

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 FOR PARTIAL DISMISSAL  
AND MOTION FOR PARTIAL SUMMARY JUDGMENT BY  
COUNTY 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, a former patient of the Augusta Mental Health Institute, was in crisis and had attempted to set the neighbor's wood pile on fire. 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.<sup>1</sup> Presently before the court is a motion for partial dismissal and partial summary judgment by one set of defendants – Lincoln County, Todd Brackett, the current Lincoln County Sheriff, and the two responding deputies, Robert Emerson and Kenneth Hatch – referred to in the aggregate as the County

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<sup>1</sup> This summary description is derived from the allegations of Buchanan's complaint.

defendants. (Docket No. 13.) Also before the court is a motion to amend the complaint. (Docket Nos. 31&32.)<sup>2</sup>

I now grant Buchanan's motion to amend to the extent that it seeks to name the former Sheriff of Lincoln County, William Carter, in his individual capacity and seeks to remove the individual capacity claims against Todd Brackett. However, I deny the motion to amend to the extent that it seeks to amend Count VII to state a claim under Title II of the Americans with Disability Act (ADA). I recommend that the Court grant summary judgment on Counts VIII (Maine Tort Claims Act), Count IX (Wrongful Death), and Count X (Punitive Damages) to the extent that Buchanan lodges these counts against Lincoln County and Brackett in his official capacity. I further recommend that the Court grant the motion to dismiss Count VII as the parties agree that Buchanan can stake no claim under Title III of the ADA. I also recommend that the Court dismiss all but the Fourth Amendment excessive force component of Counts IV, V, and VI.

***Factual Allegations Relating to these Defendants***

On February 25, 2002, Deputy Hatch was assigned the task of checking on Michael (after the call from the neighbor was received). He received the assignment while talking with Deputies Robert Emerson, Roland Rollins and Detective Sergeant Michael Murphy. Neither Hatch nor Emerson had any knowledge of or dealings with Michael, but Rollins had dealt with him. Rollins told Hatch not to go alone. He told him Michael “might be violent and definitely had mental health problems.” (Rollins and Deputy Brian Collamore had visited Michael in the Summer of 2001 with his mental

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<sup>2</sup> In an earlier decision primarily addressing a motion to dismiss by the other defendants in this action, I addressed the motion to amend as it pertained to those defendants. I now address the remaining concerns in the motion to amend.

health caseworker, co-defendant Joel Gilbert.) (Compl. ¶ 32.) Hatch asked Emerson to back him up on the assignment to check on Michael. (Id. ¶ 33.)

At approximately 5:59 p.m. Emerson radioed dispatch that he and Hatch were at the entrance of Michael's driveway on Valley Road in Somerville. He told the dispatcher they were about to set out on foot down the unplowed driveway to Michael's house which was approximately ½ to ¾ of a mile from the Valley Road driveway entrance. (Id. ¶ 34.) At 6:20 p.m., Hatch radioed dispatch asking dispatch to call the neighbor who had placed the call to the police, to find out who Michael's counselor was, make contact with him and advise that Michael was barricaded inside and would not answer the door. Hatch asked dispatch to see what the counselor advised. (Id. ¶ 35.) Dispatch responded that the line was busy and asked if Hatch wanted to break into the line. (Id. ¶ 36.) Hatch asked dispatch to break into the line. (Id. ¶ 37.) At approximately 6:24 p.m., the duty officer overheard Hatch's call for advice and set out for the Buchanan home telling dispatch he was in route. This message was conveyed to Hatch. (Id. ¶ 38.)

