

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRENT CUMMINGS,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 01-32-P-H</i>
)	
OFFICER CHUCK LIBBY, et al.,)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON DEFENDANTS’ MOTION FOR SUMMARY
JUDGMENT**

The defendants,¹ two Portland police officers, move for summary judgment in this action alleging the use of excessive force while making an arrest. I recommend that the court grant the motion in part and deny it in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter 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 over it 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 (1stCir. 1995) (citations omitted). The party moving for summary judgment must

¹ Seven additional defendants named in the original complaint have been dismissed from this action. Docket Nos. 6 & 7.

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).

II. Factual Background

The following undisputed material facts are appropriately supported in the parties' statements of material facts submitted pursuant to this court's Local Rule 56.²

A fight involving approximately ten to fifteen men on Dana Street at approximately 1:50 a.m. on July 30, 2000 resulted in the dispatch of defendant Libby to the scene to assist another officer. Defendants' Statement of Material Facts ("Defendants' SMF") (Docket No. 19) ¶¶ 2-3; Plaintiff's Responsive SMF ¶¶ 2-3. This time of night was very busy from a police perspective. *Id.* ¶ 1. The officers spent ten to fifteen minutes getting the scene quieted down and made one arrest. *Id.* ¶¶ 6-7.

² The plaintiff's response to the defendants' statement of material facts frequently presents the following as the sole response to a numbered paragraph in the defendant's statement: "Plaintiff has no evidence upon which to contradict this statement at this time; nonetheless, Plaintiff reserves the right to call witnesses at trial to rebut this statement." Plaintiff's Responsive Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 25) ¶¶ 22-25, 27, 29, 32, 38-39, 42-43, 56. The defendants' response to the plaintiff's statement of material facts frequently responds to a numbered paragraph with the word "Deny" without any citation to the record, as required by Local Rule 56(c). Defendants' Reply to Statement of Disputed Material Facts ("Defendants' Responsive SMF") (Docket No. 28) ¶¶ 7-15, 19-20, 22-26, 28-32. In each case, these responses are insufficient under the local rule and the assertions to which they respond, to the extent that those assertions are properly supported by citations to the summary judgment (continued on next page)

One of the two groups involved moved toward the area of Wharf Street and the other moved toward Commercial Street. *Id.* ¶ 8. At approximately 2:15 a.m. Libby called on his police radio about a fight in the parking lot on the south side of Brian Boru. *Id.* ¶ 11

During this time the plaintiff was walking with five other people toward Brian Boru from the Better End on Fore Street. Plaintiff's Statement of Disputed Material Facts ("Plaintiff's SMF") (Docket No. 26) ¶ 1; Defendants' Responsive SMF ¶ 1. He noticed a number of people in the parking lot adjacent to that of Brian Boru. *Id.* ¶¶ 2-3. Libby picked out of the parking lot crowd one of the males who seemed to be a spokesperson or ringleader, took him by the arm, said, "Come with me," and told him he was under arrest. Defendants' SMF ¶¶ 23-24; Plaintiff's Responsive SMF ¶ 23-24. The man pulled his arm out of Libby's grip and tried to flee; Libby brought him to the ground. *Id.* ¶ 25. A second officer arrived at the scene within a minute or two of a call for assistance; when he arrived there was a group of approximately 30 people in the parking lot. *Id.* ¶¶ 26-27. The group had circled Libby as he was on the ground attempting to restrain someone. *Id.* ¶ 28. Members of the group were taunting Libby and "trying to get at him." *Id.* ¶ 29. Libby used his OC canister to spray an individual who came closest to him as the crowd advanced. *Id.* ¶¶ 30, 32. Several other officers arrived and Libby directed one of them to arrest the man he had sprayed. *Id.* ¶¶ 33, 36-37. The officers gave several warnings for the group to disperse. *Id.* ¶ 38. Many members of the group refused and the officers started to make arrests. *Id.* ¶ 39.

While this was going on, the plaintiff moved to get a better vantage point. *Id.* ¶ 44. The plaintiff was intent on being a witness to what was taking place, because he felt it was wrong and was very disturbed by it. Plaintiff's SMF ¶ 14; Defendants' Responsive SMF ¶ 14. He turned to the police cruisers that had pulled up and read off their license plate numbers to his roommate who was

record, will be deemed admitted.

about five to ten feet away. *Id.* ¶ 15. The plaintiff heard a voice saying, “Move along; you’ve got to leave.” *Id.* ¶ 17. His roommate gestured in a manner that suggested they leave. *Id.* ¶ 18. The officers struck the plaintiff in the back of the head and the upper back and threw him to the ground. *Id.* ¶ 20. Before the plaintiff fell, defendant Keddy had been attempting to get another person to break his grip on the plaintiff’s arm by pressing down on that person’s hand. Defendants’ SMF ¶ 57; Plaintiff’s Responsive SMF ¶ 57. The plaintiff’s chest and face made contact with the ground, as a result of which he was injured. *Id.* ¶ 58; Plaintiff’s SMF ¶ 21; Defendants’ Responsive SMF ¶ 21.

