

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMISON JOSEPH MICELI,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 98-267-P-C</i>
)	
JACOB APUZZO, et al.,)	
)	
<i>Defendants</i>)	

***RECOMMENDED DECISION ON REMAINING DEFENDANTS’ MOTIONS
TO DISMISS OR FOR SUMMARY JUDGMENT***

The remaining defendants in this action, the City of Portland, Thomas Joyce, James E. Ross and C. Wesley Phinney, Jr.,¹ move for summary judgment on all remaining claims asserted against them. The plaintiff has not responded to the motions. I recommended that the court grant the defendants’ motions for summary judgment.

I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

¹ Counsel for defendant Phinney has also requested that the court dismiss the claims against him with prejudice. Docket No. 73. This request is not in the form of a motion and will not be considered further.

of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

Under this court’s Local Rule 7, a party who fails to file a timely objection to a motion is deemed to have waived objection. This court will not automatically grant a motion for summary judgment to which no objection has been filed, however, but rather will consider the merits of the motion on the basis of the materials filed by the moving party. *Redman v. FDIC*, 794 F. Supp. 20, 22 (D. Me. 1992). Under this court’s Local Rule 56 all material facts set forth in the moving party’s statement of material facts are deemed admitted unless properly controverted by a statement of

material facts filed by the nonmoving party. “When the party opposing summary judgment fails to file a statement of material facts, the party has waived objection to the moving party’s statement of material facts to the extent that the movant’s statement is supported by appropriate record citations.” *Cutler v. FDIC*, 796 F. Supp. 598, 600 (D. Me. 1992).

II. Factual and Procedural Background

The complaint filed in this action names fifteen defendants and consists of 247 numbered paragraphs setting forth 26 separate counts. Eleven of the defendants have been dismissed or have obtained summary judgment on all counts asserted against them. In addition, the court has dismissed “all allegations pertaining to electromagnetism and radiation.” Memorandum and Order (Docket No. 53) at 17. Still pending before the court are six counts asserted against each of the four remaining defendants: Count III, raising claims under 42 U.S.C. § 1983; Count IV, alleging negligence; Count VII, alleging violation of the Maine Tort Claims Act; Counts VIII and IX, asserting that the defendants have violated the “Federal Civil Rights Act;” and Count X, alleging violation of 5 M.R.S.A. § 4681. Some of these counts as set forth in the complaint include allegations pertaining to electromagnetism and radiation which are no longer before the court; only the allegations independent of such claims that are also presented in these counts are under consideration at this time.

On or about October 28, 1996 defendant Joyce and other members of the Portland Police Department were advised of an outstanding warrant for the arrest of the plaintiff, who was believed to be in the Portland area. Affidavit of Det. Sgt. Thomas Joyce (“Joyce Aff.”) (Docket No. 69) ¶ 2 & Exhibit A. The warrant had been issued by a justice of the peace in York County pursuant to a

complaint filed in the Maine District Court for the Division of Eastern York by a Biddeford police officer. *Id.* ¶ 3 & Exh. B. On October 29, 1996 Joyce received at the Portland Police Department a facsimile transmission related to the warrant which he concluded had been sent by the plaintiff. *Id.* ¶ 4 & Exh. C. Joyce and defendant Ross went to the business where the transmission had originated and showed a picture of the plaintiff to the employees who identified the picture as that of a man who had been in the store that afternoon. *Id.* ¶ 4. Joyce then confirmed by telephone that the warrant was still outstanding. *Id.*

Shortly thereafter, Joyce and Ross saw the plaintiff outside the Portland Public Library. *Id.* ¶ 6. They arrested the plaintiff on the outstanding warrant and so informed him. *Id.* Confirmation of the warrant was received by teletype at the Cumberland County Jail after the arrest. *Id.* ¶ 8.

The policies and procedures of the Portland Police Department allow arrests only pursuant to applicable state law. *Id.* ¶ 9 & Exh. D; Affidavit of Chief Michael J. Chitwood (“Chitwood Aff.”) (Docket No. 67) ¶¶4, 8 & Exh. A. Joyce and Ross received training concerning the execution of arrest warrants both initially and annually. Chitwood Aff. ¶ 4. The Portland Police Department has not received any formal complaints arising out of the execution of an arrest warrant by Joyce or Ross. *Id.* ¶ 7. The Portland Police Department has no knowledge of any improper dealings with citizens in the community by Joyce or Ross as set forth in the complaint in this action. *Id.*