At the Buchanan residence, Michael was eating dinner in his living room. Shortly after Hatch talked with dispatch, Michael allegedly appeared in the window of the second floor kitchen above the entrance door. He appeared to be screaming, but his voice was not audible to Hatch and Emerson. (Id. ¶ 39.) Buchanan, unable to open the window over the entrance door, allegedly opened a different kitchen window near by at the southeastern corner of the house. There he screamed at Emerson. He then closed the window and went away. He came back, reopened the window and talked again with Emerson and at that time threw a liquid from a Styrofoam cup at Emerson which Emerson took to be alcohol. He did not throw the cup. During these encounters between

Emerson and Buchanan, Hatch was checking the house for additional exits and entrances and checking out smoke he smelled. He concluded the basement entrance was the only exit/entrance to the house. (Id. ¶ 40.)

Michael then allegedly closed the window, turned off the light and left the room. Michael then went to the other end of the house where he turned on a light. Emerson followed, moving to the entrance door and at that point heard a loud noise, which he interpreted as a gunshot. (Id. ¶ 41.) Hatch was near Emerson. (Id. ¶ 42.) Emerson, by shining his flashlight through the entrance door window, was able to identify various landmarks in the basement of the home and then saw Buchanan coming out of the house. Emerson alleges he saw blood on the knuckles of Michael Buchanan's hands as he descended the stairs into the basement. (Id. ¶ 43.)

Hatch and Emerson allege Michael opened the door and, unexpectedly, spit on Emerson, screamed at them and told them to get off his property. Michael then turned and started back toward the stairs. (Id. ¶ 44.) Hatch and Emerson allege that Emerson tried to grab Michael's arm as he retreated, but missed. (Id. ¶ 45.) Hatch alleges that Emerson said "I'm going to grab him" as he took off after Michael.

Michael then ran up the stairs with Emerson and Hatch behind him. He entered his upstairs living area and closed the door. (Id. ¶ 46.) Emerson, as alleged by Hatch, was nearly at the landing – Hatch himself was 1/3 the way up the stairs – when Michael reappeared with a kitchen knife in his hand and began stabbing at Emerson. (Id. ¶ 47.) With pleas: "He's killing me, he's killing me," from Emerson, Hatch shot and killed Michael who fell from the landing onto the wood pile and then to the dirt floor below. (Id. ¶ 48.)

## *Discussion*

### *Motion to Amend to Name William Carter in his Individual Capacity*

Buchanan seeks to amend his complaint to name the former Sheriff of Lincoln County, William Carter in his individual capacity in lieu of maintaining his personal capacity suit against Todd Brackett, who is the current sheriff but was not in any way associated with the Lincoln County Sheriff's department at the relevant times.<sup>3</sup> Rather, Carter was served with the notice of claim, they contend, in his official capacity as sheriff of Lincoln County, and they cite to the return of service that so reflects (a return that Carter would not have reason to see).

In actuality, the caption of the notice of claim (which Carter would have seen) indicates that he is receiving the notice in his individual and official capacity as sheriff of Lincoln County. There is no contest that this notice was timely filed on August 21, 2002, within 180 days of Michael's death, the juncture at which the wrongful death action accrued. See 14 M.R.S.A. § 8107 (1). Buchanan then had two years from the accrual date to file his action. See id. § 8110 ("Every claim against a governmental entity or its employees permitted under this chapter is forever barred from the courts of this State, unless an action therein is begun within 2 years after the cause of action accrues, except

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<sup>3</sup> The defendants, in arguing that this amendment should not be permitted, contend that Buchanan did not make proper service on the County Commissioners, County Clerk, or County Treasurer as required by 14 M.R.S.A. § 8107(3)(B) and Maine Rule of Civil Procedure 4(d)(4). Because his pleading did not comply with the local rules Buchanan was denied leave to file a statement of material fact in opposition to the defendants' facts pertaining to this service dispute. (Docket Nos. 30, 33, & 36.) In his statement of facts, Buchanan stated (without record support) that he did in fact serve a notice of claim on the County Commissioners by service on Lincoln County Chair John O'Connell. Given the resolution of the summary judgment motion in Lincoln County's favor, the question of whether or not it received proper notice of claim can be left unanswered.

that, if the claimant is a minor when the cause of action accrues, the action may be brought within 2 years of the minor's attaining 18 years of age.').