The plaintiff was arrested. Defendants’ SMF ¶ 52; Plaintiff’s Responsive SMF ¶ 52.

III. Discussion

The defendants contend that they violated none of the plaintiff’s constitutional rights and that they are entitled to qualified immunity from the federal claim set forth in Count I of the amended complaint. Defendants’ Motion for Summary Judgment (“Motion”) (Docket No. 18) at 3-6. They argue that they are entitled to discretionary act immunity from the state-law assault claim that is the only other count in the amended complaint. *Id.* at 7-8. They also seek, in the alternative, summary judgment on the plaintiff’s demands for punitive damages. *Id.* at 6-7, 8-9.

A. The Federal Claim

Count I of the amended complaint alleges, pursuant to 42 U.S.C. § 1983, that the defendants deprived the plaintiff of his constitutional rights to bodily integrity and due process of law and to be free of the use of unreasonable force. Amended Complaint (Docket No. 11) ¶¶ 39-40. The plaintiff’s memorandum of law refines the claim, stating that “[t]his is an excessive force claim.” Memorandum in Opposition to Defendants’ Motion for Summary Judgment (“Plaintiff’s Opposition”) (Docket No. 23) at 1. The defendants assert a defense of qualified immunity. Motion at 3-6.

In such cases,

the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.

Saucier v. Katz, 121 S.Ct. 2151, 2155-56 (2001). The first question to be addressed by the court is the following: “Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?” *Id.* at 2156.

[I]f a violation could be made out on a favorable view of the parties’ submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition.

Id. “*Graham v. Connor*, [490 U.S. 386 (1989),] clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness.” *Id.* “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.*

The reasonableness of the officer’s belief is to be judged from the on-scene perspective because “police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.” *Graham*, 490 U.S. at 397. The 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.* at 395. Officers are entitled to immunity for reasonable mistakes. *Saucier*, 121 S.Ct. at 2159.

Here, the defendants argue that “there is simply no evidence generated that [Keddy] did anything to violate Plaintiff’s constitutional rights.” Motion at 5. With respect to Libby, they contend that the “volatile situation” in which the plaintiff exhibited “inexplicable and unexpected belligerence”

led to a “split second decision to arrest the plaintiff, after which it was necessary to handcuff him and get him into the arrest wagon quickly. *Id.* at 5-6. Under these circumstances, they assert, “it would not be clear to a reasonable officer that the use of this level of force would violate Plaintiff’s constitutional rights.” *Id.* at 6.

The defendants’ assertion concerning Keddy is incorrect. The plaintiff has provided his testimony, albeit disputed by the defendants, that after hearing someone say “You’ve got to leave,” he started to leave the scene, putting his hands up to show that he was not trying to get in the way or be aggressive, when he was struck by police officers in the back of the head and the upper back and thrown to the ground; that he did not resist arrest in any way; that he did not address the officers in any way; and that he was not warned by the officers before he was attacked. Plaintiff’s SMF ¶¶ 17-20, 22-26. He denies that an accidental loss of balance on the part of an officer caused his fall. *Id.* ¶ 28. The defendants’ statement of material facts does not suggest that any officer other than Keddy and Libby were involved in any way in the plaintiff’s arrest. Defendants’ SMF ¶¶ 45-63. At the summary judgment stage, the plaintiff is entitled to an inference that Keddy was one of the officers to which his testimony refers; such an inference is reasonable under the circumstances. The plaintiff’s testimony alleges the use of force by Keddy that was excessive under objective standards of reasonableness. Keddy is not entitled to summary judgment because he has not shown that he may invoke qualified immunity on the basis of the sole argument he makes.

The outcome might be different with respect to Libby were the evidence upon which he relies undisputed, but it is not. While the defendants present the plaintiff’s actions as having the potential to “further incite the crowd” in a “volatile situation” and to interfere with “their attempts to control a large and hostile group engaged in a brawl,” Motion at 6, the plaintiff has denied that he said anything at the time other than calling out the license plate numbers of the police cruisers to his roommate and

saying to his roommate that they were witnessing police brutality, Plaintiff's SMF ¶¶ 14-15; Plaintiff's Responsive SMF ¶¶ 46, 49-51. He also offers his own testimony that Libby himself initiated whatever fighting was taking place at the scene; that he was walking away from the scene with his hands up when he was struck from behind and thrown to the ground; that the officers "chose to assault [him] without provocation, and from behind;" and that he never resisted arrest but nonetheless was "summarily beaten and thrown to the ground," causing injuries to his face, head, wrist and knee. Plaintiff's SMF ¶¶ 7-11, 19-26, 28-32.

