

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMISON JOSEPH MICELI,
Plaintiff

v.

Civil No. 98-267-P-C

JACOB APUZZO, Esquire, *et al.*,
Defendants

Gene Carter, District Judge,

MEMORANDUM AND ORDER

Plaintiff Jamison Joseph Miceli filed a sixty-six-page, two-hundred-and-forty-seven-paragraph Complaint (Docket No. 1) alleging that he is the target of a conspiracy masterminded by fifteen defendants. The Defendants to the Complaint are Jacob Apuzzo, Esquire; WHDH Television, Inc.; Edmund N. Ansin, president of WHDH Television; Rodger G. Metcalf and Edmund Miely, employees of WHDH Television; Richard Gagne and Elizabeth Coleman, Biddeford police detectives; the Town of Biddeford; Theodore Ross and Thomas Joyce, Portland police detectives; the City of Portland; Wesley Phinney, Jr., Sheriff of York County, County Jail; Joseph Wannemacher, District Attorney; and Ulrich B. Jacobson, M.D., and Salman Kazim, M.D., forensic psychiatrists.

On August 12, 1998, Defendant Joseph Wannemacher, District Attorney, filed a motion to dismiss pursuant to the doctrine of absolute immunity (Docket No. 5). The Court granted this motion on September 9, 1998. On November 16, 1998, Plaintiff filed a motion to dismiss, without prejudice, claims against WHDH Television, Edmund Ansin, president of WHDH Television, Inc.; Rodger G. Metcalf; and Edmund Miely, employed by WHDH Television, Inc. (Docket No. 29). The Court granted this motion on January 27, 1999. On September 14, 1998, Defendant Ulrich B. Jacobson filed a motion for a more definite statement and to require Plaintiff

to file an amended complaint (Docket No. 19). The Court granted this motion on December 22, 1998, after Plaintiff failed to object. On February 22, 1999, the Court issued an Order instructing Plaintiff to file an amended complaint by March 8, 1999 (Docket No. 48). On March 9, 1999, Plaintiff having failed to file an amended complaint, the Court dismissed the Complaint as against Ulrich B. Jacobson without prejudice. On February 10, 1999, Plaintiff filed a motion to dismiss Defendant Jacob Apuzzo from the case without prejudice (Docket No. 47). On February 29, 1999, the Court granted this motion.

Accordingly, Defendants WHDH Television, Ansin, Metcalf, Miely, Jacobson, and Apuzzo have been dismissed from the case, without prejudice, and Defendant Wannemacher has been dismissed from the case with prejudice. The remaining Defendants are Detective Gagne, Detective Coleman, and the Town of Biddeford (the “Biddeford Defendants”), Detective Joyce, Detective Ross, and the City of Portland (the “Portland Defendants”), Sheriff Phinney, and Dr. Kazim.

Before the Court is Defendants Richard Gagne, Elizabeth Richard Coleman and The Inhabitants of the City of Biddeford’s Motion for Summary Judgment and Incorporated Memorandum of Law (Docket No. 32) (“Biddeford Defendants’ Motion for Summary Judgment”) and the Portland Defendants’ Amended Motions For Stay, For Abstention, and/or to Strike the Complaint (Docket No. 40) (“Portland Defendants’ Motions to Stay, Abstain, or Strike the Complaint”). The Biddeford Defendants object to the Portland Defendants’ Motions to Stay, Abstain, or Strike the Complaint (Docket No. 45). Plaintiff has filed a motion to dismiss the Biddeford and Portland Defendants without prejudice (Docket No. 49). Both sets of Defendants object to Plaintiff’s motion to dismiss without prejudice (Docket Nos. 52, 50).

I. BACKGROUND

The facts relevant to the Court’s decision are as follows: In October of 1996, District Attorney Cantarra contacted Detective Gagne, regarding certain letters that Plaintiff had sent to Jacob Apuzzo. *See* Biddeford Defendants’ Statement of Facts As to Which There is No Genuine

Dispute (“Docket No. 33) (“Statement of Facts”) ¶ 2. The content of these letters included threats to kill Apuzzo and a stated belief that Apuzzo was responsible for certain physical symptoms experienced by Plaintiff.¹ In a meeting arranged by Detective Gagne, which Detective Coleman attended for a “few minutes,” Apuzzo informed the detectives that he was concerned about the threats made against his life and stated his belief that Plaintiff was capable of carrying out such threats. *See id.* ¶ 6. Apuzzo substantiated his fears with the fact that Plaintiff had moved from Massachusetts to Maine and attempted to locate Apuzzo. *See id.*

