

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

ALLA IOSIFOVNA SHUPER,            )  
  )  
                          Plaintiff,            )  
  )  
                  v.                            )        2:14-cv-00317-JAW  
  )  
DAN AUSTIN,                            )  
  )  
                          Defendant.        )

**ORDER ON MOTION TO DISMISS AND  
ON 28 U.S.C. § 1915(e)(2)(B)(ii) REVIEW**

Feeling anxious, on February 27, 2013, Alla Iosifovna Shuper called 911 because she had received a notice from the Internal Revenue Service saying that she may have been the victim of identity theft. Ms. Shuper speaks and writes English but it is not her native language, and she also suffers from mental and physical health problems. When Officer Dan Austin of the Falmouth Police Department arrived at her home in response to her 911 call, he attempted to summon her for misuse of the 911 system and when she refused to sign the summons, he arrested her.

Ms. Shuper, acting pro se, brought a civil action against Officer Austin and perhaps against the Town and its Police Department under various legal theories. Addressing Officer Austin’s motion to dismiss and performing its own § 1915 review of claims against the Town of Falmouth and the Falmouth Police Department, the Court concludes that her 42 U.S.C. § 1983 claim against Officer Austin for warrantless arrest and for excessive force survives dismissal, that her § 1983 equal protection claim against Officer Austin must be dismissed, that her pleadings do not

state a § 1983 municipal liability claim against the Town or its Police Department, and that her Americans with Disabilities Act (ADA) and Maine Human Rights Act (MHRA) claims survive summary dismissal but only as claims against the Town of Falmouth Police Department restricted to Officer Austin's arrest and detention of Ms. Shuper.

## **I. OFFICER DAN AUSTIN'S MOTION TO DISMISS**

### **A. Legal Standard**

When evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, a court must determine “whether, construing the well-pleaded facts of the complaint in the light most favorable to the plaintiffs, the complaint states a claim for which relief can be granted.” *Ocasio–Hernández v. Fortuño–Burset*, 640 F.3d 1, 7 (1st Cir. 2011). A court need not assume the truth of conclusory allegations, and the complaint must state at least a “plausible claim for relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). However, “[n]on-conclusory factual allegations in the complaint must ... be treated as true, even if seemingly incredible.” *Ocasio–Hernández*, 640 F.3d at 12. A court may not “attempt to forecast a plaintiff's likelihood of success on the merits.” *Id.* at 13.

Furthermore, courts should be “solicitous of the obstacles that pro se litigants face, and ... endeavor, within reasonable limits, to guard against the loss of pro se claims due to technical defects.” *Dutil v. Murphy*, 550 F.3d 154, 158–59 (1st Cir. 2008). In deciding a Rule 12(b)(6) motion, a court may consider any documents attached to the complaint as well as any other documents “integral to or explicitly

relied upon in the complaint, even though not attached to the complaint.” *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008) (quoting *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000)).

## **B. Factual Background<sup>1</sup>**

Ms. Shuper alleges that she suffers from a mental health impairment, lives alone with her service dog, and suffers from bouts of angina. *Compl.* at 4; *id.* Attach. 8, *Memo from Yudi Shuper* at 2 (ECF No. 1). She also has a “pretty bad” health condition that “requires a close medical attention because of the very serious side effects of the medications I have been taking.” *Second Am. Compl.* at 8 (ECF No. 15). Although Ms. Shuper speaks and writes English, she apparently requires interpretive services. *Id.* at 1. Ms. Shuper’s mental health symptoms and her language skills have complicated her encounters with law enforcement officers and other members of the community. *Id.* at 1-16.

On February 27, 2013, Ms. Shuper was suffering from a panic attack brought on by her receipt of a notice from the Internal Revenue Service that it suspected she was the victim of identity theft. *Id.* at 4. Ms. Shuper’s anxiety made her feel unsafe and “what I had in my mind at that time is to call Public Safety.” *Id.* Despite having difficulty understanding Ms. Shuper, the dispatcher did not call for interpretive services and did not understand whether she was requesting services of an ambulance, the Fire Department, or the Police Department. *Id.* She responded that she “did not feel safe and I do not know who supposed to be called in such situations.”

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<sup>1</sup> The Court gleaned these facts from the allegations in Ms. Shuper’s pleadings.

*Id.* The dispatcher replied that he “has a protocol and should follow it.” *Id.* Ms. Shuper determined that the dispatcher was not going to help her. *Id.* at 3-4. Ms. Shuper’s anxiety heightened and she “remembered only the words of the Social Worker and the Case Worker, saying that in case of Emergency call 911.” *Id.* at 4. Ms. Shuper called 911. *Id.* at 4-5.

