



other materials like charging documents. See United States v. Harris, 964 F.2d 1234, 1235-36 (1st Cir. 1992).

The relevant Maine assault statute applies to one who “intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another.” 17-A M.R.S.A. § 207 (West 1983) (emphasis added). (The complaint on which the conviction is based similarly is phrased in the disjunctive.) The defendant concedes that “bodily injury” connotes physical force, but argues that “offensive physical contact” does not, or at least not always. Given the two possibilities under the statute, I turn to the police reports and victim statements associated with the conviction, as Taylor and Harris contemplate. They reveal that in fact there was no bodily injury in this case.<sup>1</sup> Therefore, I conclude that the defendant is correct in his contention that his conviction must be deemed as one for “offensive physical contact,” not “bodily injury.”

I must next determine categorically, then—not on the particular circumstances of this case—whether physical force is a necessary component of

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<sup>1</sup> It is tempting to look at these underlying documents generally and conclude that even though no bodily injury resulted physical force was used. As Presentence Report ¶ 20 reports:

Defendant pled no contest to assaulting Denise Smith. He was represented by counsel. Denise Smith was the defendant’s girlfriend at the time, they were living together and had a child together. The police report for the domestic assault indicate [sic] that after Ms. Smith dumped some cocaine on the floor, the defendant flipped out, breaking up the mirrors and furniture. He almost hit his younger son, Noah, with a chair. Ms. Smith told the responding police officer that she had tried to get Noah out of the house. In her statement she indicated that the defendant grabbed her when she was in the truck trying to leave the scene. After the defendant let go of Ms. Smith, he told her to come straight home or he would shoot her animals. This is the conviction that renders the defendant a prohibited person.

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“offensive physical contact.” The First Circuit has held that a Massachusetts statute criminalizing offensive physical contact with a police officer categorically implicates physical force because in such cases a serious risk of physical harm is implicated: a defendant knows that the officer is actually engaged in the performance of official duties, usually carries weapons and is likely to react or attempt to subdue the offender. See United States v. Fernandez, 121 F.3d 777 (1st Cir. 1997). But those unique characteristics recognized in Fernandez for police officers do not apply to run-of-the-mill offensive physical contacts among ordinary citizens, which could be no more than an unwelcome hand upon the arm. The government urges me to follow an Eighth Circuit footnote, where the court stated that under Iowa law “physical contact that is merely insulting or offensive” “by necessity, requires physical force to complete.” United States v. Smith, 171 F.3d 617, 621 n.2 (8th Cir. 1999). With all respect to the Eighth Circuit, an offensive physical contact such as an unconsented-to touching—a hand upon the arm, for example—does not always or even usually require physical force to complete. And Maine’s highest court seems to interpret Maine’s offensive physical contact prohibition quite broadly. Specifically, the Law Court has stated that “offensive physical contact” does not even require a direct touching of the victim, and that “unpermitted and intentional contacts,” such as touching even a cane or clothing or anything directly grasped by the hand can be included. State v. Rembert, 658 A.2d 656, 658 (Me. 1995) (quoting Restatement (Second) of Torts

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But reaching that far into the underlying record is inconsistent with the approach of Taylor and Harris.

§ 18 cmt. c (1964)). Such contacts may well not require physical force to complete.<sup>2</sup>

I conclude, therefore, that whatever the actual circumstances of the underlying assault, the defendant pleaded nolo to and was convicted of only offensive physical contact, and that such a crime is not a crime that categorically involves physical force.

Consequently the defendant shall not be treated as a prohibited person for purposes of calculating the Base Offense Level.

**So ORDERED.**

**DATED THIS 28TH DAY OF SEPTEMBER, 2000.**

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**D. BROCK HORNBY**  
**UNITED STATES DISTRICT JUDGE**

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<sup>2</sup> It is true that in Rembert the Law Court concluded that physical force on another necessarily involves some type of offensive physical contact with another for purposes of a lesser included offense charge, see 658 A.2d at 658, but that does not diminish its expansive reading of the offensive contact crime.

U.S. District Court  
District of Maine (Bangor)  
Criminal No. 00-4-B-H

JOHN IRA WEEKS, JR.  
defendant

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