The detectives reviewed the letters sent by Plaintiff to Apuzzo and confirmed that several of the letters contained threats against Apuzzo including a threat to kill. *See id.* ¶¶ 8, 9. Based on his review of the letters and his interview with Apuzzo, Detective Gagne signed an affidavit outlining the basis for his belief that probable cause existed to issue a warrant for the arrest of Plaintiff on the charge of terrorizing. *See id.* ¶ 13. The State of Maine District Court, Division of Eastern York issued the warrant for the arrest of Plaintiff on October 22, 1996, on the charge of criminal terrorizing. *See id.* ¶ 15. Detective Coleman was not involved in that decision. *See id.* ¶ 14. On October 25, 1996, Detective Gagne contacted the Portland Police Department and faxed to the attention of Detective Theodore Ross a copy of the warrant and a photograph of Plaintiff. *See id.* ¶ 17. Detective Joyce of the Portland Police Department subsequently arrested Plaintiff on October 26, 1996. *See id.* ¶ 18.

II. DISCUSSION

A. *Plaintiff’s Motion to Dismiss Defendants With Prejudice.*

Plaintiff requests a dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1). The stated premise of Plaintiff’s motion to dismiss the Complaint as against the Biddeford and Portland Defendants is that litigation of the suit may result in the revelation of confidential

¹ Apparently, Plaintiff first made contact with Apuzzo in 1990-91 when Plaintiff notified Apuzzo that Plaintiff believed that Apuzzo represented his wife in her divorce proceedings against Plaintiff in 1990. *See* Statement of Facts, Exhibit A.

information that would interfere with his ongoing investigation of the conspiracy waged against him. Plaintiff is referring to the alleged conspiracy to inflict Plaintiff with “personal and bodily injury from a known physical agent microwave magnetism and toxic effects of an anti-psychotic drug Olanzapine,” Complaint ¶ 1, for which there is simply no factual basis in the record.

Rule 41(a)(1) of the Federal Rules of Civil Procedure governs voluntary dismissal by stipulation between the parties and by a plaintiff any time before service of an answer by the adverse party. Here, however, the Biddeford and Portland Defendants have indicated that they are not willing to stipulate to a dismissal *without* prejudice. Pursuant to the federal rules, a plaintiff may also dismiss an action, without order of the Court or agreement of all parties, by filing a Notice of Dismissal at any time before service by the adverse party of an answer or motion for summary judgment. *See* Fed. R. Civ. P. 41(a)(1). Here, the Biddeford and Portland Defendants have answered Plaintiff’s Complaint (Docket Nos. 27, 31). Furthermore, the Biddeford Defendants have filed a motion for summary judgment, and the Portland Defendants have filed motions to stay, to abstain, or to strike the Complaint. At this point in the proceedings, the Defendants have an interest in the resolution of this case on the merits. Accordingly, the Court will not dismiss the case without prejudice upon Plaintiff’s request at this juncture in the proceedings.

B. Portland Defendants’ Motions to Stay, Abstain, or to Strike the Complaint.

The Portland Defendants ask the Court to either stay, abstain or strike the Complaint. The Biddeford Defendants oppose the Portland Defendants’ motions and ask the Court to rule on the issue of qualified immunity presented by their motion for summary judgment. After receiving an enlargement of his time period to answer, Plaintiff did not respond to the Portland Defendants’ motion (Docket No. 44).

In support of their motion to strike the Complaint, the Portland Defendants contend that Plaintiff’s claims that he was arrested by the Portland Defendants and placed in jail where he was “irradiated with microwave magnetism” and suffered brain damage obviously lack merit and