In about ten minutes, Officer Dan Austin arrived at Ms. Shuper’s home. *Id.* at 5. Officer Austin asked what the emergency was; Ms. Shuper mentioned the IRS letter, said that she felt unsafe because of the suspected identity theft, and told the Officer that she feared someone wanted to kill her. *Id.* She told Officer Austin “about a huge stress I had experienced.” *Id.* Officer Austin did not understand Ms. Shuper and did not call for interpretive services or for the services of a crisis worker. *Id.* at 5-6. Instead, “in about 5 minutes” Officer Austin “brought the summons” for misuse of the 911 system. *Id.* at 6. Ms. Shuper “knew that I did not do anything wrong and refused to sign the summons.” *Id.* Officer Austin called for assistance and he and Officer Mazziotti handcuffed Ms. Shuper, who was in her pajamas and slippers, and “physically forced me to go outside.” *Id.* Ms. Shuper remained in detention for approximately 18 hours. *Id.* She was accused of misuse of 911 and refusal to sign a summons. *Id.* She says she “never violated” the 911 law. *Id.* at 7.

Ms. Shuper subsequently obtained information concerning the number of calls she placed to 911, which she says confirm that she only called the “Falmouth 911” on February 27, 2013. *Id.* at 7-8. According to filings attached to her pleadings, Ms. Shuper was charged with misusing the 911 system and with refusing to sign a

summons; on June 12, 2013, the District Attorney eventually “filed” these charges for a one-year period beginning June 12, 2013. *Compl.* Attach. 9, Docket Record at 4.

Ms. Shuper later filed three administrative complaints against Officer Austin; one with the Falmouth Police Department, another with the Cumberland County Sheriff’s Office, and a third with the Maine Human Rights Commission. *Second Am. Compl.* at 9.

In addition to the February 27, 2013 incident, Ms. Shuper alleges what she calls “assaults” and “humiliation” related to subsequent encounters with the Falmouth Police Department. *Id.* at 10-11. These encounters involve being told that there was a harassment notice pertaining to calls Ms. Shuper made to the New England Poison Control Center, which information was false, *id.* at 11; a caution that she stop calling the Falmouth Police Department’s non-emergency phone line to discuss her case or face arrest, *id.*; a response police made to a call placed by an employee of Shaw’s Supermarket concerning Ms. Shuper, in which response a police officer made the manager apologize to her for having the police called, *id.* at 12; a trespass notice initiated by Staples due to an encounter Ms. Shuper had with an employee in a Staples Copy Center who declined to give her the store’s “policies”, *id.* at 13; a description of Ms. Shuper’s speech as rambling, which was made in a Falmouth Police Department filing with the Maine Human Rights Commission, *id.* at 14-16; and, two calls to Ms. Shuper in which a dispatcher or officer reported to her that someone called and said there was a “protection order” or “cease harassment order” against her, which was not true. *Id.* at 16.

Based on these allegations, Ms. Shuper alleges a violation of her civil rights, citing § 1983; a violation of the Fourteenth Amendment; a violation of “ADA Chapter 126”; and a violation of Chapter 337, subchapter 5 of the Maine Human Rights Act. *Id.* at 17. For relief, she requests emotional and physical damages, complaining of two hospitalizations and three visits to a Crisis Stabilization Unit maintained by Crisis & Counseling Centers of Maine. *Id.* at 17-18.

### **C. The Parties’ Positions**

#### **1. Daniel Austin’s Motion**

On October 16, 2014, Daniel Austin moved to dismiss the Second Amended Complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure 8 and 12(b)(6). *Def. Daniel Austin’s Mot. to Dismiss for Failure to State a Claim* (ECF No. 38) (*Def.’s Mot.*). Officer Austin points out that many of the allegations in the Second Amended Complaint are not directed against him. *Id.* at 1-3. He also disputes whether his arrest of Ms. Shuper constituted an “assault” as legally defined. *Id.* at 2. He maintains that Ms. Shuper failed to allege facts sufficient to conclude that she has a disability within the meaning of the ADA. *Id.* Officer Austin points to Ms. Shuper’s Second Amended Complaint and its acknowledgement that she refused to sign the summons as conceding that “probable cause to support her arrest” existed and refuting “any right she has to bring an unlawful arrest claim under § 1983.” *Id.* at 3. Turning to the “only portion of Plaintiff’s Complaint that appears to implicate Officer Austin”, namely the events leading to her arrest, Officer Austin says that he summoned Ms. Shuper for the criminal violation of misuse of the 911 system because

he understood “she did not have any kind of emergency that would justify her use of the 911 emergency line.” *Id.* at 3-4. Officer Austin then says that once she refused to sign the summons, she was committing a Class E offense in his presence and this “provided the probable cause necessary for him to lawfully arrest her.” *Id.* at 4.

Regarding the claims underpinning the § 1983 action, citing *Graham v. Connor*, 490 U.S. 386 (1989), Officer Austin maintains that routine arrests—like the one in this case—do not constitute a Fourth Amendment violation. *Id.* at 7. In fact, he writes that “[a]n arrest supported by probable cause cannot support a § 1983 claim for violation of the 4th Amendment.” *Id.* at 8. As in his view, Ms. Shuper committed “an arrestable offense in [his] presence”, her Second Amended Complaint fails to state a claim that can survive a motion to dismiss. *Id.* at 8.

