UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BERT J. ALLEN, III,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 01-224-P-C
	)	
YORK COUNTY JAIL, et al.,	)	
	)	
Defendants	)	

BERT J. ALLEN, III,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 02-158-P-C
	)	
YORK COUNTY SHERIFF'S DEPARTMENT, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON MOTIONS FOR JUDGMENT ON THE PLEADINGS

Bert Allen has filed two complaints pursuant to 42 U.S.C. § 1983 seeking damages for violations of his constitutional rights while he was confined at the York County Jail, in Sanford, Maine. One complaint, Civil No. 01-224-P-C (Docket No. 1), names as defendants the York County Jail, Daniel Dubois, Tammy Lynard, and "other known and unknown" officers in their individual and official capacities.[1] The other complaint, Civil No. 02-158-P-C (Docket No. 1), names as defendants the York County

[1] This complaint also names two inmates, Scott and Richard, but there is no indication that these inmates are considered "state actors" by either party. These two inmates were dismissed from the action by order of the District Court on June 11, 2002, because neither Allen nor the Deputy U.S. Marshal made service upon them.

Sheriff's Office, Sheriff Philip Cote, and "other unknown officers."[2] The two complaints have been consolidated by the court for administrative purposes. York County Jail, the York County Sheriff's Department, and Sheriff Philip Cote have filed motions for judgment on the pleadings seeking dismissal of the complaints against them and Allen has responded. Civil No. 01-224-P-C (Docket Nos. 86 & 94); Civil No. 02-158-P-C (Docket Nos. 21 & 27). I recommend that the Court **GRANT** the motion.

The Complaints' Allegations

A. Allen's Complaint against York County Jail

In the complaint in which he names the York County Jail (Civil No. 01-224-P-C), Allen seeks money damages to redress the violation of his constitutional rights arising from physical and mental abuse between September 1999 and October 2000. Broadly stated he alleges that predatory inmates at the York County Jail were allowed to torture, abuse, and sodomize him in part because of his physical and emotional disabilities. He alleges that these defendants conspired with inmates to target weaker inmates "in a game of sport." He alleges that the defendants acted pursuant to both a jail policy and custom.

In particular Allen alleges that during this period he was housed as a federal detainee in the York County Jail, a jail that was built to house fifty-seven inmates but which had twice that number. When Allen arrived at the facility he was wearing a back brace and required daily therapy sessions with weekly trigger point injections. He experienced pain and discomfort that made it hard for Allen to move quickly and difficult for him to sleep. The first time that Allen entered the general prison population an (unnamed) inmate stated: "I wouldn't want to be in your shoes, you're going to A, B, or

[2] The complaint naming the sheriff's department and Sheriff Cote was removed to this court from state court.

C pods which are reserved for skinners, rapists, and the physically infirm[], it's a jail policy."

In his first week Allen was attacked in the shower by other inmates at the behest of a jail guard. Allen alleges that Officer Dubois (a nonmoving defendant) spoke with inmates named Scott and Richard at the door of the dayroom. Scott and Richard were given access to the shower room by Dubois. Allen states that while he was in the shower room he was hit, beaten, and sodomized with a toothbrush until his rectum began to bleed. He then lay helpless on the floor. Allen reports that after the attack the inmate named Scott declared: "It was the easiest $100 he ever made and the rape was a present from some of the guards." There was no monitoring of the incident because the shower room camera was broken and purportedly was not fixed because of budget constraints.

After the attack Allen, in pain and bleeding, was placed in a holding cell for over eighteen hours. He had no feeling in his legs. Without success he repeatedly requested medical attention from numerous jail staff. When being returned to his original cell a jail officer (unnamed) said, "people like you should not have money spent on them and the manpower."

The next day an officer, whose first name is Robert, determined that Allen was in shock and took him to a nurse who examined him. The nurse had a doctor named Mersue examine Allen and eventually he was examined by a Maine Emergency Crisis Response worker. There were no jail records of the attack in the shower, however, because the officer in charge failed to file and follow-up on the attack with reports.