should be dismissed as frivolous pursuant to Federal Rule of Civil Procedure 11(b). In this regard, Plaintiff alleges that the Portland Defendants arrested him, put him in Cumberland County Jail and placed him in a holding cell where they irradiated him with “energy” through a signal “appropriated to his anatomy” for which he sustained “brain damage.” Complaint ¶¶ 36-37. He further alleges that Apuzzo, WHDH Television, Inc., Ansin, and Metcalf caused the false arrest of Plaintiff for the sole purpose of irradiating his person with “microwave magnetism.” *Id.* ¶ 33. Finally, he alleges that the purpose of the conspiracy was to align Plaintiff “on a wireless technology and to therewith eavesdrop, monitor, to interfere with his rights and avoiding him from testimony and to conduct a biological experiment through an ‘energy’ normally used in broadcasting and known to be deadly to mankind.” *Id.* ¶ 19. The Court agrees that there is no scientific, factual, or legal basis for the facts underlying the claims based on these alleged events and that these claims obviously lack merit. The Court finds that these claims are frivolous and irrational and will dismiss with prejudice these claims as to all of the remaining Defendants in the case.² *See Ferguson v. MBANK Houston, N.A.*, 808 F.2d 358 (5th Cir. 1986) (dismissing *pro se* complaint as frivolous and irrational).

Plaintiff has, however, set forth a claim under section 1983 of Title 42, alleging that the Portland Defendants violated his federal and state constitutional rights. *See* Complaint ¶¶ 56-69. The Complaint sets forth mainly conclusory allegations, none of which specify any facts to indicate exactly how his rights were allegedly violated, however, he has set forth a claim under a notice pleading standard that conceivably could have a factual basis. Although it is likely that the Portland Defendants are entitled to immunity in regard to these claims, as the Court determines below in regard to the Biddeford Defendants, and that the claims would not survive a motion to dismiss, the Court will not, on this record, strike these claims pursuant to Federal Rule 11(b) as irrational or frivolous.

² These Defendants are the Biddeford Defendants, the Portland Defendants, Dr. Kazim, and Sheriff Phinney.

The Portland Defendants also claim that Plaintiff filed the suit for an improper purpose. Rule 11(b)(1) proscribes complaints and other pleadings that are “presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation” Fed. R. Civ. P. 11(b)(1). The Portland Defendants contend that the Complaint was filed for the purpose of harassing the Defendants because it is part of “a clearly abusive pattern of litigation.” Portland Defendants’ Motions to Stay, Abstain, or Strike the Complaint at 5. It is true that Plaintiff has filed four separate lawsuits, including the one at bar, that concern the same alleged conduct. Plaintiff filed a complaint in Cumberland County Superior Court on November 5, 1996, in York County Superior Court on November 14, 1996, and in Cumberland County Superior Court on July 18, 1997. *See* Portland Defendants’ Motions to Stay, Abstain, or Strike the Complaint, Exhibits A, B, F. Plaintiff’s November 5, 1996, state court complaint was voluntarily dismissed without prejudice upon Plaintiff’s motion. *See id.*, Exhibit D. Plaintiff’s November 15, 1996, state court complaint was also voluntarily dismissed without prejudice upon Plaintiff’s motion on January 4, 1999. *See id.*, Exhibit E. Plaintiff’s July 18, 1997, complaint was stayed by the state court on February 6, 1998, after plaintiff filed pleadings that contained allegations regarding “unlawful use of electromagnetism and/or microwave radiation” and it appeared to the state court that Plaintiff was incompetent. *See id.*, Exhibit C.

There is no direct evidence that Plaintiff filed the four lawsuits with the improper purpose of harassing the Portland Defendants. Plaintiff filed, within a close time frame, two complaints in state court, the first of which does not name the Biddeford Defendants and the second of which does not name the Portland Defendants. *See id.* Exhibits B, F. Plaintiff voluntarily moved to dismiss both complaints before Defendants filed an answer. The remaining state court proceeding, naming only the Portland Defendants and alleging violations of the Maine Tort Claims Act and the Federal Civil Rights Act for Plaintiff’s allegedly unlawful arrest, does not contain the irrational allegations pertaining to “electromagnetism” and “microwave radiation.” *See id.* Exhibit B.

Complaints drawn by *pro se* litigants are held to a less stringent standard than those drawn by legal counsel. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976), and *pro se* complaints will be dismissed only if it appears beyond doubt that no set of facts supporting the claim for relief can be proved. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). It does not appear on the face of the state court complaints that there was no factual or legal basis for Plaintiff's civil rights claims. Here, the record suggests that Plaintiff, acting *pro se*, attempted to file suit in state court two times before he settled on a final state court complaint and subsequently filed suit in federal court, exercising his right to concurrent jurisdiction. Without evidence of an improper purpose, the Court will not find that Plaintiff's Complaint was filed in this Court with the improper purpose to harass and dismiss it under Federal Rule of Civil Procedure 11(b).