## **2. Alla Iosifovna Shuper’s Response**

On October 16, 2014, Ms. Shuper filed a response in opposition to the motion. *Opp’n to Def.’s Mot.* (ECF No. 39) (*Pl.’s Opp’n*). In her opposition, Ms. Shuper maintains that she has stated a claim both under § 1983 and under the ADA against Officer Austin, the Town of Falmouth and the Falmouth Police Department. *Id.* at 1-8.

## **3. Officer Austin’s Reply**

On October 29, 2014, Officer Austin filed a reply. *Def. Daniel Austin’s Reply Mem. in Support of Mot. to Dismiss* (ECF No. 40) (*Def.’s Reply*). Officer Austin points out that contrary to her allegations, Ms. Shuper appears to have no difficulty at all writing English. *Id.* at 1-2. He asserts that Ms. Shuper failed to allege facts that

would support a finding that she is a qualified person with a disability who was denied services or otherwise discriminated against. *Id.* at 2. He also urges the Court to conclude that Ms. Shuper has conceded that he had probable cause to make the arrest and that she has no claim under § 1983. *Id.* at 3.

## **D. Discussion**

### **1. Section 1983**

The federal civil rights statute, 42 U.S.C. § 1983, provides a remedy against persons acting under color of state law for violations of rights created by other sources of federal law. *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 44 (1st Cir. 2012). “To state a claim under § 1983, a plaintiff must make two showings: the existence of a federal or statutory right; and a deprivation of that right by a person acting under color of state law.” *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F.3d 487, 491 (1st Cir. 1996). Ms. Shuper asserts a violation of the Fourteenth Amendment. Her theories are not individually outlined in her pleadings, but it is apparent from her factual allegations that she complains of a warrantless arrest, the use of force to remove her from her home on February 27, 2013, and of various acts of what she describes as “assaults”, “humiliation” or “discrimination” related to law enforcement activities.

#### **a. Illegal arrest**

“The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ... particularly describing the place to be searched, and the persons or

things to be seized.” U.S. CONST. amend. IV. The Fourth Amendment’s prohibition of unreasonable searches and seizures applies equally against the states through the Due Process Clause of the Fourteenth Amendment. *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013). Although unreasonable seizures are prohibited, a warrantless arrest is reasonable “where there is probable cause to believe that a criminal offense has been or is being committed.” *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

Officer Austin states that the charge upon which he arrested Ms. Shuper was the charge of failure to sign the summons because refusal to sign a summons is a Class E crime and was committed in Officer Austin’s presence. *Def.’s Mot.* at 4 (citing 17-A M.R.S. §§ 15(1)(B) (“Warrantless arrests by law enforcement officers”) and 17-A M.R.S. § 15-A (“Issuance of summons for criminal offense”). In her Second Amended Complaint, Ms. Shuper admits she refused to sign the summons. *Second Am. Compl.* at 6 (“I knew that I did not do anything wrong and refused to sign summons”).

However, the reasonableness of the arrest must be judged according to whether Officer Austin had probable cause to issue the summons for misuse of the E-9-1-1 system. Title 17-A M.R.S. § 15-A(1) provides that “[a] law enforcement officer who has probable cause to believe that a crime has been or is being committed by a person may issue . . . a written summons to that person directing that person to appear in the appropriate trial court to answer the allegation that the person has committed the crime.” (emphasis supplied). Thus, the existence of probable cause is a precondition for a valid written summons. *See, cf. State v. Hillsgrove*, 658 A.2d 1100, 1101 (Me. 1995) (“The prosecution and conviction in this case are valid because the

State filed a valid criminal complaint in the District Court”). The statute further provides:

If the person refuses to sign the summons after having been ordered to do so by a law enforcement officer, the person commits a Class E crime.

17-A M.R.S. § 15-A(1). Although the statute does not directly address whether a person who refuses to sign a summons for a crime for which the summoning officer did not have probable cause has committed a Class E crime, Officer Austin has provided no authority for the proposition that a person who refuses to sign a summons when the officer did not have probable cause to believe that a crime was committed has nevertheless violated 17-A M.R.S. § 15-A(1).

The Court turns to the predicate question: whether Officer Austin had probable cause to believe that Ms. Shuper misused the 911 system in violation of 25 M.R.S. § 2931. Officer Austin appears to assume that Ms. Shuper’s one call to 911 for a situation not an emergency violated 25 M.R.S. § 2931. *Def.’s Mot.* at 4 (“After another five minutes of this conversation, Officer Austin allegedly gave Plaintiff a summons for misuse of the 911 emergency line. If anything, this demonstrates that Officer Austin understood Plaintiff enough to know that she did not have any kind of emergency that would justify her use of the 911 emergency line”).