In the last week of October 1999 Allen woke with red circles around his penis. This problem was reported and (the nonmoving defendant) Tammy Lynard took Allen to

a storage area with a glass partition between this room and another. Lynard locked Allen in this room with inmates Scott and Richard, his previous attackers. Scott stated, "You are going to shut your mouth or we are going to hurt you." Dubois and Lynard were outside in the hall. Allen screamed and banged in the hopes of defusing this incident before it could get worse. Lynard pulled Allen out of the storage room and took him to the nurse. After Allen informed the nurse of what had happened the nurse confronted Lynard outside the room. The red sore was diagnosed as herpes, a virus that one of Allen's attacker's roommate had.

Allen also complains of an incident involving a fire alarm evacuation that occurred on August 30, 2000. He states that during the evacuation the inmates in pods A, B, and C, including Allen, were filed into the courtyard with the other inmates even though as pre-trial detainees they were supposed to be kept separate from the other inmates. The inmates from the general population began throwing stones and chunks of hard tar at the inmates in pods A, B, and C, including Allen. Several correctional officers were watching and laughing during the entire incident. Allen was struck in the eye and eventually taken to a hospital. He was given medication that necessitated that Allen simultaneously drink milk but an officer, whose first name is Linda, refused Allen milk even though he had a nurse's note.

Another incident of which Allen complains is an incident on September 25, 2000, in which tear gas was used in response to a fight between two inmates in Allen's cell area. Dubois watched the fight for awhile then he decided to intervene by using a gray gas. After it was sprayed it caused all the inmates in the room to cough and gag; Allen lay on the floor for ten minutes coughing and gagging. His cough got worse over the

next two days to the point that he was coughing up blood. Four days after the incident Allen had severe chest pains and was taken to the hospital and diagnosed with pneumonia. As a consequence of the gas-related difficulties he could not access the law library to fight his federal charges. Two weeks after this incident Allen, after making numerous requests to the effect, was transferred to the Cumberland County Jail.

Though these seem to be the major events, Allen complains of other occurrences and conditions at the jail. He states that in the third week of November 1999 he filed numerous complaints that jail officials were stealing his medications. Around this time Allen was sent to Cumberland County Jail where the doctor prescribed a medication named Valtrax for his herpes. At the York County Jail's request Allen was transferred back to York County Jail on December 24, 1999. On his reentry Dubois told Allen that Dubois had spread the word around the jail that Allen was a "skinner," a remark that put Allen in daily jeopardy. In addition to being overcrowded the jail had several mentally ill inmates housed there due to prison policy. It was also infested by ants and spiders that frequently bit the inmates leaving large welts. Fumes from the generator would flood into the inmates' rooms as it was located only four feet away from the pod windows. Jail officers exacerbated this condition by removing the air-tight corking from around the cell windows. Everyday he was on duty Dubois would gratuitously kick in the leg inmates who were lying in bed.

Allen states that his rights under the First, Fourth, Sixth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments of the United States Constitution were violated and asserts claims under sections 1981, 1983, 1985, and 1988 of title 42. He contends that in addition to being intended to gratuitously hurt and punish Allen his treatment by

the defendants was calculated to prevent Allen from fighting his federal charges. He seeks $100 million in compensatory damages, injunctive relief in the form of a court appointment of a special master to monitor the jail's activities for one year, and attorney fees.

B. Allen's Complaint against York County Sheriff's Department and Sheriff Cote

The caption of Allen's removed complaint (Civil No. 02-158- P-C) reads: "York County Sheriffs Dept., Sheriff Philip Cote, and 'other unknown officers,[']Defendants 'individually and in their official capabilities[sic] as officers of the York County Sheriffs Dept. Et. al.[']" It is a complaint for money damages, including a request for punitive damages. He alleges in paragraph three of his complaint that the defendants were acting in their official capacities during all times mentioned in the complaint.