The Portland Defendants also ask the Court to abstain from exercising its concurrent jurisdiction over this litigation under the *Colorado River* doctrine. Pursuant to this doctrine, a federal court may abstain from exercising jurisdiction in a case for the purpose of promoting sound judicial administration, which includes conserving judicial resources and avoiding piecemeal litigation. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The usual rule is that a court proceed with its concurrent jurisdiction and refuse to exercise its jurisdiction only in exceptional circumstances. *See id.* The factors that a district court should consider are the following: 1) whether either court has assumed jurisdiction over a *res*; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which the forums obtained jurisdiction; 5) whether state or federal law controls; 6) the adequacy of the state forum to protect the parties rights; and 7) the vexatious or reactive nature of the federal lawsuit. *See Elmendorf Grafica, Inc. v. D.S. American (East) Inc.*, 48 F.3d 46, 50 (1st Cir. 1995).

Here, the *Colorado River* factors do not favor abstention. The state court proceeding is pending against only the Portland Defendants. Thus, the issue of concurrent jurisdiction does not arise with regard to the Biddeford Defendants. Furthermore, neither the state nor federal court

has exercised jurisdiction over a *res*. Second, the federal forum is not inconvenient for any parties. Third, because the state court proceedings do not involve any Defendants other than the Portland Defendants, there is no risk of piecemeal litigation with regard to the remaining Defendants in this case. *Res judicata* would apply defensively in the action that is decided last. Fourth, both questions of federal and state law exist in the case, and there is no uniquely difficult question of state law that should be decided by the state court. Fifth, the state court proceeding, which is currently pending, will not offer any protection to the rights of the Biddeford Defendants who will be subject to further litigation should this Court decline to exercise its jurisdiction. Furthermore, the state court action is currently stayed. Although the federal litigation was filed after the state litigation and appears to have little merit, there is no direct evidence that it was filed for a vexatious purpose. Hence, the Court will not abstain under the *Colorado River* doctrine.

Finally, the Portland Defendants request that the Court stay the litigation until there is evidence on the record that Plaintiff is competent to pursue the case or appoint a guardian *ad litem* to assess the claims' merits and, only if it is meritorious, pursue it on behalf of Plaintiff. The Portland Defendants refer the Court to the Portland Defendants Consolidated Motions for 1) The Determination of Plaintiff's Competency and the Appointment, if Necessary, of a Guardian Ad Litem; and 2) Protective Order and Stay in Cumberland County Docket No. CV-97-543, filed in Plaintiff's state court proceeding against them. *See* Portland Defendants' Motions to Stay, Abstain, and Strike the Complaint, Exhibit G. The Portland Defendants rely on the state court's stay of the proceeding, the fact that Plaintiff is believed to still be a patient of Augusta Mental Health Institute, and the fact that Plaintiff's papers contain allegations regarding "electromagnetism" and "microwave radiation" to support their claim that Plaintiff is legally competent. Although the Complaint indicates that Plaintiff suffers from a mental illness, it also indicates that Plaintiff has a basic understanding of the civil litigation process. Plaintiff has demonstrated a basic understanding of the rules of civil procedure throughout this litigation. The

Portland Defendants have not submitted any evidence that Plaintiff is not competent in his pursue of his legal rights. Accordingly, the Court will not stay this action due to Plaintiff's incompetence without evidence that plaintiff is legally incompetent.

C. Biddeford Defendants' Motion for Summary Judgment.

Summary judgment may be granted 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 judgment as a matter of law. *See* Fed. R. Civ. P. Rule 56(c). Federal Rule 56 further provides that,

[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided under the rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). Here, Plaintiff requested an enlargement of time within which his objection might be filed, which the Court granted (Docket No. 42) but, after the requested enlargement of time had passed, Plaintiff did not respond to the motion. Nor has Plaintiff presented an explanation for his failure to respond. Plaintiff has failed to comply with the requirements of Local Rule 7(b), to file "within ten (10) days after the filing of a motion, a written objection thereto, incorporating a memorandum of law." *See* D. Me. Local R. 7(b). By virtue of that failure, Plaintiff is deemed to have waived objection to the motion, empowering the Court to act on the motion. *See* D. Me. Local R. 7(b).