Buchanan argues that his amendment to his complaint to sue Carter in his individual capacity should relate back to the timely filed complaint under Federal Rule of Civil Procedure 15(c) which provides:

- (c) Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when
- (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
  - (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
  - (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c). With these defendants having filed their answer on July 8, 2004, Buchanan can amend his "pleading only by leave of court or by written consent of the adverse party"; however, "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

It would be easier to swallow Buchanan's argument in favor of relation back if his design was to amend a complaint that first named Carter, who was served the notice of claim, to substitute Brackett vis-à-vis the official capacity claim. But in this case Buchanan had the right sheriff tagged at the get-go as far as having any possible liability for his personal, although not direct, involvement in the events that transpired. It is inexplicable why he did not then name Carter in his individual capacity and Brackett in

his official capacity when he filed the federal action. Buchanan claims only that it was a "misnomer."

It is my belief that the First Circuit's discussion in Leonard v. Parry, 219 F.3d 25, 27 -31 (1st Cir. 2000) of the relation back and motion to amend analysis counsels strongly in favor of allowing the amendment. In that case, the 'misnomer' was equally avoidable. However, the Panel reflected: "Virtually by definition, every mistake involves an element of negligence, carelessness, or fault--and the language of Rule 15(c)(3) does not distinguish among types of mistakes concerning identity. Properly construed, the rule encompasses both mistakes that were easily avoidable and those that were serendipitous." Id. at 29. It is true in addressing this question under subsection (a) – as opposed to subsection (c)—of Rule 15 that what Buchanan "knew or should have known and what he did or should have done are relevant to the question of whether justice requires leave to amend under this discretionary provision." Id. at 30; see also id. at 30-31 ("There is no reason to think that this bevue, however careless, was anything but an honest mistake concerning identity.").

The docket in this case reflects no efforts on Buchanan's part to serve Carter within the Federal Rule of Civil Procedure 4(b) 120-day period. However, this case was filed on February 15, 2004, the defendants, after getting an extension for filing their answer, filed their answer and the motion for partial dismissal and summary judgment on July 8, 2004. The motion to amend was filed on September 7, 2004, and discovery has not yet closed. I would not call the delay by Buchanan "protracted." See Steir v. Girl Scouts of the USA, 383 F.3d 7, 12 (1st Cir. 2004) ("Regardless of the context, the longer a plaintiff delays, the more likely the motion to amend will be denied, as protracted delay,

with its attendant burdens on the opponent and the court, is itself a sufficient reason for the court to withhold permission to amend." ). It is also evident that Carter clearly had notice of the action from the time that he was served with the notice of claim in August 2002. Further, it is plain that Brackett's attorney is proceeding on Carter's behalf in opposing the motion to amend. See Lacedra v. Donald W. Wyatt Detention Facility, 334 F.Supp.2d 114, 129 -30 (D.R.I. 2004) ("When a new and original defendant share the same attorney, there is no prejudice to the new defendant if the attorney was initially on notice to prepare the new party's defense." ). In view of this law, I now grant the amendment to the complaint to name Carter in his individual capacity and naming Brackett in his official capacity only.<sup>4</sup> The portion of the defendants' motion to dismiss seeking summary judgment vis-à-vis the state and federal individual capacity claims against Brackett is therefore moot.

***Maine Tort Claims Act, Wrongful Death, and Punitive Damages Counts***

Buchanan states that he does not seek to hold these defendants liable under Count VIII, entitled "Maine Tort Claims Act." (Pls.' Mem. Response Mot. Dismiss & Partial Summ. J. at 3.) He does seek to hold them liable under Count IX for wrongful death, seeking damages under 18-A M.R.S.A. § 3-715 and § 2-804 for emotional distress, conscious pain and suffering, loss of consortium, loss of comfort, society, and companionship, pecuniary losses and cost of medical care and burial, and all damages available under the act (Compl. ¶ 111) and Count X, seeking punitive damages (id. ¶ 113).