He contends that these defendants participated in a conspiracy to protect employees by covering-up complaints of the rape and abuse of mentally and physically disabled pre-trial detainees. In particular they set up a scheme to cover-up incidents involving Allen at the jail and that they so conspired "under the color of law."

Many of the allegations in this complaint overlap the allegations of the complaint summarized above. On August 30, 2000, there was an evening fire drill at the jail. When the inmates were outside in the court-yard, York County sheriff officers as well as unknown non-jail police officers responded to the jail alarm. Allen asserts that he and thirteen other pre-trial detainees were stoned by a hundred other inmates and that the sheriff officers and town police officers incited the stone throwing attack. After this incident Allen had to go to a hospital for treatment.

Allen asserts that the sheriff's office, while aware of what had really transpired, set up a scheme to cover-up the violation of his rights. He asserts that York County officials failed to give records containing information about these violations to the district attorney. Allen contends that if the district attorney learned of the due process violations at the jail Allen's criminal charges would have been dropped.

Allen also contends that these defendants covered up an attack and rape on Allen that occurred at the jail on September 27, 1999. Allen explains that all his life he has had "ADHD" (which seems to stand for "Attention Deficit Hyperactivity Disorder"), he was wearing a back brace while at the jail, and his disability made him a target at the jail. The September 27, 1999, attack was ordered by "a group" of jail officers who used a couple of inmates as their weapons. He alleges that he was knocked unconscious for about twenty-five minutes and woke to find that a toothbrush was being violently "shoved up his ass." Allen could not pick himself up off the floor following the attack. One of the attackers indicated that reason for the attack was "the order." Allen contends that the officers knew that one of the inmates had the means of infecting him with a sexually transmitted disease and that the officer intended to punish Allen by seeing that Allen got AIDS and died. A (herpes) infection did result from the attack.

With respect to the cover-up of the rape incident, Allen asserts that the jail altered or destroyed these records in order to prevent the information flowing to the district attorney and the trial judges. He complains that the investigation was all handled in-house, at the same address, and under the same boss creating a conflict of interest. Allen was told during the investigation by a "Major Daniels" that this was a criminal matter and that the criminal division would be taking over. Daniels indicated to Allen that he was

turning over Allen's blood soaked pants and shorts as evidence and Allen has not seen these items since.

On October 28, 1999, a jail officer named Tammy Lynard (a defendant in Allen's companion complaint) led Allen to a room in which Allen's September 27, 1999, attackers waited with friends and these individuals told Allen that he must stop writing grievances or his life would come to a violent end.

Apparently Allen's report concerning this incident (or perhaps the September 27, 1999, attack) was taken five days later by an argumentative officer. Allen informed this individual that since the incident other inmates had told him "the full story" and that the attacker was still on Allen's block able to torment him. The officer destroyed Allen's first complaint and told him to write another. Allen did so and the officer tore it up again, stating: "I will not accept any complaint that implicates a fellow officer." In response, Allen wrote a scaled-down complaint to assure that at least something was put on record. This officer allowed a female officer to read the complaint and she responded, "oh they're getting kinky with toothbrushes in the block now."

Allen has further grievances with these defendants. He states that his reports of medication theft went unheeded for twelve months while his medication continued to be stolen. He indicates that in March 2002 the jail finally arrested "one of its own" but did nothing with respect to the officers Allen complains about. He also notes that just after Allen left the facility the York County Sheriff's Department came out with a report after "the riot" that indicated that there was high officer turnover at the jail. The report apparently attributed this turnover to a dynamic in which the "good" officers who witnessed wrongdoing left the jail to distance themselves from the abuses while

maintaining the code of silence. This left the inmates to the mercy of the "untouchables" and the "little dirty Harrys." This report also noted that there was a lack of training at the facility. Finally, during his stay at the York jail Allen experienced "extreme coerced state of mind" meant to stop him from writing complaints about the abuses he suffered.[3]

Allen claims he has been physically and emotionally injured by the set of events and prevented from adequately fighting the federal criminal charges underlying his detention. He asserts claims tethered to the First, Fourth, Fifth, Sixth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments, sections 1981, 1982, 1983, 1985, and 1988 of title 42 of the United States Code, and claims under the Americans with Disabilities Act and the Maine Human Rights Act. He seeks $50 million in compensatory damages and $50 million in punitive damages, attorney fees, and the expungement of all charges against him as a consequence of the violations of his constitutional rights.