It is well established in this District that when a nonmoving party chooses to rest on his pleadings, as here, the court may not automatically award summary judgment to the moving party and must examine the merits of the motion. *See Winters v. Federal Deposit Insurance Corp.*, 812 F. Supp. 1, 2 (D. Me. 1992); *Gagne v. Carl Bauer Schraubenfabrick*, 595 F. Supp. 1081, 1084 (D. Me. 1984); *McDermott v. Lehman*, 594 F. Supp. 1315, 1320-21 (D. Me 1984). The

moving party has the burden of showing undisputed facts that entitle it to summary judgment as a matter of law. *See* Fed R. Civ. P. 56(c); *Stepanishcen v. Merchants Despatch Transport. Corp.*, 722 F.2d 922, 929-30 (1st Cir, 1983). A party who fails to object to a motion for summary judgment within the time allotted under the local rules is deemed to have consented to the moving party's statement of facts to the extent it is supported by appropriate record citations. *See Winters*, 812 F. Supp. at 2. Accordingly, the Court will review the materials presented by the moving party to determine whether the standard for summary judgment is met even though Plaintiff has failed entirely to file materials in opposition. Plaintiff is deemed to have waived his right to controvert facts asserted by the moving part. Thus, the Court will accept as true all material facts, supported by appropriate record citations, set forth by the movant. Summary judgment will be granted if, upon the Court's consideration of the pertinent papers, those facts entitle the moving party to judgment as a matter of law.

As discussed *supra* IIA, in his Complaint, Plaintiff asserts allegations relating to “electromagnetism” and “microwave radiation” which the Court has dismissed pursuant to Federal Rule of Civil Procedure 11as to all Defendants as obviously lacking merit. Plaintiff has also alleged a cause of action pursuant to section 1983 of Title 42 against each of the Biddeford Defendants, alleging that his civil rights under the United States and Maine constitutions were violated when he was arrested. *See* Complaint ¶¶ 2, 34, 35, 56-68. In addition, he raises certain state-law tort claims against the Biddeford Defendants. *See id.* ¶¶ 96-108. The allegations in the Complaint that pertain to the Biddeford Defendants arise out of the issuance of a warrant for the arrest of Plaintiff on the charge of criminal terrorizing. Plaintiff contends in the Complaint that the detectives lacked probable cause to issue the arrest warrant. *See id.* ¶ 34. The allegations against the City of Biddeford pertain to its alleged failure to properly train and supervise, as well as to adequately discipline or control its employees, and its failure to forward the alleged evidence of the criminal acts of Detectives Gagne and Coleman to the City of Biddeford. *See id.* ¶¶ 56-58.

1. *Constitutional Claims.*

Detectives Gagne and Coleman assert that they are entitled to qualified immunity arising out of the issuance of the warrant for the arrest of Plaintiff and are entitled to summary judgment in their favor as to these claims. 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 (1981) (citing cases). An 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, Detective Gagne decided, using his judgment, to issue an affidavit seeking an arrest warrant. This action is clearly a discretionary function in furtherance of a legislatively imposed duty.

The detectives do not contend that they were not on notice of the Fourth and Fourteenth Amendments to the United States Constitution and the extent to which the allegations of the Complaint concern these rights. The sole issue for the Court to determine is whether Detective Gagne acted reasonably in believing that probable cause existed for the issuance of a warrant for the arrest of Plaintiff. “Probable cause to make an arrest exists where the facts and circumstances of which the arresting officer has knowledge would be sufficient to permit a reasonably prudent person to conclude that an offense has been committed by the person arrested.” *Hoffman v. Reali*, 973 F.2d 980, 985 (1st Cir. 1992). Probable cause exists when personal knowledge of the facts, together with reasonable trustworthy information conveyed to an officer, would warrant a prudent police officer to believe that a crime had been committed. *See McPherson*, 842 F. Supp. at 29 (citing *State v. Izzo*, 623 A.2d 1277, 1281-82 (Me. 1993)). The pertinent inquiry is not whether probable cause existed, but whether another officer in the shoes of Detective Gagne with the same information, “might reasonably have come to the conclusion that he had probable cause to apply for the arrest warrant.” *Hoffman*, 973 F.2d at 986.