Officer Austin is incorrect. Misuse of the E-9-1-1 system for which Officer Austin issued the summons requires “repeated telephone calls to a public safety answering point by dialing 911 to make nonemergency reports or inquiries” and these calls must have been made “after having been forbidden to do so by a public safety answering point manager or administrator or a law enforcement officer.” 25 M.R.S.

§ 2931(1)(A).<sup>2</sup> There is no allegation in the Second Amended Complaint that Ms. Shuper had been previously warned not to make nonemergency calls to 911 and only slight evidence that she had done so repeatedly. Ms. Shuper's allegations demonstrate that she called 911 on February 27, 2013 in the absence of an emergency, and that she called 911 on a number of prior occasions as well.<sup>3</sup> But, the circumstances of the prior calls are not clear. If there is one point Ms. Shuper has sought to make clear in her many filings, it is that most of her prior calls to the Falmouth Police Department were to its non-emergency local line and that her prior 911 calls were, in fact, emergency-related resulting in emergency services such as ambulance transport to the hospital.<sup>4</sup> In addition, a plausible interpretation of Ms. Shuper's Second Amended Complaint is that an emergency in fact existed whenever she placed calls to the 911 system prior to February 27, 2013.

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<sup>2</sup> 5 M.R.S. § 2931(1)(A) reads:

A person is guilty of misuse of the E-9-1-1 system if without reasonable cause the person, after having been forbidden to do so by a public safety answering point manager or administrator or a law enforcement officer: (A) makes repeated telephone calls to a public safety answering point by dialing 9-1-1 to make nonemergency reports or inquiries.

<sup>3</sup> According to Ms. Shuper, she obtained a list of "all the calls [she] made directly to 911," which list contained calls for the following dates: March 18, 2012; March 26, 2012; and "dates since 02/23/2013 to 02/27/2013." *Second Am. Compl.* at 7. Although the last reference to "dates since" is difficult to understand, Ms. Shuper's allegations establish prior calls to 911. Ms. Shuper explains that many other calls to the Department were not to 911 or another "emergency" line, but to the non-emergency line. Other filings indicate that Ms. Shuper called 911 between April 9, 2011, and January 20, 2014, four times "from Falmouth." *Resp.-Opp'n* at 2-3 (ECF No. 13-1) (*Pl.'s Me. Human Rights Comm'n Opp'n*).

<sup>4</sup> Ms. Shuper alleges a history of cardiac catheterization and frequent attacks of angina, including angina symptoms caused by anxiety and panic attacks. *Pl.'s Me. Human Rights Comm'n Opp'n* at 3.

In sum, Ms. Shuper has successfully pleaded a claim of wrongful arrest based on an unreasonable seizure and detention on February 27, 2013: (1) Officer Austin did not have probable cause to believe that Ms. Shuper had violated 25 M.R.S. § 2931(1)(A) when he issued a summons for that crime; (2) because he did not have probable cause to believe that a crime had been committed, she did not commit a violation of 17-A M.R.S. § 15-A(1) when she refused to sign the summons; and (3) because no crime had been committed, Officer Austin did not have the legal authority to physically arrest her.

**b. Excessive force**

A Fourteenth Amendment claim of excessive force is evaluated under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989); *Torres-Rivera v. O'Neill-Cancel*, 406 F.3d 43, 45 (1st Cir. 2005). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 480 U.S. at 396 (some internal quotation marks omitted) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). Relevant factors include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* The test is objective: "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or

motivation.” *Id.* at 397. “‘Serious injury’ is not a prerequisite to recovery.” *Bastien v. Goddard*, 279 F.3d 10, 14 (1st Cir. 2002) (quoting *Dean v. City of Worcester*, 924 F.2d 364, 369 (1st Cir. 1991) (collecting cases)).

The Court’s discussion of Ms. Shuper’s claim of wrongful arrest and detention informs its discussion of her claim of excessive force. Once the inference is drawn that probable cause did not support the arrest, the use of handcuffs and the forcible removal of Ms. Super from her home may be considered an unreasonable application of force in light of the totality of the circumstances then known to Officer Austin.<sup>5</sup>

### c. Equal protection

“Under the Equal Protection Clause, similarly situated entities must be accorded similar governmental treatment.” *Barrington Cove, LP v. R.I. Hous. & Mortgage Fin. Corp.*, 246 F.3d 1, 7 (1st Cir.2001) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985)). “In order to establish an equal protection violation, a plaintiff must show state-imposed disparate treatment compared with

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<sup>5</sup> The mere application of handcuffs incident to a lawful arrest does not amount to an application of excessive force as a matter of law. *Calvi v. Knox Cnty.*, 470 F.3d 422, 428 (1st Cir. 2006); *see also Hunt v. Massi*, \_\_\_ F.3d \_\_\_, No. 14-1379, 2014 WL 6960410, at \*7, 2014 U.S. App. LEXIS 23204, at \*17-19 (1st Cir. Dec. 10, 2014) (reversing the denial of qualified immunity where officers executing arrest warrant handcuffed arrestee with his hands behind his back despite arrestee’s request that his hands be in front of him due to a recent abdominal surgery); *Solomon v. Auburn Hills Police Dep’t*, 389 F.3d 167, 175 (6th Cir. 2004) (“It is well established that the handcuffing of a suspect incident to a lawful arrest is constitutional”). Caselaw suggests that an arrest does not constitute an application of excessive force simply because it is illegal for want of probable cause. *See, e.g., Snell v. City of York, Pa.*, 564 F.3d 659,672-73 (3d Cir. 2009) (rejecting claim that any force applied incident to an illegal arrest is excessive).