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<sup>4</sup> I reached a similar conclusion on similar facts in Lemerich v. International Union of Operating Engineers, Locals 877 and 4, Civ. No. 01-124-B-C, 2002 WL 655333, \*2 -5 (D. Me. Apr. 19, 2002).

In their quest for summary judgment on these counts the defendants argue that these counts are state law claims brought under the Maine Tort Claims Act and apropos Lincoln County and the official capacity claims they are entitled to immunity from suit. In their statement of material fact the defendants state that the Maine County Commissioners Association Self-Funded Risk Management Pool (Risk Pool) is a public self-funded pool established pursuant to 30-A M.R.S.A. ch. 117. (SMF ¶ 1, Docket No. 14.). Lincoln County is a Named Member of the Risk Pool and is provided with insurance-type coverage pursuant to a document entitled “Maine County Commissioners Association Self-Funded Risk Management Pool Coverage Document” (“Coverage Document”). (Id. ¶ 2.) The Coverage Document specifically excludes any coverage for any cause of action seeking tort damages for which the County is immune pursuant to the Tort Claims Act, and limits coverage to those areas for which governmental immunity is expressly waived by the Tort Claims Act. (Id. ¶ 3.) Other than the insurance-type coverage provided to Lincoln County under the Risk Pool’s Coverage Document, Lincoln County has not procured insurance against liability for any claim against the County or its employees for which immunity is not otherwise waived under the Maine Tort Claims Act. (Id. ¶ 4.)

In his reply, Buchanan does not dispute these facts but contends that the actionable misconduct that is the basis for these counts is the violation of Michael's federal constitutional rights as opposed to Maine tort law and, therefore, the Maine Tort Claims Act is not brought into play. (Pls.' Mem. Response Mot. Dismiss & Partial Summ. J. at 4-5.) He asserts that he seeks punitive damages only against the defendants in their individual capacity. (Id. at 5.) Maine's "wrongful death law anticipates tort

claims actions and explicitly makes such actions subject to the limitations of the Maine Tort Claims Act." Porter v. Philbrick-Gates, 2000 ME 35, ¶ 6, 745 A.2d 996, 998 (citing 14 M.R.S.A. § 8104-C (Supp.1999)). I agree with the defendants that Buchanan cannot circumvent the immunity provision of the Maine Tort Claims Act that is applicable to his wrongful death count simply by dissociating it from his Maine Tort Claims Act count and framing it as a remedy for the federal constitutional violations: "Painting a pumpkin green and calling it a watermelon will not render its contents sweet and juicy." Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 24 (1st Cir. 2002).

#### ***Motion to Dismiss and Federal Claims***

"In civil rights actions, as in the mine-run of other cases for which no statute or Federal Rule of Civil Procedure provides for different treatment, a court confronted with a Rule 12(b)(6) motion 'may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66 (1st Cir. 2004) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

#### ***ADA Claim and Motion to Amend***

Buchanan concedes that his ADA claim as currently plead in Count VII is not viable, premised as it is on Title III of the ADA which targets public accommodation discrimination. Buchanan's motion to amend his complaint, in this case to alter the complexion of his ADA claim, may be denied as futile if the "complaint, as amended, would fail to state a claim upon which relief could be granted." Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir.1996). I make this determination of futility using the same standard applicable to ruling on motions to dismiss under Federal

Rule of Civil Procedure 12(b)(6). Id. The court must accept all the well-pleaded factual allegations as true and must draw all reasonable inferences favorable to the plaintiff but need not credit bald assertions or legal conclusions. Id. at 628.

With respect to these defendants, Buchanan clarifies that he is attempting to bring the Title II claim only against the County. (Pls.' Reply Mem. to Obj. Mot. Amend at 4.)<sup>5</sup> 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. Buchanan contends that he has provided adequate notice of his Title II ADA claim in paragraphs 96 through 102 of his complaint and the factual underpinnings in paragraphs 22 through 49.