Here, Detective Gagne found that probable cause existed to arrest Plaintiff on the charge of terrorizing.³ The decision to seek a warrant for the arrest of Plaintiff was based on his interview with Apuzzo and his review of the letters sent by Plaintiff to Apuzzo. Apuzzo told the detective that he feared for his safety, and the letters and the fact that Plaintiff moved from Massachusetts to Maine and attempted to contact Apuzzo substantiated Apuzzo's belief. Plaintiff has waived all objections to these facts by virtue of his failure to respond to the Biddeford Defendants' motion. The Court finds that Detective Gagne acted reasonably in finding that probable cause existed to issue a warrant, in obtaining the warrant, and in notifying the Portland Police Department about the warrant. Weight is given to the fact that a court issued a warrant for the arrest of Plaintiff based on Detective Gagne's affidavit. Accordingly, Detective Gagne is entitled to qualified immunity on all counts of Plaintiff's Complaint alleging violations of his federal civil rights arising out of the issuance of the warrant and his subsequent arrest. Furthermore, Plaintiff has not disputed that Detective Coleman did not actually participate in the decision to seek a warrant for Plaintiff's arrest and, to the extent that her actions played any role in the decision to seek a warrant, she, too, is entitled to summary judgment on Plaintiff's Complaint alleging violations of his federal civil rights.

³ The crime of terrorizing is defined as follows:

1. A person is guilty of terrorizing if he communicates to any person a threat to commit or to cause to be committed a crime of violence dangerous to human life, against the person to whom the communication is made or another, and the natural and probable consequence of such a threat, whether or not such consequence in fact occurs, is:
 - A. To place the person to whom the threat is communicated or the person threatened in reasonable fear that the crime will be committed; or
 - B. To cause evacuation of a building, place of assembly or facility of public transport.

The City of Biddeford contends that it, too, is entitled to immunity in regard to the allegations of Plaintiff's Complaint. A municipality cannot be held liable under section 1983 of Title 42 on a *respondeat superior* theory. *See Monell v. Department of Civil Services of the City of New York*, 436 U.S. 658, 691 (1977). 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 that the government as an entity is responsible under section 1983." *Id.* at 694. In order to make a claim against a municipality alleging a violation of a plaintiff's constitutional rights, the plaintiff must prove (1) a municipal custom or policy, and (2) that this custom or policy was the cause of and the moving force behind the deprivation of constitutional rights. *See Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1231-33 (D. Me. 1996).

Plaintiff alleges that the liability of the Town of Biddeford arises out of its alleged failure to train and supervise Gagne and Coleman. *See* Complaint ¶¶ 56-58. In order to be liable under section 1983 for the alleged failure to train and supervise, Plaintiff must prove that the alleged failure amounted to a deliberate indifference to his constitutional rights and (2) been affirmatively linked to the violation of those rights. *See Comfort*, 924 F. Supp. at 1231-32. The record shows that the officers of the Biddeford Police Department receive their initial training at the Maine Criminal Justice Facility and receive additional training throughout the course of their career with the police department. *See* Statement of Facts ¶ 20. There are no facts in the record that support Plaintiff's allegation that Detective Gagne lacked sufficient training to make a determination that probable cause existed to seek a warrant for Plaintiff's arrest and, from the facts, one can infer the opposite. *See id.* ¶¶ 20, 21, 22, 23. Furthermore, there are no facts in the record that indicate that the Town of Biddeford had a duty to prosecute either Detective Gagne or Detective Coleman. There is also no evidence in the record that the Town of Biddeford Police Department had knowledge of past misconduct on the part of either detective. The department had not received formal complaints against either detective. *See* Statement of Facts ¶ 23.

Therefore, because Plaintiff has not identified a policy or custom that amounts to deliberate indifference toward Plaintiff's constitutional rights and has not contradicted the facts that demonstrate that the Town of Biddeford properly trained its detectives, the Court finds that the Town of Biddeford is immune from liability, and the Court will grant summary judgment for Defendants.

2. *State-Law Claims.*

Plaintiff also alleges that Detectives Gagne and Coleman violated state common law.

The Maine Tort Claims Act ("MTCA") 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 MTCA "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 which involve the assertion of a claim against a government official, the court demands that the plaintiff's complaint state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity. *Id.* at 1010 n. 6 (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993)). To the extent that the Complaint raises allegations regarding Detectives Coleman and Gagne, the allegations concern only discretionary

functions. Pursuant to the MTCA, Detectives Gagne and Coleman are entitled to summary judgment on all counts of the Complaint arising under the common law.