Officer Austin has not advanced this issue, however, in his motion to dismiss. For purposes of this motion only, the Court assumes that a plausible claim of excessive force may be based on allegations capable of supporting the inference that Officer Austin applied an unreasonable degree of force to Ms. Shuper incident to an arrest not supported by probable cause. *See Muehler v. Mena*, 544 U.S. 93, 99 (2005) (describing the “imposition of correctly applied handcuffs” as “a separate intrusion”); *see also id.* at 103 (“The use of handcuffs is the use of force, and such force must be objectively reasonable under the circumstances”) (Kennedy, J., concurring).

others similarly situated in all relevant respects.” *Bruns v. Mayhew*, 750 F.3d 61, 65 (1st Cir. 2014) (internal quotation marks omitted). In the absence of disparate treatment based on membership in a suspect classification,<sup>6</sup> the plaintiff must allege facts indicating disparate treatment based on malice or personal animosity or the absence of any “rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Ms. Shuper alleges “discrimination” and “humiliation” in her Second Amended Complaint, but she does not allege facts that would support a plausible inference of disparate treatment. Principally, the circumstances alleged by Ms. Shuper defy comparison to any other citizen “similarly situated in all relevant respects.” *Bruns*, 750 F.3d at 65; *Buchanan v. Maine*, 469 F.3d 158, 178 (1st Cir. 2006) (“Plaintiffs claiming an equal protection violation must first identify and relate *specific instances* where persons *situated similarly in all relevant aspects* were treated differently, instances which have the capacity to demonstrate that [plaintiffs] were singled . . . out for unlawful oppression”) (internal punctuation omitted) (emphasis in original). Ms. Shuper fails to state an equal protection claim

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<sup>6</sup> Membership in a suspect classification is not required to state an equal protection claim.

A “class of one” equal protection claim exists “where the plaintiff alleges that [he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” While the United States Supreme Court has recognized the propriety of “class of one” equal protection claims, the viability of such a claim depends upon a showing that the plaintiff was intentionally treated differently than others *similarly situated*.

*Buchanan v. Maine*, 469 F.3d 158, 177-78 (1st Cir. 2006) (quoting *Buchanan v. Maine*, 417 F. Supp. 2d at 37 (alteration in original) (citation and footnote omitted) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000))).

## **2. Americans with Disabilities Act**

Ms. Shuper alleges a violation of Chapter 126 of the ADA (Title II). Title II of the ADA provides that “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. In his reply, Officer Austin argues that Ms. Shuper’s pleadings do not suggest that she is a qualified individual with a disability who was denied accommodation or otherwise discriminated against in connection with his decision to arrest her. *Def.’s Reply* at 2.

Although Officer Austin does not advance the argument, the Court concludes that Ms. Shuper cannot maintain her Title II claim against him because Title II does not generate individual liability for the employees and agents of public entities. *See DeCotiis v. Whittemore*, 842 F. Supp. 2d 354, 363 n.5 (D. Me. 2012), *recons. denied* (Mar. 16, 2012) (citing *Maine Human Rights Comm’n v. Coffee Couple LLC*, No. 1:10-cv-00180-JAW, 2011 WL 2312572, at \*7, 2011 U.S. Dist. LEXIS 61768, at \*17 (D. Me. June 8, 2011) *recommended decision adopted in the absence of objection*, 2011 WL 2580644, 2011 U.S. Dist. LEXIS 70009 (D. Me. June 29, 2011)).

## **3. The Maine Human Rights Act**

Ms. Shuper asserts a claim under the Maine Human Rights Act (MHRA). Specifically, she cites Chapter 337, subchapter 5 of the MHRA, which addresses “public accommodations.” Officer Austin does not discuss Ms. Shuper’s MHRA claim,

though his argument related to the Title II claim can be construed as a challenge to the MHRA claim as well.

Again, although Officer Austin does not advance the argument, the Court concludes that Ms. Shuper may not maintain a MHRA public accommodation claim against him based on *Fuhrmann v. Staples Office Superstore E., Inc.*, 2012 ME 135, 58 A.3d 1083. In *Fuhrmann*, the Maine Supreme Judicial Court held that the language of the MHRA prohibiting employment discrimination by the agents and employees of an “employer” is intended to incorporate the doctrine of respondeat superior, not to authorize actions and remedies against individual defendants. *Id.* ¶ 32, 58 A.3d at 1098. In reaching this conclusion, the Maine Law Court rejected an argument advanced by the dissenting justices that the language of section 4621 of the MHRA provides for the individual liability of agents responsible for discrimination.<sup>7</sup> *Id.* ¶ 38, 58 A.3d at 1099 (Levy, J., dissenting in part).