In defending this proposed amendment Buchanan asserts that his original Title III count put Lincoln County on notice of the nature of his Title II claim. In my opinion, even the proposed amended count does not put Lincoln County on notice of the nature of Buchanan's claim. The proposed amended Count VII proffers the following allegations as to the Title II ADA claim. DUBY, Nicholas, Lincoln County and Todd Brackett, Lincoln County Sheriff, each had a duty to make reasonable modifications to their policies, practices and procedures necessary to the provision of services to persons with

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<sup>5</sup> Hatch and Emerson were the two officers that arrived on the scene on February 25, 2002. These officers are only susceptible to suit in their individual capacities and Buchanan cannot sustain Title II ADA claims against these defendants for action taken in this capacity. See Miller v. King, 384 F.3d 1248,1277 - 78 (11th Cir. 2004); Garcia v. S.U.N.Y. Health Scis. Cent. of Brooklyn, 280 F.3d 98, 107 (2d Cir. 2001); Silk v. City of Chicago, 194 F.3d 788, 797 (7th Cir. 1999); Alsbrook v. City of Maumelle, 184 F.3d 999, 1005 n.8 (8th Cir. 1999); Crocker v. Lewiston Police Dept., 2001 WL 114977, \*5 (D. Me. 2001); Smith v. Maine School Admin. Dist. No. 6, 2001 WL 68305, \*3 (D. Me. 2001).

disabilities under the Public Accommodations Provisions of the United States Code (42 U.S.C. §12132, 42 U.S.C. §12132 and 28 C.F.R. §35.101 et seq. (Proposed Am. Compl. ¶ 97.) Michael was a qualified person with a disability. He was mentally ill suffering from bipolar disorder with psychosis. Each of the defendants had actual knowledge of Buchanan's disability. As a person with a disability Michael was denied the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation. (Id. ¶98.) The Maine Department of Behavioral and Developmental Services (now Health and Human Services) and the Lincoln County Sheriff's Department are covered Public Accommodation entities under the United States Code and its equivalent Maine Human Rights Act. (Id. ¶ 99.) By failing to modify its policies, procedures, customs and/or practices, defendants denied Michael Buchanan on the basis of his disability full and equal enjoyment of the services, privileges and advantages they provide. (Id. ¶ 100.) Because of the failure of defendants to modify their services to meet the needs of Michael's disability, Michael was injured and died. (Id. ¶ 101.) Michael Buchanan's injury and death was proximately caused by the failure of defendants to modify their policies with respect to his disability. (Id. ¶ 102.)

"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).

In his complaint, amended complaint, and his pleadings relating to the motion to amend and the motion for partial dismissal and summary judgment, I could not identify any possible basis for holding Lincoln County liable on a Title II theory. For example, crediting Buchanan's own factual allegations recited above, I cannot conceive of a Lincoln County policy or custom (to borrow the terms for municipal liability) that could have animated the way that events unfolded at Michael's residence on February 25, 2002. Recognizing that factually Buchanan need not spell out all the specifics of his claim, when confronted by a motion to dismiss and an objection to the motion to amend, he at least must identify some plausible legal basis for his claim. He has not done so, and even his proposed amended complaint continues to recite the public accommodation language of Title III claims. Therefore, I now deny the motion to amend to the extent that it seeks to state a Title II claim against Lincoln County because the proposed amendment would not state a claim against Lincoln County.

***42 U.S.C. § 1983 Claims***

Last up for discussion are Count IV against Lincoln County, Count V against Brackett in his official capacity and Carter in his individual capacity, and Count VI against deputies Emerson and Hatch. Buchanan concedes that he cannot pursue his Eighth Amendment deliberate indifference claims or his "right to be left alone" claim. This leaves his contentions that these defendants "intentionally deprived Michael Buchanan of 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 his right to equal protection of the laws." (Compl. ¶¶ 74, 90 & 89; see also Am. Compl. ¶¶ 75, 81 & 90.)