Attached to this complaint is a compendium of documents, including a memorandum that discusses the Eighth Amendment standard for analyzing cruel and unusual punishment cases, the First Amendment prohibition on retaliation, and a mention of a failure to train theory. He also includes a long affidavit that provides explicit factual details of his experiences at the jail.

The Motion for Judgment on the Pleadings

The defendants move pursuant to Federal Rule of Civil Proceeding 12(c) for judgment on the pleadings. Though Allen's reply to the motions argues that some of his shortfall is a consequence of difficulties in discovery, I have approached this motion with a narrow view, addressing the viability of the complaint before me and, thus, the parties'

[3] Allen alleges that he reported his abuses suffered at the York County Jail to an employee at the Cumberland County Jail who then had a conversation about the incident with someone at the York County Jail.

discovery status is immaterial and further discovery by Allen would not change the disposition.[4]

For purposes of ruling on this motion I take all of Allen's allegations as true. Buckley v. Fitzsimmons, 509 U.S. 259, 261 (1993). Since Allen is proceeding pro se I subject his submissions to a "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972).

Allen's claims against these movants – the jail, the sheriff's department, and Cote in his official capacity – will only be successful if they were responsible for an unconstitutional municipal custom or policy. Monell v. Dept. of Soc. Servs. City N.Y., 436 U.S. 658, 690 (1978) ("Local governing bodies ... can be sued directly under [42 U.S.C.] § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," footnote omitted); id. at 690-91 ("[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."); Burrell v. Hampshire County, 307 F.3d 1, 2 (1st Cir. 2002) (observing that suit against an

[4] It would be inappropriate to treat this as a motion for summary judgment under 12(c), see Fed. R. Civ. P. 12(c), though I have reviewed the papers filed with Allen's pro se complaint in order to better comprehend the nature of his claims. See Gray v. Poole, 275 F.3d 1113, 1115 (D.C. Cir. 2002) (citing the holding of Richardson v. United States, 193 F.3d 545, 548 (D.C.Cir.1999) that District Court abused its discretion when it failed to consider the pro se plaintiff's complaint in light of his reply to the motion to dismiss).

official in an official capacity "is tantamount to a suit against the entity of which the official is an agent" and there must be a claim "that the entity followed a policy or custom" that was unconstitutional).

With respect to his claims against these defendants Allen must ultimately establish two elements:

> First, the custom or practice must be attributable to the municipality, i.e., it must be "so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice." Bordanaro v. McLeod, 871 F.2d 1151, 1156 (1st Cir.1989). Second, the custom must have been the cause of and "the moving force" behind the deprivation of constitutional rights. Id. at 1157.

Miller v. Kennebec County, 219 F.3d 8, 12 (1st Cir. 2000).

A. Claims against the York County Jail and the York County Sheriff's Department

The defendants move to dismiss the complaint against the York County Jail (Civil No. 01-224) and York County Sheriff's Department (Civil No. 02-158) on the grounds that they are arms of the municipal entity, York County, and not independently liable under 42 U.S.C. § 1983. They contend that because they raised this concern in their answer and Allen has failed to move to amend his complaint to name York County as a defendant the claims against the jail and the sheriff's department should be dismissed. While I concur with the defendants that they are entitled to judgment on the pleadings, I do not agree that this "technicality" is the reason.

It is true that several courts have stated, matter-of-factly, that arms of a municipal entity, such as the jail and the sheriff's department vis-à-vis York County, cannot be sued independently of the municipality because they do not have a legal identity distinct from the municipality. See, e.g., Kujawski v. Bd. Comm'rs of Bartholomew County, 999 F.