Like *Fuhrmann*, Ms. Shuper’s claim arises under the “civil action” provision of section 4621. If the *Fuhrmann* Court’s definition of “employer”, which excludes individual liability in favor of respondeat superior, applies to Ms. Shuper’s public accommodation claim, she may not maintain a claim of individual liability against Officer Austin under the MHRA. Even if *Fuhrmann* does not directly apply to a public accommodation claim, *Fuhrmann* remains the closest Maine Supreme Judicial Court decision on an analogous issue and suggests that the Law Court would not

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<sup>7</sup> The Law Court also held that the remedies for unlawful discrimination in 5 M.R.S. § 4613(2)(B) suggest a legislative intention to implement a vicarious liability regime rather than impose individual liability on agents. *Fuhrmann*, 2012 ME 135, ¶ 33, 58 A.3d at 1097-98.

impose individual liability in a public accommodation claim.<sup>8</sup> Based on *Fuhrmann*, the Court concludes that Ms. Shuper may not maintain a MHRA claim against Officer Austin.

## II. SECTION 1915 ANALYSIS: TOWN OF FALMOUTH AND FALMOUTH POLICE DEPARTMENT

### A. The Falmouth Police Department as a Party Defendant

The Court's docket identifies Dan Austin as the lone defendant. Upon review of Ms. Shuper's pleadings, it appears she intends to name the Falmouth Police Department as an additional defendant and, if she must, would seek to name the Town of Falmouth as a defendant. The caption of Ms. Shuper's operative pleading<sup>9</sup> is ambiguous: "Dan Austin, Falmouth Police Department." *Compl.* at 1. The heading states:

**Second Amended Complaint described the act of discrimination-humiliation preformed towards me by the policeman Daniel Austin of Falmouth PD on February 27<sup>th</sup> of 2013, assaults and retaliations performed by Falmouth PD towards me.**

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<sup>8</sup> In the absence of an on-point decision by a state's highest court on a question of state law, a federal court "should endeavor to predict how [the state] court would likely decide the question." *Butler v. Balolia*, 736 F.3d 609, 613 (1st Cir. 2013). "The most reliable guide to the interpretation of state law is the jurisprudence of the state's highest court." *Id.* at 612. Here the most reliable indicator is *Fuhrmann*.

<sup>9</sup> The Court previously outlined the pleading history in this case and has not recounted it here. *See Order Denying Appeals* (ECF No. 37).

*Id.* Thereafter, in the body of the Second Amended Complaint, the factual allegations include not only the circumstances on February 27, 2013 involving Officer Austin, but also other circumstances involving other Falmouth police officers.<sup>10</sup>

Service has not been completed against the Falmouth Police Department or the Town of Falmouth.<sup>11</sup> However, as it seems that Ms. Shuper would implead both, the Court considers whether service on the Town of Falmouth or the Falmouth Police Department is warranted, or whether dismissal of the municipal defendant is appropriate pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

## **B. Legal Standard**

While the federal in forma pauperis statute, 28 U.S.C. § 1915, is designed to ensure meaningful access to the federal courts for persons unable to pay the costs of bringing an action, Congress directed that a district court “shall” dismiss “at any time” cases or claims proceeding in forma pauperis, if the court determines that the action “fails to state a claim upon which relief may be granted.” 28 U.S.C. §

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<sup>10</sup> The Court later concludes that these other allegations do not survive a § 1915 screening; however, the allegations suggest that Ms. Shuper’s contentions are broader than against Officer Austin alone. *See* note 13 below.

On August 12, 2014, the Court ordered Ms. Shuper to provide “the full name and address for the defendant” to permit the U.S. Marshal to attempt service. *Order for Service* (ECF No. 4). In response, Ms. Shuper filed a notice identifying both Daniel Austin and the Falmouth Police Department. *Defs.’ Address and Tel. Number* (ECF No. 6). Nevertheless, the Waiver of Service of Summons form, signed by defense counsel on August 29, 2014, *Waiver of the Serv. of Summons* (ECF No. 23), indicates only Officer Austin waived service.

<sup>11</sup> One of Ms. Super’s claims is under the federal civil rights statute, 42 U.S.C. § 1983. The Town of Falmouth is amenable to suit as a “person” within the meaning of § 1983, although the Town of Falmouth Police Department, technically, is not a person. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). Additionally, Ms. Shuper alleges discrimination under Title II of the ADA. This claim is available against a public entity, defined to include local governments and their departments and agencies, but not individual government agents, 42 U.S.C. § 12131(1)(A), (B). Ms. Shuper’s Title II claim is a claim against the Town of Falmouth Police Department, not against Officer Austin.

1915(e)(2)(B)(ii). “Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints.” *Neitzke v. Williams*, 490 U.S. 319, 324 (1989).