The defendants are not now moving for a disposition on Buchanan's claim that his Fourth Amendment rights to be free from a seizure by excessive force were violated, although they reserve the right to seek a brevis disposition of this claim in a future dispositive motion. (Reply Mem. to Pls.' Opp'n Mot. Dismiss at 11 n.6.) I agree with the defendants that, under Graham v. Connor, 490 U.S. 386, 393-95 (1989), if Buchanan has a claim based on the manner he was seized it is an excessive force claim. Graham stated:

Today we make explicit ... and hold that all claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.

Id. at 395.

Finally, with respect to the Equal Protection claim, in his consolidated response to the State defendants' motion to dismiss and the Lincoln County defendants' partial motion to dismiss, Buchanan states vis-à-vis these defendants:

The equal protection clause of the Fourteenth Amendment is implicated by Mr. Buchanan's mental illness. Officers Hatch and Emerson's only provocation for invading Mr. Buchanan's home and following up the stairs was his mental illness. Invading his home and causing an altercation requiring the use of excessive force to resolve because Mr. Buchanan was mentally ill is an impermissible violation of his right to equal protection of the laws. See, e.g., Hall v. Ochs, 817 Fed.2d. 920, (1st Cir. 1987); United States v. Alarcon-Gonzales, 73 Fed. 3rd 289, 293 (10th Cir. 1996) and Brown v. City of Oneonta, New York, 221 Fed. 3rd, 329 (2nd Cir. 2000), re-hearing and re-hearing en banc denied, 235 Fed. 3rd. 769 (2nd Cir. 2000) and cert. denied U.S. (2001).

(Pls.' Mem. Resp. Defs.' Mots. Dismiss & Partial Summ. J. at 10.) The allegations of Buchanan's own complaint that detail how, on Michael's worried neighbor's behest,

Hatch and Emerson arrived at Michael's house, approached with caution, and eventually entered his home (aborting efforts to first make contact with Michael's caseworker due to Michael's behavior). The argument that the Equal Protection claim against these defendants should survive a motion to dismiss because the "only provocation for invading Mr. Buchanan's home and following up the stairs was his mental illness" belies his own facts and defies common sense. I recommend that the court dismiss the equal protection claim against these County defendants because it fails to state a claim.

### *Conclusion*

Vis-à-vis Docket Nos. 31 & 32, I **grant** Buchanan's motion to amend to the extent that it seeks to name the former Sheriff of Lincoln County, William Carter, in his individual capacity and seeks to remove the individual capacity claims against Todd Brackett. I **deny** the motion to amend to the extent that it seeks to amend Count VII to state a claim under Title II of the Americans with Disability Act (ADA). Plaintiff's counsel shall file an amended complaint that incorporates the amendments allowed by this order and the companion order contained within the recommended decision found at Docket No. 43. This amended complaint shall be filed by November 23, 2004.

Apropos Docket No. 13, the motion for partial summary judgment and dismissal, I **recommend** that the Court **grant summary judgment** on Counts VIII (Maine Tort Claims Act), Count IX (Wrongful Death), and Count X (Punitive Damages) to the extent that Buchanan lodges these counts against Lincoln County and Brackett in his official capacity; **grant** the **motion to dismiss** Count VII as the parties agree that Buchanan can stake no claim under Title III of the ADA; and **dismiss** all but the Fourth Amendment excessive force component of Counts IV, V, and VI.

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 9, 2004.

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

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

**Plaintiff**  
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**ESTATE OF**

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**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

V.

**Defendant**

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**MAINE, STATE OF**

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**SABRA BURDICK, *Individually and in her official capacity as Acting Commissioner of the Maine Department of Behavioral and Developmental Services***  
*TERMINATED: 11/02/2004*

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Sheriff*

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**KENNETH HATCH**

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**MAINE DEPARTMENT OF  
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SERVICES COMMISSIONER**

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