.

The Second Circuit addressed a very similar Title II (as well as a Rehabilitation Act) claim in Doe v. Pfrommer:

At the outset, on their face, the court notes that Doe's discrimination claims do not draw their substance from any allegedly discriminatory animus against the disabled, either under a disparate treatment or disparate impact theory. Such an argument would be beyond tenuous given [the New York Office of Vocational Educational Services for Individuals with Disabilities' (VESID)] sole purpose in assisting the disabled. Rather, his challenge derives from VESID's failure to provide him with tailored vocational services, which he terms as "reasonable accommodations," because of the particular needs of his disability. While such particularized treatment among the many services provided by VESID to the disabled may be required under Title I, it is not necessarily required under the anti-discrimination provisions of the Rehabilitation

Act, or by implication, the ADA. See Flight v. Gloeckler, 68 F.3d 61, 64 (2d Cir.1995) ("challenges to the allocation of resources among the disabled under the Rehabilitation Act are disfavored"). In reviewing Doe's discrimination claims, therefore, it is important to bear in mind that the purposes of such statutes are to eliminate discrimination on the basis of disability and to ensure evenhanded treatment between the disabled and the able-bodied. See Southeastern Comm. College v. Davis, 442 U.S. 397, 410 (1979); 45 C.F.R. § 84.1; 28 C.F.R. § 35.101. In the case before us, it is clear that the plaintiff is in essence challenging the adequacy of his VESID services, not illegal disability discrimination.

148 F.3d 73, 82 (2d. Cir.1998); see also Rodriguez v. City of New York, 197 F.3d 611, 618 (2d Cir.1999) (rejecting ADA challenge based on New York City's failure to provide safety monitoring devices to a subset of individuals with disabilities because "the ADA requires only that a particular service provided to some not be denied to disabled people").

In defending the claim in his reply to the defendants' opposition to the motion to amend, Buchanan states that he has sufficiently stated a claim under the notice pleading standards of Federal Rule of Civil Procedure 8. (Pl.'s Reply Mem Opp'n Mot. Amend at 1-2.) He cites to certain paragraphs in his proposed amended complaint that he contends are not all the facts but are the "salient" facts necessary to understand the nature of his Title II claim. (Id. at 2.)⁵

The referenced allegations set forth that Michael was a member of a class of AMHI plaintiffs covered by a consent decree stemming from a civil rights class action alleging violations of Maine statutes, the Maine Constitution, and the Fourteenth Amendment of the United States Constitution that remains open and over which the Maine Superior Court retains jurisdiction. (Proposed Am. Compl. ¶¶ 2, 3.) Under the

⁵ Although Buchanan has changed the statutory citation to Title II from Title III in Paragraph 97 of his proposed amended complaint, the Count is still captioned as arising under 42 U.S.C. § 12182(a) and still uses the language of public accommodations in setting forth the claims. (See Proposed Am. Comp. ¶¶ 97, 98.)

1990 AMHI consent decree Michael as a class member was entitled to: "(1) adequate professional medical care and treatment; (2) individualized treatment and service plans; (3) freedom from unnecessary seclusion and restraint; (4) provision of treatment and related services in the least restrictive appropriate setting; (5) adequate community support services systems and program(s); (6) freedom from intimidation or cruel punishment resulting in physical harm, pain, mental anguish or death; (7) an individualized support plan; (8) the right to psychiatric treatment; and, (9) crisis intervention and resolution services." (Id. ¶ 5.) The Superior Court on May 23, 2003, found that the State was not in substantial compliance with the provisions of the consent decree. (Id. ¶ 4.)

Other cited allegations describe how Michael was suffering from bipolar disorder with psychosis and paranoia (id. ¶ 22); per the consent decree was assigned a case manager and had an individual service plan designed to enable him to live independently in the community (id. ¶ 23); defendant Gilbert was Michael's assigned intensive case manager and defendant Edmonson was the assigned intensive case manager supervisor of Gilbert (id. ¶ 24); and the goals under Michael's service plan were minimal and superficial, with once a week check-ups being the most significant aspect (id. ¶ 26).