Supp. 1234, 1237 (S.D.Ind.1998), rev'd on other grounds,183 F.3d 734 (7th Cir.1999); Cronin v. Town of Amesbury, 895 F.Supp. 375, 383 (D. Mass. 1995)[5]; Post v. City of Fort Lauderdale, 750 F.Supp.1131, 1132 (S.D.Fla.1990); see also Fanelli v. Town of Harrison, 46 F. Supp. 2d 254, 257 (S.D.N.Y.1999) (noting that New York law provided that the town police departments "do not have a legal identity separate and apart from the municipality and cannot sue or be sued"); Schneider v. Elko County Sheriff's Dept., 17 F. Supp. 2d 1162, 1164 (D. Nev.1998) (attorney fees cases, sheriff's department lacks the capacity to be sued under Nevada law). However, almost all the cases relied on by the

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[5] Cronin relies on Post and Tucker v. City of Montgomery Board of Commissioners, 410 F.Supp. 494, 511 (D.C. Ala. 1976) to support its conclusion that municipal departments have no legal identity distinct from the municipality. Tucker relied on Monroe v. Pape, 365 U.S. 167 (1961) for its determination that a damage award against the City of Montgomery Board of Commissioners was precluded, stating: "As the legally constituted governing body of the City, the Council is not a 'person' for § 1983 purposes." Id. at 91. However, in Monell the United States Supreme Court expressly overruled this tenant of Monroe. Following a discussion of Monroe it stated: "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies." Monell, 436 U.S. at 690.

The defendants also cite to Fugate v. Unified Government of Wyandotte County, 161 F. Supp. 2d 1261 (D. Kan.2001). Therein the Court explained:

> In Wright v. Wyandotte Sheriff's Department, 963 F.Supp.1029, 1034 (D.Kan.1997), this Court specifically found that the Wyandotte County sheriff's department is an agency of Wyandotte County and thus is not capable of being sued. See also Farris v. Board of County Commr's, 924 F.Supp. 1041, 1045 (D.Kan.1996); Owens v. Rush, 636 F.2d 283, 286 (10th Cir.1980). Plaintiff concedes this point but seeks dismissal without prejudice "to protect plaintiff's interests in the event that defendant Unified Government later denies that it is the proper party defendant with respect to the actions of the Sheriff's Department." Plaintiff's Response to Defendant Wyandotte County Sheriff's Department's Motion To Dismiss (Doc. # 29) filed April 6, 2001. As a matter of law the Unified Government of Wyandotte County/Kansas City, Kansas is responsible for actionable misconduct, if any, by the Sheriff's Department. The Court therefore denies plaintiff's request. The Sheriff's Department is not capable of being sued and the Court therefore sustains its motion to dismiss with prejudice.

161 F. Supp. 2d at 1266.

Farris v. Board of County Commissioners of Wyandotte County, 924 F.Supp. 1041 (D.Kan.1996) relied on in Fugate reasoned in reliance on Tenth Circuit precedent that Fugate also cited:

> The court in Owens v. Rush, 636 F.2d 283 (10th Cir.1980), addressed the issue of whether a county incurs Title VII liability for acts occurring within the sheriff's department. In Owens, a former deputy sheriff brought a sexual discrimination claim under Title VII. The court held that a county sheriff is an "agent" of the county and is liable under Title VII even though the department employed fewer than fifteen employees. The court concluded that "it is inappropriate to condition the County's liability on whether the allegedly improper act was committed by the Board or the Sheriff when both are agents of the same political entity--the County." Id. at 286.

924 F. Supp. at 1045-46.

defendants involved actions in which the court observed that the municipality was also a named party and would remain as the proper defendant vis-à-vis the claims asserted against its subunit or "arm." Fanelli, 46 F. Supp. 2d at 257; Kujawski, 999 F. Supp. at 1237; Post, 750 F. Supp. at 1132 ; Cronin, 895 F. Supp. at 383; but also Schneider, 17 F.Supp.2d 1162 (county named as defendant in case summary but no discussion of claims against the county proper).