On or about February 27, 1997 the Biddeford District Court issued a warrant for the arrest of the plaintiff for violating conditions of bail. Affidavit of Dennis Daniels (Docket No. 72) ¶ 4. The plaintiff was brought to the York County Jail on March 18, 1997. *Id.* ¶ 5. On March 21, 1997 the plaintiff was arraigned on the charge of violating conditions of his bail, and bail was denied. *Id.* ¶¶ 6-7. The plaintiff continued to be held at the York County Jail until June 19, 1997. *Id.* ¶ 8. There

are no reports of incidents or complaints related to the plaintiff's incarceration in the records of the York County Jail. *Id.* ¶ 10. The plaintiff was not mistreated during his detention at the York County Jail. *Id.* ¶ 12. Defendant Phinney was the sheriff for York County at the time of the plaintiff's detention. Complaint ¶ 13; Answer of Defendant C. Wesley Phinney, Jr. (Docket No. 28) ¶ 19.

III. Analysis

A. The Portland Defendants

The City of Portland and defendants Joyce and Ross (“the Portland defendants”) contend that they are immune from liability on the plaintiff's claims under the Maine Tort Claims Act (Counts IV and VII), federal civil rights law (Counts III, VIII and IX), and the Maine Civil Rights Act (Count X).

1. The Maine Tort Claims Act. The complaint alleges in Counts IV and VII that defendants Joyce and Ross violated state common law. The Maine Tort Claims Act provides:

1. Immunity. Notwithstanding any liability that may have existed at common law, employees of governmental entities shall be absolutely immune from personal civil liability for the following:

* * *

C. Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid;

D. Performing or failing to perform a prosecutorial function involving civil, criminal or administrative enforcement.

14 M.R.S.A. § 8111. The Act “provides governmental employees with immunity for performing either discretionary functions or intentional acts or omissions within the scope of employment, unless such actions were in bad faith.” *Webb v. Haas*, 665 A.2d 1005, 1009 (Me. 1995).

In cases that involve the assertion of a claim against a government official, the plaintiff's complaint must state with particularity and factual detail the basis for the claim, which necessarily includes the reason or reasons why the defendant cannot successfully maintain the defense of immunity. *Id.* at 1010 n.6. The allegations in the complaint concerning defendants Joyce and Ross concern only the discretionary function of arresting the plaintiff in execution of a facially valid warrant. To the extent that the complaint alleges that these defendants engaged in intentional conduct not within the scope of their discretion, Complaint ¶¶ 97-98, there are no facts in the summary judgment record that could be construed to create a genuine issue of material fact on this claim. *See Polley v. Atwell*, 581 A.2d 410, 413-14 (Me. 1990). Under section 8111, and on this summary judgment record, Joyce and Ross are entitled to summary judgment on all claims arising under state common law.

The complaint alleges in Count IV that the City of Portland's liability arises from failure to train Joyce and Ross or to correct their unlawful use of authority. Complaint ¶¶ 67. The only evidence in the summary judgment record is to the contrary. The complaint alleges no basis for liability against the city in Count VII. The city is accordingly entitled to summary judgment on these counts as well.²

² The City of Portland might also be immune under the Act from liability for the plaintiff's state-law claims. The Act provides, in relevant part:

Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages. When immunity is removed by this chapter, any claim for damages shall be brought in accordance with the terms of this chapter.

14 M.R.S.A. § 8103(1). In addition, municipalities are immune from liability for claims arising from the performance of an employee's discretionary functions. 14 M.R.S.A. § 8104-B(3). However,
(continued...)

2. *The federal civil rights claims.* Counts III, VIII and IX of the complaint all allege that the defendants deprived the plaintiff of certain constitutional rights. The Supreme Court has held that “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A police officer is carrying out a discretionary function where “the officer is required to use his or her judgment while acting in furtherance of a departmental policy, law, or legislatively imposed duty.” *McPherson v. Auger*, 842 F. Supp. 25, 29 (D. Me. 1994). Here, there can be no question that Joyce and Ross were using their judgment when they decided to execute a facially valid arrest warrant. This is clearly a discretionary function in furtherance of a legislatively imposed duty. As long as the officers were not “plainly incompetent” or their actions “clearly proscribed” they are protected by qualified immunity from the charges raised in counts III, VIII and IX based on their arrest of the plaintiff. *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). The facts in the summary judgment record cannot be construed to support a finding that the arrest in this case was clearly proscribed or that Joyce and Ross were incompetent in executing a facially valid arrest warrant. Defendants Joyce and Ross are entitled to summary judgment on counts III, VIII and IX.