The plaintiff was arrested on charges of disorderly conduct, 17-A M.R.S.A. § 501(1)(A), and failure to disperse, 17-A M.R.S.A. § 502. Amended Complaint ¶ 31. These are not severe crimes. Disorderly conduct is a Class E crime, 17-A M.R.S.A. § 501(6), the lowest designation in the Maine criminal code, and failure to disperse is a Class D crime "if the person is a participant in the course of disorderly conduct," 17-A M.R.S.A. § 502(3). The evidence submitted by the defendants that might allow an inference to be drawn to the effect that the plaintiff posed an immediate threat to the safety of the officers or others is that the plaintiff's "being loud and screaming and refusing to leave elevated the potential for violence in the area, making it more explosive" and that the plaintiff had "tried to resist arrest by pulling away from Libby." Defendants' SMF ¶¶ 61-62. The factual elements of these assertions are sufficiently challenged by the plaintiff's testimony to make it impossible to conclude as a matter of law that an immediate threat to the safety of Libby or others existed. Finally, the amount of resistance to the arrest set forth in the defendants' statement of material facts — "pulling away" from the officer's grip on his arm — is not great. Application of the *Graham* factors thus does not support the defendants' position.

Libby is not entitled to summary judgment on Count I on the basis of qualified immunity.

B. State-Law Claim

Count IV of the amended complaint³ alleges that the defendants assaulted the plaintiff. Amended Complaint ¶¶ 41-44. The defendants contend that they are entitled to discretionary function immunity pursuant to 14 M.R.S.A. § 8111(1)(C). Motion at 7-8. That statute provides, in relevant part:

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; [or]

* * *

E. Any intentional act or omission within the course and scope of employment, provided that such immunity shall not exist in any case in which an employee's acts are found to have been in bad faith.

14 M.R.S.A. § 8111(1)(C) & (E).

The effectuation of an arrest qualifies as a “discretionary function” for purposes of the statute. *Leach v. Betters*, 599 A.2d 424, 426 (Me. 1991). The Maine Law Court nonetheless has assumed (without deciding) that the execution of such an arrest in a wanton or oppressive manner would vitiate the protections of section 8111(1). *Id.* This court accordingly has declined, in a summary judgment context, to grant absolute immunity as to state-law causes of action related to a plaintiff's triable claim of arrest with excessive force. *McLain v. Milligan*, 847 F. Supp. 970, 977-78 (D. Me. 1994). Inasmuch as there are genuine issues of material fact regarding whether the defendants used excessive force against the plaintiff, summary judgment on the ground of discretionary function immunity is not appropriate on Count IV.

³ So denominated despite the fact it is the only other count in the amended complaint.

C. Punitive Damages

The defendants also seek summary judgment on the plaintiff's claim for punitive damages on both counts. Motion at 6-7, 8-9. With respect to Count I,

a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

Smith v. Wade, 461 U.S. 30, 56 (1983). Punitive damages are reserved for “instances where the defendant's conduct is of the sort that calls for deterrence and punishment over and above that provided by compensatory damages.” *Davet v. Maccarone*, 973 F.2d 22, 27 (1st Cir. 1992) (internal punctuation and citation omitted). Here, the plaintiff has submitted no evidence that would support a reasonable inference of evil motive or intent on the part of the defendants. However, the evidence in the summary judgment record would allow a jury reasonably to conclude that either or both of the defendants exhibited reckless or callous indifference to the plaintiff's Fourth Amendment rights. Accordingly, the defendants are not entitled to summary judgment on the demand for punitive damages in connection with the federal claim.

The state-law claim is a different matter. Under Maine law

[a]n award of punitive damages is justified where the plaintiff proves by clear and convincing evidence that the defendant acted with malice. *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985). Express or actual malice exists when the tortious conduct is motivated by ill will toward the plaintiff, but punitive damages are also available “where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied.” *Id.* at 1361.

Boivin v. Jones & Vining, Inc., 578 A.2d 187, 189 (Me. 1990). Malice may not be established by reckless indifference to the rights of others. *DiPietro v. Boynton*, 628 A.2d 1019, 1024 (Me. 1993). Here, the plaintiff has offered no evidence of actual ill will toward him on the part of either defendant.

The Maine Law Court has applied the alternate standard of proof — conduct so outrageous that malice may be implied — in a very restricted manner. For example, in *Gayer v. Bath Iron Works Corp.*, 687 A.2d 617 (Me. 1996), the defendant had offered positions on October 20 and 21 to twenty-six individuals in an apprenticeship program beginning on November 7 only to advise the apprentices on November 3 or 4 that the program had been terminated; the Law Court found “nothing in the record” to support a claim for punitive damages. *Id.* at 619-20, 622. In *DiPietro*, the Law Court overturned an award of punitive damages based on the defendant’s sale of the plaintiffs’ property without notice to them. 628 A.2d at 1024. In *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985), the Law Court vacated an award of punitive damages where the defendant seriously injured the plaintiff when he drove through a red light at high speed and struck the plaintiff’s vehicle with sufficient force to shear her car in half. *Id.* at 1354, 1362.

In the instant case, the defendants’ alleged conduct — striking the plaintiff in the back and the back of the head, causing him to fall and injure himself — is not to be condoned and may well be considered to have been undertaken with reckless indifference to the plaintiff’s constitutional rights in the context of an arrest. However, it cannot meet the standard under Maine law to allow a finding of implied malice. Accordingly, the defendants are entitled to summary judgment on the plaintiff’s demand for punitive damages on his state-law claim.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants’ motion for summary judgment be **GRANTED** as to the demand for punitive damages in Count IV of the amended complaint and otherwise **DENIED**.

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