Buchanan's allegations narrate how Michael refused to continue with his medications in early 2001 and began to decompensate while Gilbert watched. (Id. ¶¶ 27, 28.) Michael began talking about large snakes in culverts near his house; Nazis and creatures in the woods; foreign bank accounts; unnecessary public assistance; beating a giant snake to death with a 2-foot by 4-foot crocodile followed by the consumption of the snake and crocodile by giant lizards; and threatening to shoot unwanted people if they

came on his property. (Id. ¶ 28.) Buchanan faults Gilbert for decreasing his visits to Michael beginning in June 2001, with gaps between visits stretching out to nine to ten days, then two weeks, by November 2001, and curtailing in January and February of 2002, as Gilbert began to rely on Michael's neighbor to report Michael's status. (Id. ¶¶ 29, 30.) Gilbert did not intervene despite the neighbor's report of continuing decompensation and the state defendants did not use the crisis intervention program for community released AMHI patients called for by the consent decree. (Id. ¶ 30.) "Instead," Buchanan alleges, "because of his disability, the State withdrew and withheld services from Michael Buchanan." (Id.) Vis-à-vis Gilbert's response to the neighbor's call concerning Michael on February 25, 2002, Buchanan states that Gilbert and Edmonson -- rather than invoking the crisis intervention procedures of the consent decree -- decided to take no action until the day after when they could learn what happened when the sheriff's department responded. (Id. ¶ 31.) Buchanan sees this as denying Michael, as a person with a disability, public services he was entitled to receive because of his disability. (Id.) (emphasis added).⁶

This last allegation pinpoints the fault line in Buchanan's Title II theory. Michael was not denied a public service provided to certain 'able' members of the population because of his disability; he alleges he was denied a public benefit due him because he was disabled. Parallel to the situation in Pfrommer, Buchanan is asserting the adequacy of the state defendants' compliance with the consent decree in their treatment of Michael as a member of the class of AMHI patients covered under the decree.

⁶ The remainder of the cited allegations pertain to the events that unfolded once the sheriff's department responded. (See id. ¶¶32-49.)

Remaining Federal Counts as against the State Defendants

These defendants also move to dismiss Counts I, II, and III, of the complaint against them on the grounds that they do not state a 42 U.S.C. § 1983 claim. In responding to the motion to dismiss, Buchanan concedes that neither an Eighth Amendment cruel and unusual punishment claim nor a "right to be left alone" claim is actionable in the context of this case. (Pl.'s Mem. Response Mot. Dismiss at 10-11.) He also concedes that Duby and Nicholas are not amenable to suits for damages in their official capacities. (Id. ¶ 11.) Therefore, these three counts now charge all four defendants with violating Michael's rights under the Constitution of the United States to be free from unreasonable search and seizure, not to be deprived of life or liberty without due process of law, and to equal protection of the laws. (Compl. ¶¶ 50, 56 & 64; see also Proposed Am. Compl. ¶¶ 51, 57, & 65.) Buchanan further alleges that Edmonson is liable for failure to train and supervise Gilbert. (Compl. ¶ 59.)

In responding to the defendants' argument as to the infirmity of these counts, Buchanan states:

The State Defendants, and each of them, cause[d] Michael Buchanan to be subjected to deprivation of his constitutional rights by a deliberate and unlawful course of action through the exercise of their State authority, which led directly to the events of February 25, 2002 which brought the police to his door and into his home and culminated in his death. The State Defendants' actions brought about the fatal home invasion by police. The State Defendants' actions, whether viewed as in concert or conspiracy with police, caused the deprivation of Mr. Buchanan's protected rights. Tower v. Leslie-Brown, 167 Fed. Sup. 2nd, 399, (D. Me. 2001); and, Pelletier v. Magnusson, 195 Fed. Sup. 214, (Me. 2002). The State doesn't argue that the State Defendants didn't have notice of Defendant Gilbert's indifference toward Michael Buchanan's mental health needs, their own indifference to the requirements of the consent decree; or, that the failure to provide the services mandated would lead inexorably to a fatal confrontation between Michael Buchanan and police. To say they can't be held liable for the

deprivation of his constitutional rights on the evening of February 25, 2002, stands Section 1983 on its head.

(Pl.'s Mem. Response Defs.' Mot. Dismiss at 11.) It is clear that Buchanan believes that the rights accorded Michael in the consent decree are the key to these federal claims:

Michael Buchanan's status and rights to mental health and related services were definitively decided as between him and the State Defendants, by and through his participation as a class member, in Bates v. Glover. The deprivation of those rights is either actionable or not. The rights are not new rights nor are their contours unknown to these Defendants. These Defendants have known and worked with them since they were adjudicated in 1990.

(Id. at 14.)

Far from standing §1983 on its head, the State defendants have challenged these claims for failing to state a cause of action under § 1983 because they are not grounded in a violation of the United States Constitution or Federal law. This is black letter law: a violation of a provision of the United States Constitution or a federal statute is a predicate to bringing a federal civil rights claim. Buchanan is complaining of the failure of these defendants to comply with a State of Maine consent decree.