“Ordinarily, before dismissal for failure to state a claim is ordered, some form of notice and an opportunity to cure the deficiencies in the complaint must be afforded.” *Brown v. Rhode Island*, 511 Fed. App'x 4, 5 (1st Cir. 2013) (unpublished). However, “no such safeguards need be provided if it is ‘crystal clear that ... amending the complaint would be futile,’ i.e., if the complaint is ‘patently meritless and beyond all hope of redemption.” *Id.* (quoting *Gonzalez–Gonzalez v. United States*, 257 F.3d 31, 37 (1st Cir. 2001)).

Although the Town of Falmouth and its Police Department are not now defendants, the claims Ms. Shuper would assert against them are subject to § 1915 review in advance of service of process. This review is based on the same factual background recited above in connection with the Court’s consideration of Officer Austin’s motion to dismiss.

## **C. Discussion**

### **1. Section 1983**

To establish § 1983 liability against the Town, Ms. Shuper not only must demonstrate an underlying constitutional violation, but also must show that the violation was caused by a municipal policy, custom, or practice. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978); *see also Maldonado–Denis v. Castillo–Rodriguez*, 23 F.3d 576, 583 (1st Cir. 1994) (“Supervisory liability attaches only if a

plaintiff can demonstrate by material of evidentiary quality an affirmative link between the supervisor's conduct and the underlying section 1983 violation"). Ms. Shuper's Second Amended Complaint lacks factual allegations that would support a plausible inferential finding that the Town of Falmouth or its Police Department has an established custom, policy, or practice of violating her constitutional rights in the provision of law enforcement services, whether by means of wrongful arrest or the application of unnecessary force against her person. In particular, the various "assaults" and "humiliation" Ms. Shuper complains of after the February 27, 2013 arrest do not raise any plausible constitutional violation.

Pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), the Court sua sponte dismisses the § 1983 claims against the Town of Falmouth and the Falmouth Police Department for failure to state a claim for which relief may be granted.

## **2. The ADA**

Ms. Shuper's claim under Title II of the ADA necessarily runs against the Town of Falmouth Police Department because it is the only public entity subject to Title II named as a defendant in Ms. Shuper's pleadings. Ms. Shuper alleges that she is entitled to special services to accommodate her difficulties communicating with law enforcement, and that Officer Austin failed to accommodate her on February 27, 2013 because he arrested her and because he did not contact an interpreter or crisis worker.

The elements of a claim under Title II call for a showing (1) that the plaintiff is a qualified individual with a disability; (2) that the plaintiff 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. *Buchanan*, 469 F.3d at 170–71. To recover compensatory damages under Title II, a plaintiff must demonstrate that the defendant intentionally discriminated against her or that the discrimination caused her economic harm. *Forestier Fradera v. Mun. of Mayaguez*, 440 F.3d 17, 22 n.6 (1st Cir. 2006).

“The protection afforded by the ADA is characterized as a guarantee of ‘meaningful access’ to governmental benefits and programs, which broadly means that public entities must take reasonable steps to ensure that individuals with disabilities can take advantage of such public undertakings.” *Theriacault v. Flynn*, 162 F.3d 46, 48 (1st Cir.1998) (citations omitted). Title II “requires only ‘reasonable modifications’ that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.” *Tennessee v. Lane*, 541 U.S. 509, 532 (2004) (quoting 42 U.S.C. § 12131(2)).

Plaintiff's allegations do not reasonably suggest that she was “otherwise eligible” for 911 services on February 27, 2013. Ms. Shuper has not alleged a bona fide emergency that would have justified her call to the Town's emergency number and, therefore, she would not have been entitled to be accommodated to receive a municipal service to which she was not entitled. Because her allegations do not support a reasonable inference that she was otherwise eligible for emergency services

on February 27, 2013, Title II did not require that the Town provide her with an accommodation to facilitate her request for emergency services on that date.

Even if she was not entitled to ADA protection for the nonemergency call to the Town's emergency line, Officer Austin did arrest Plaintiff and the Court turns to whether Officer Austin's arrest of Ms. Shuper has ADA implications. In the absence of a need for emergency services on February 27, 2013, the probable cause determination made by Officer Austin turned on whether he had a reasonable basis to believe that Ms. Shuper previously misused the 911 system and had been instructed not to do so. *See* 25 M.R.S. § 2913(1)(A) (requiring "repeated" misuse and after being "forbidden to do so").

There are two possibilities: (1) that Ms. Shuper had previously misused the 911 system and had been properly instructed not to do so; and (2) that she had not. If she had a history of misuse and if Officer Austin was aware of the prior calls, his probable cause determination would not be subject to Title II of the ADA because Ms. Shuper would not be entitled to an accommodation to negate a probable cause finding that would otherwise exist. In other words, if she had repeatedly called the 911 number in nonemergency situations, she may not use the failure of the Town to accommodate her prior calls to bootstrap a Title II claim.