The theory of § 1983 municipal liability evolves from the United States Supreme Court conclusion in Monell, "that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies." 436 U.S. at 690 (second emphasis added). The Court stated that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." 436 U.S. at 690 n.55.

Subsequently, the Supreme Court's Brandon v. Holt, 469 U.S. 464 (1985) framed the party naming concern by discussing a trio of its cases:

> In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond. We now make that point explicit.
>
> In Monell, the City of New York was not itself expressly named as a defendant. The suit was nominally against the city's Department of Social Services, but that Department had no greater separate identity from the city than did the Director of the Department when he was acting in his official capacity. For the purpose of evaluating the city's potential liability under § 1983, our opinion clearly equated the actions of the Director of the Department in his official capacity with the actions of the city itself.
>
> Hutto v. Finney, 437 U.S. 678 (1978), was an action against state officials rather than municipal officers. Notwithstanding our express recognition that an order requiring the Arkansas Commissioner of Corrections to pay the plaintiff's counsel fees would be satisfied with state funds, we sustained the order against an Eleventh Amendment challenge.

> We considered it obvious that the State would pay the award because the defendants had been sued in their "official capacities."
>
> Less than two years later, we decided Owen v. City of Independence, 445 U.S. 622 (1980), a § 1983 action in which the complaint named as defendants "the city of Independence, City Manager Alberg, and the present members of the City Council in their official capacities." We held that the qualified immunity that protects public servants acting in good faith was not available to those defendants. In so holding, we expressly distinguished between suits against government officials "in their individual capacities" on the one hand, and those in which "only the liability of the municipality itself was at issue," on the other.

469 U.S. at 471-73 (footnotes omitted). The Court 'noted' that, "the Police Department and the city received notice; no claim is made that the Director of Police and the city were without due notice of the proceedings." Id. at 472 n.20.

Therefore, contrary to the defendants' assertion, the rule is not so much that suits against municipal subdivisions cannot be maintained but that they are in essence suits against the municipality, here York County. While a cautious plaintiff might have moved to amend his complaint in light of the defendants' answer, Allen is proceeding pro se and self-professes difficulty in following the pleading rules. And in light of the settled law cited above, York County should have been on notice that it was the entity subject to liability vis-à-vis Allen's claims against the jail, the sheriff's department, and the sheriff in his official capacity.[6]

[6] The First Circuit has recently said, in passing, that a suit against an official in an official capacity "is tantamount to a suit against the entity of which the official is an agent (the jail)." Burrell, 301 F.3d at 2 (emphasis added). It is possible to overstate the significance of this phrasing. Be that as it may, in the context of these municipal liability/intra municipal entities/official capacity suits, it is the tenability of the municipal liability claim that should be determinative of a claim's viability when the municipality -- that is well aware that the ultimate liability for such claims will flow back to it -- has fair notice of the pendency of the action naming one of the municipality's arms and/or the municipality's agent in his or her official capacity.

B. Claims against Sheriff Philip Cote

The defendants also move to dismiss the complaint against Sheriff Philip Cote on the grounds that it is not clear from the allegations of the complaint whether Cote is being sued in his individual or official capacity, the complaint does not allege that Cote had final decision making authority, and it does not allege that the actions taken by the named and unnamed officers were the product of a custom, policy, or practice as required to state a claim for municipal liability.

However, as noted above, Allen expressly captioned his complaint to indicate that Cote (the only individual defendant Allen could name in this complaint) was being sued "'individually and in [his] official capabilities[sic] as [an] officer[] of the York County Sheriffs Dept. Et. al.['] Though there is no precise allegation that Cote had final decision making authority, he is identified as the sheriff by Allen and Allen does attribute the policy and custom to the sheriff.[7] However, Allen's allegation against Cote only supports a claim that in his official capacity Cote is responsible for the policy or custom underlying the conspiracy to cover-up the mistreatment of Allen at the jail. Because this is an "official capacity" claim it is one that is properly directed against York County, as discussed above. Allen has not alleged that Cote had any other personal involvement or supervisory role in the events that would support claims against him in his individual capacity. He is certainly entitled to dismissal of the complaint against him in his individual capacity.