Plaintiff also alleges intentional conduct on the part of Detective Gagne and Detective Coleman. The question in regard to the intentional torts alleged in the Complaint is whether Defendant's alleged egregious conduct "clearly exceeded, as a matter of law, the scope of any discretion he could have possessed in his official capacity as a police officer and therefore was not encompassed within the immunity provision of 14 M.R.S.A. § 8111(1)(C)." *Polley v. Atwell*, 581 A.2d 410, 413-14 (Me. 1990). Despite Plaintiff's labeling of the actions as intentional, there are simply no facts in the record that create a genuine issue of material fact as to whether the detectives engaged in egregious conduct that exceeded the scope of discretion that they possessed in issuing a warrant for Plaintiff's arrest. Accordingly, the Court will grant summary judgment on the state law claims in favor of Detectives Gagne and Coleman.

Likewise, the Town of Biddeford is, as the Biddeford Defendants contend in their motion for summary judgment, immune under the MTCA from liability for Plaintiff's state-law claims. Plaintiff alleges, on information and belief, that the Town of Biddeford, had prior notice of the "vicious propensities" of Detectives Gagne and Coleman, but failed to train them or correct their unlawful use of authority. *See* Complaint ¶¶ 57, 59. The undisputed facts show, however, that Gagne and Coleman received initial training and training throughout their career as detectives. *See* Statement of Facts ¶ 20.

In regard to municipalities, the MTCA provides,

[e]xcept 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). Furthermore, under the MTCA, municipalities are immune for the performance of an employee's discretionary function under section 8014-B. The only way by

which a municipality may waive immunity is if it procures insurance that covers areas where the municipality would otherwise be immune. *See* 14 M.R.S.A. § 8116. The Biddeford Defendants assert that the policy of insurance issued to the City of Biddeford contains an endorsement that the coverage provided does not extend to the immunities afforded by the MTCA. Specifically, the policy provides:

Coverage is limited to those areas for which governmental immunity has been expressly waived by 14 M.R.S.A. 8104-A, as limited by 14 M.R.S.A. 8104-B, and 14 M.R.S.A. 8111. Coverage amounts for causes of action seeking tort damages pursuant to the provisions of the Maine Tort Claims Act are limited to those specified in 14 M.R.S.A. 8105 and 8104-D. Liability coverage shall not be deemed a waiver of any immunities or limitation of damages available under the Maine Tort Claims Act, other Maine Statutory Law, Judicial Precedent or Common Law.

Statement of Facts ¶ 25. Accordingly, to the extent that state common law claims are asserted by Plaintiff against the City of Biddeford, those claims do not survive the immunity provisions of the MTCA.

Finally, the qualified immunity analysis the Maine Civil Rights Act for state law claims is the same as the analysis under section 1983 of the Federal Civil Rights Act for federal constitutional claims. *See Comfort*, 924 F. Supp at 1236. Accordingly, Detectives Gagne and Coleman and the Town of Biddeford are immune from the state constitutional claims raised by Plaintiff.

Because Plaintiff failed to comply with Local Rule 7, he has waived the right to submit materials opposing the motion for summary judgment, and the Court decides the motion for summary judgment upon the Biddeford Defendants' submissions. Based upon the Biddeford Defendants' submissions alone, no genuine issue of material fact exists as to whether the Biddeford Defendants are immune from liability for Plaintiff's federal and state law claims. No evidence having been submitted to the contrary, the record properly before the Court establishes that the Biddeford Defendants are immune. Accordingly, the Court will grant summary

judgment against Plaintiff on the counts in his Complaint that pertain to the Biddeford Defendants.

Accordingly, the Court **ORDERS** that the Portland Defendants' motion to strike the Complaint be, and it hereby is, **GRANTED** in part and **DENIED** in part. It is granted insofar as it seeks to dismiss all allegations pertaining to electromagnetism and radiation and denied insofar as it seeks to dismiss the civil rights claims in the Complaint that pertain to Plaintiff's arrest. The Court further **ORDERS** that the Portland Defendants' motions to abstain from hearing the suit and to stay the proceedings be, and they hereby are, **DENIED**. Finally, the Court **ORDERS** that the Biddeford Defendants motion be, and it hereby is, **GRANTED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 7th day of April, 1999.