The other possibility is that Ms. Shuper had never before misused the 911 system and had never been warned not to do so. As the context of this part of the Order is a § 1915 screening, the Court must generally restrict itself to the facts

alleged in the pleadings.<sup>12</sup> Here, Ms. Shuper claims she never previously misused the 911 line. This allegation leads to the conclusion that Officer Austin did not have probable cause to arrest her. For Title II purposes, the inquiry is whether the arrest amounted to the denial of a reasonable accommodation or whether she was “otherwise discriminated against.” *Buchanan*, 469 F.3d at 170–71. The Court could find no First Circuit authority on this narrow point; however, the Ninth Circuit recently addressed a similar issue:

Courts have recognized at least two types of Title II claims applicable to arrests: (1) wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity; and (2) reasonable accommodation, where, although police properly investigate and arrest a person with a disability for a crime unrelated to that disability, they fail to reasonably accommodate the person’s disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees.

*Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014) (citing *Waller ex rel. Estate of Hunt v. City of Danville*, 556 F.3d 171, 174 (4th Cir. 2009); *Gohier v. Enright*, 186 F.3d 1216, 1220–21 (10th Cir. 1999)).

Ms. Shuper’s alleged disability is both mental and physical. Her call to 911 for emergency assistance to deal with a letter from the IRS is on its face a misuse of the 911 emergency system by any reasonable person. But Ms. Shuper was suffering, according to her pleadings, from a panic attack directly related to her mental health

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<sup>12</sup> Unlike *Widi v. United States Department of Justice*, No. 1:11-cv-00113-JAW, 2013 WL 1834673, 2013 U.S. Dist. LEXIS 62269 (D. Me. May 1, 2013), this is not a situation where there is videotape evidence that confirms so wide a disparity between the allegations in the complaint and the contents of a videotape that the Court concluded that the complaint did not survive § 1915 screening.

problems. It may be understandable that Officer Austin, not knowing the nature of her mental health issues, would take her explanation for the 911 call as so bizarre that he concluded her conduct was willful. But fairly reviewing the allegations in the pleadings, there is enough to conclude that Officer Austin may have “wrongly arrest[ed Ms. Shuper, a person] with a disability because [he misperceived] the effects of that disability as criminal activity.” *Sheehan*, 743 F.3d at 1323.<sup>13</sup>

This is sufficient to survive a § 1915(e)(2)(B) screening for a Title II claim against the Town of Falmouth Police Department.<sup>14</sup>

### **3. The MHRA**

Like Title II, the MHRA is designed to ensure equal access to public accommodations. 5 M.R.S. §§ 4552, 4591, 4592. Ordinarily, “the MHRA should be construed and applied along the same contours as the ADA.” *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 312 (1st Cir. 2003). As discussed in relation to Ms. Shuper’s Title II claim, the Court limits Ms. Shuper’s MHRA claim to a claim against the Falmouth Police Department based on Officer Austin’s decision to arrest and detain her on February 27, 2013.

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<sup>13</sup> Ms. Shuper’s factual allegations do not support an inference that she “suffer[ed] greater injury or indignity ... than other arrestees” as a consequence of her arrest. *Sheehan*, 743 F.3d at 1232. Therefore, the Court dismisses any such claim.

Additionally, Ms. Shuper’s remaining allegations concerning “assaults” and “humiliation” on other occasions do not describe Title II violations. Rather than supporting an inference that the Town of Falmouth Police Department deprived Ms. Shuper of the benefit of meaningfully accessing police services on these other occasions, her allegations about other incidents reflect that the demands she placed on the public safety services provided by the Falmouth Police Department are well out of proportion to the kind of “meaningful access” sought by the typical member of the community, disabled or not, and fail to depict treatment that reasonably could be described as discriminatory.

<sup>14</sup> For purposes of its review under 28 U.S.C. § 1915, the Court does not agree with Officer Austin’s contention that Ms. Shuper’s pleadings fail to suggest the existence of a qualifying disability.

### III. CONCLUSION

The Court GRANTS IN PART and DENIES IN PART Defendant Dan Austin's Motion to Dismiss (ECF No. 38). The Court DISMISSES Plaintiff Alla Iosifovna Shuper's equal protection claim, ADA claim, and MHRA claim against Defendant Dan Austin. In addition, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), the Court DISMISSES Plaintiff Alla Iosifovna Shuper's § 1983 claims against the Town of Falmouth/Falmouth Police Department. Plaintiff Alla Iosifovna Shuper's ADA and MHRA claims will advance against the Falmouth Police Department but are restricted to Officer Dan Austin's decision to arrest and detain Plaintiff on February 27, 2013. Absent waiver of service, the Clerk will arrange for service of Plaintiff's Second Amended Complaint upon the Town of Falmouth Police Department.

SO ORDERED.

*/s/ John A. Woodcock, Jr.*  
JOHN A. WOODCOCK, JR.  
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 15th day of December, 2014

**Plaintiff**

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V.

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**DEPARTMENT**