With respect to the search and seizure theory, there is no factual allegation that these defendants in any way participated in the activities at Michael's house on the night in question. Indeed, Buchanan faults Edmondson and Gilbert for sitting back and waiting to see what happened when the sheriff responded to the neighbor's call.

Apropos the due process claim, in defending this motion to dismiss Buchanan has done nothing to identify the process he was due that was denied him by these defendants. Rather he focuses the argument that they under took, "a deliberate and unlawful course of

action through the exercise of their State authority."⁷ Again, what Buchanan is really complaining about is the failure of the defendants to comply with the state consent decree which, Buchanan himself indicates, is still the subject of an ongoing state action.

Finally, with respect to Buchanan's Equal Protection claim, such a claim has a different complexion than the ADA Title II claim, as Buchanan has alleged that Michael was part of a class of AMHI patients covered by the consent decree and that Gilbert did not comply with the demands of the decree in his monitoring and care of Michael. The defendants assert that Buchanan has not alleged any fact that supports a conclusion that he was not treated like similarly situated persons.

"The Equal Protection Clause contemplates that similarly situated persons are to receive substantially similar treatment from their government." Tapalian v. Tusino, 377 F.3d 1, 5 (1st Cir. 2004) (citing Barrington Cove Ltd. P'ship v. R.I. Hous. and Mortgage Fin. Corp., 246 F.3d 1, 7 (1st Cir.2001)). See also Gary S. v. Manchester School Dist., 374 F.3d 15, 22 (1st Cir. 2004). In Village of Willowbrook v. Olech, the Supreme Court embraced a 'class of one' equal protection claim:

Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 (1923); Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty., 488 U.S. 336 (1989). In so doing, we have explained that " '[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper

⁷ In response to the defendants' conjecturing of and argument against a substantive due process claim (State Defs.' Mot. Dismiss at 8-11), Buchanan has relied on the amorphous theory quoted above. I recognize that all that is required at the motion to dismiss juncture is notice pleading. However, Buchanan was placed on notice by the defendants that they were not clear as to on what theory his Fourteenth Amendment claim was premised and Buchanan has responded with a legal argument that makes no sense as a procedural or substantive due process claim.

execution through duly constituted agents.' " Sioux City Bridge Co., supra, at 445 (quoting Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352(1918)).

528 U.S. 562, 564-565 (2000). The First Circuit has explained vis-à-vis such a claim:

Normally, such a plaintiff must establish more than that the government official's actions were simply arbitrary or erroneous; instead, the plaintiff must establish that the defendant's actions constituted a "gross abuse of power." Baker v. Coxe, 230 F.3d 470, 474 (1st Cir.2000); see Rubinovitz v. Rogato, 60 F.3d 906, 912 (1st Cir.1995) (noting that "gross abuse of power" may obtain where official harbors personal hostility toward plaintiff, and undertakes a "malicious orchestrated campaign causing substantial harm"); see also Village of Willowbrook v. Olech, 528 U.S. 562, 566 (2000) (Breyer, J., concurring) (noting that some otherwise "ordinary violations of city or state law" may become actionable under the equal protection clause provided the plaintiff proves "extra factor[s]," such as "vindictive action," "illegitimate animus" or "ill will"); Esmail v. Macrane, 53 F.3d 176, 179, 180 (7th Cir.1995) (finding viable equal protection claim based upon (i) mayor's "orchestrated campaign of official harassment directed against [plaintiff] out of sheer malice" and (ii) "spiteful effort to 'get' [plaintiff] for reasons wholly unrelated to any legitimate state objective").

Tapalian, 377 F.3d at 6.

The only allegation in Buchanan's complaint that would support a theoretical (as opposed to factual) basis for such a claim is Paragraph 65 which complaint states:

"Defendant Joel Gilbert[], through deliberate indifference, failed to provide adequate community services under the community service program mandated by the AMHI Consent Decree for Michael Buchanan to meet Michael Buchanan's actual needs."

Otherwise, Buchanan persistently charges, in this and other counts, Gilbert with being deliberately indifferent to Michael. (Compl. ¶¶ 66-71.) This allegiance to the deliberate indifference standard is maintained in Buchanan's proposed amended complaint even though he has dropped his Eighth Amendment claim which is the constitutional ground

that is associated with that standard. This pleading pattern is inexplicable and is hardly "simple, concise, and direct." Fed. R. Civ. P. 8(e)(1).