Count IX is not asserted against the City of Portland. The city is also entitled to summary judgment on counts III and VIII. Count VIII alleges liability against the city only by virtue of its authorization or ratification of the alleged acts of Joyce and Ross. Complaint ¶ 103. A municipality

²(...continued)

there is an exception to this immunity when the municipality obtains insurance covering claims for which it would otherwise be immune. 14 M.R.S.A. § 8116. The city has not submitted any evidence on this point.

cannot be held liable on a claim under 42 U.S.C. § 1983 on a theory of *respondeat superior*. *Monell v. Department of Civil Servs. of the City of New York*, 436 U.S. 658, 691 (1978). Only when “execution of a government’s policy or custom, whether made by its lawmakers or by those edicts or acts that may fairly be said to represent official policy, inflicts the injury [is] the government as an entity . . . responsible under section 1983.” *Id.* at 694. In order to recover against a municipality for a violation of his constitutional rights, a plaintiff must prove (i) the existence of a municipal custom or policy that (ii) was the cause of and the moving force behind the deprivation of the constitutional right. *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1231-33 (D. Me. 1996).

In Count III, the complaint alleges that the city’s liability arises out of its failure to prevent the officers from depriving him of his constitutional rights, although it had knowledge of past instances of such misconduct by them; its failure to train and supervise the officers properly; its failure to exercise due care in hiring and discipline of police officers; and its failure to inform the district attorney of unspecified criminal acts. Complaint ¶¶ 56-58. In order to establish liability under section 1983 for an alleged failure to train and supervise, the plaintiff must prove that the alleged failure amounted to deliberate indifference to his constitutional rights and that the failure is affirmatively linked to that violation. *Comfort*, 924 F. Supp. at 1231-32. The only facts in the record on this issue show that Portland police officers receive initial training at the Maine Criminal Justice Academy and receive additional training throughout their careers. There are no facts in the summary judgment record to support the allegation that Joyce and Ross were inadequately trained or supervised. There is no evidence in the summary judgment record of past misconduct by either officer or of any need for discipline of officers in connection with the execution of arrest warrants. There is also no evidence to indicate that the city had a duty to report any criminal acts, or the acts

of Joyce and Ross that are at issue and, on this record, were clearly not criminal, to the district attorney. Finally, the plaintiff has offered no evidence that the city had a policy or custom that amounted to deliberate indifference to his constitutional rights. For all of these reasons, the city is entitled to summary judgment on Counts III and VIII.

3. *Maine Civil Rights Act.* Count X of the complaint raises factual allegations identical to those asserted in connection with the claims of violation of the plaintiff's federal constitutional rights in counts III, VIII and IX but seeks recovery under the Maine Civil Rights Act, 5 M.R.S.A. § 4681 *et seq.* The Portland defendants contend that they are entitled to immunity on this claim as well.

For the individual defendants, the qualified immunity analysis of the plaintiff's federal constitutional claims set forth above applies to claims under the Maine Civil Rights Act as well. *Comfort*, 924 F. Supp. at 1236. Accordingly, they are entitled to summary judgment on this count.

For the city, there is a similar lack of evidence in the summary judgment record to support this claim as that discussed above in connection with the federal civil rights claims asserted against the city. For the same reasons, therefore, the city is also entitled to summary judgment on this count.

B. Defendant Phinney

Claims against defendant Phinney are raised in Counts III, VII, VIII, IX³ and X. Although there is no indication in the court file that Phinney has ever been served and the time allowed for service by Fed. R. Civ. P. 4(m) has long since expired, the remaining claims asserted against him are based upon the same principles of law as those discussed above, and the same result obtains. Under these circumstances, the best use of the court's resources would be entry of summary

³ None of the allegations in Count IX mentions Phinney, but the demand for relief on that count is made against him as well as other defendants.

judgment in his favor on his motion as well.

The only allegation against Phinney in Count III that differs from those discussed above is that Phinney failed to comply with M. R. Crim. P. 5A(a) when he did not release the plaintiff from the York County Jail within 48 hours after his arrest. Complaint ¶ 41. In the absence of any factual support of evidentiary quality in the record to support this allegation, Phinney is entitled to summary judgment on this claim as well. None of the other remaining counts include allegations against Phinney that differ from those asserted against the other defendants.⁴ For the reasons set forth above, therefore, Phinney is also entitled to summary judgment on the remaining counts asserted against him.

IV. Conclusion

For the foregoing reasons, I recommended that the defendants' motions for summary judgment **GRANTED**.

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 after 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

⁴ Phinney contends that he is entitled to dismissal of the claims against him in Count VII under the Maine Tort Claims Act because he was not served with the written notice required by 14 M.R.S.A. § 8107. Defendant's [sic] C. Wesley Phinney's Motion for Summary Judgment and Incorporated Memorandum of Law (Docket No. 70) at 4-5. However, he has not provided the court with any evidence to support this factual assertion.

by the district court and to appeal the district court's order.

Dated this 17th day of September, 1999.

David M. Cohen
United States Magistrate Judge