However, Buchanan does respond to the defendants' argument for dismissal in the following manner:

While it may be seen oxymoron that State officials charged with providing services to people incapacitated by mental illness, would discriminate against them, the services provided by the State and the conduct of the State Defendants toward Michael Buchanan demonstrate a mendacity and bias against Michael Buchanan and the State's mentally ill charges. Joel Gilbert documents, all too well, his disdain for Michael Buchanan and his intolerance and neglect in having to provide services to him. Perhaps Plaintiffs' have not laid out "in spades" all of the facts which would support an equal protection claim, but this is notice pleading. If the Court decides the pleadings fail to allege sufficient predicate facts, Plaintiffs move the Court for leave to amend the Complaint to add additional factual allegations in support of Michael Buchanan's equal protection claims.

(Pl.'s Mem. Response Defs.' Mot. Dismiss at 14-15.) And, as stated in the discussion of the ADA claim above, Buchanan faults Gilbert for decreasing his visits to Michael beginning in June 2001 and curtailing in January and February of 2002, relying on Michael's neighbor to report Michael's status. Gilbert did not intervene despite Michael's continuing decompensation and there was no crisis intervention program invoked on his behalf. Gilbert responded to the neighbor's call concerning Michael on February 25, 2002, by deciding to take no action until the day after when they could learn what happened when the sheriff's department responded.

In my view, under the pleading standards articulated in Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002) and Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 63 (1st Cir. 2004) the Equal Protection portion of Count II, against Edmonson for a failure to supervise and Count III, against Gilbert, should not be

dismissed for failure to state a claim.⁸ That said, it is evident from Buchanan's own description of his theory behind this claim that Count I against the commissioners does not state an equal protection claim against them. The claim of discriminatory animus is directed solely against Gilbert and his immediate supervisor, Edmonson, who apparently is brought in solely on a failure to train and supervise theory of liability.

State Law Claims

The defendants' argument that Buchanan's state law negligence and wrongful death claims are ripe for dismissal for failure to state a claim because they do not sufficiently allege that these defendants were the proximate cause of Buchanan's death is without merit. As the defendants admit, ordinarily proximate cause is a question of fact for the jury. And the cases they rely on in seeking dismissal advanced to litigation as far as the summary judgment stage, Crowe v. Shaw, 2000 ME 136, ¶¶ 8-11, 755 A.2d 509, 512 -13; Cyr v. Adamar Assocs. Ltd. P'ship, 2000 ME 110, ¶¶ 5-7, 752 A.2d 603, 604 -05; Webb v. Haas, 1999 ME 74, ¶¶19-22, 728 A.2d 1261, 1267 -68; Champagne v. Mid-Maine Med. Cent'r, 1998 ME 87, ¶ 12, 711 A.2d 842, 846, or to trial and judgment on a directed verdict, Brewer v. Roosevelt Motor Lodge, 295 A.2d 647, 652 -53 (Me. 1972).

It cannot be said that this case is so "out of the ordinary" on the proximate cause question that dismissal (as opposed to summary judgment or trial) is the appropriate stage to adjudicate the question; a reading of the defendants' strained argument on the absence of proximate cause proves the point. With respect to the punitive damage count,

⁸ The defendants are free to move for a more definitive statement if they feel they are unable to defend this claim as it is currently plead.

Buchanan makes it clear that he does not seek punitive damages against the State of Maine but only against the defendants in their individual capacities.

Conclusion

I now deny the motion to amend Count VII to the extent it seeks to allege an ADA Title II claim against these defendants. I allow the amendment to replace Burdick with Nicholas as a defendant.⁹ I recommend that the Court grant the motion to dismiss as to Count VII. With respect to Counts I, II, and III, brought pursuant to 42 U.S.C. § 1983, I recommend that the Court dismiss those counts except for that portion of Counts II and III pertaining to the alleged equal protection violations by Gilbert and Edmonson. And, I recommend that the Court deny the motion to dismiss as to the state law claims.

NOTICE

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

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

November 2, 2004.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

⁹ To the extent the motion to amend pertains to counts and allegations against the other defendants who currently have pending a motion for partial dismissal/summary judgment (Docket No. 13), I will address the remainder of the motion to amend in analyzing those pleadings.

BUCHANAN et al v. MAINE, STATE OF et al
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Cause: 42:1983 Civil Rights Act

Date Filed: 02/25/2004
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights:
Other
Jurisdiction: Federal Question

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V.

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