[7] This would not be the first time that a sheriff was identified as the possible final decision-making authority over jail operations and practices. See, e.g., Alkire v. Irving, 305 F.3d 456, 467 (6th Cir. 2002); Cortez v. County of Los Angeles, 294 F.3d 1186, 1189 (9th Cir. 2002).

C. The Sufficiency of the Claims as Pled

Having accorded Allen the benefit of the doubt by treating his allegations lodged against municipal subunits and the sheriff in his official capacity as stating a complaint seeking to impose municipal liability upon York County, the issue then becomes whether Allen has stated a violation of his constitutional rights based upon either policy or custom. I recognize that under Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) there is no "heightened pleading standard" in cases alleging municipal liability. Id. at 168. By the same token the court need not engage in an exercise in creative reading to try to find a claim where none is properly stated. See Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (court can ignore "bald assertions, unsupportable conclusions, periphrastic circumlocution, and the like"); accord LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998).

In Monell the Court explained that local governments may be sued for damages, when the allegedly unconstitutional action implements or executes "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or when a constitutional deprivation has been "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's decisionmaking channels." 436 U.S. at 690-91. Simply because Allen has managed to say the magic words "custom" and "policy" does not mean that either of his complaints properly pleads municipal liability.

The gist of Allen's numerous complaints is that certain corrections officers treated him badly by allowing other inmates to abuse him and by not assisting him when he sought to make his complaints known through the proper channels. Allen does not begin

to allege that York County through any of its final decision makers has officially adopted a policy that would condone such conduct on the part of its corrections officers. In fact what he does allege about official policies and regulations is that he was denied access to them, for example, an official mechanism existed for him file a complaint but the officer assigned to that task kept ripping up what he had written. An official policy did not work any deprivation, but rather it was the officer's conduct. It is true that under Leatherman Allen does not have to plead that the claimed constitutional violation was linked to a particular official policy. But still the complaint when read in a common sense manner has to make some sense. This is especially true in a case like this one where Allen obviously has difficulties understanding pleading requirements and intersperses legal conclusions throughout his factual allegations. Reading Allen's two complaints in tandem it is impossible to reasonably construe an allegation that York County or the York County Sheriff, if he is the final decision maker on these matters, adopted any sort of officially promulgated policy or regulation that led to the claimed constitutional deprivations.

Nor has Allen successfully pled that a municipal "custom" caused a constitutional deprivation, although it is a closer question whether the complaint should be so construed. In order for a "custom or usage" to become the basis of municipal liability, the duration and frequency of the practice must be so widespread and longstanding that the decision making officials' actual or constructive knowledge of the custom can be established. Miller, 219 F.3d at 12 -13. A municipality is liable under a "custom" theory because it tolerated or acquiesced in the widespread unconstitutional practice. See also Britton v. Maloney, 901 F. Supp. 444, 450 (D. Mass. 1995)(" Unlike a

"policy", which comes into existence because of the top-down affirmative decision of a policymaker, a custom develops from the bottom-up. Thus, the liability of the municipality for customary constitutional violations derives not from its creation of the custom, but from its tolerance of or acquiescence in it.").

Applying this analysis to Allen's two complaints, it becomes apparent that the serious constitutional deprivations that he alleges were committed by corrections officers who took pains to engage in schemes and conspiracies to keep their conduct hidden. Allen does not actually allege that pretrial detainees were routinely raped and abused by fellow inmates at the behest of correctional officers. He describes in detail a series of events that happened to him personally and a number of corrections officers, some named and some unnamed, who acted improperly vis-à-vis his detention. The apparent theory is that a number of officers intentionally conspired together to deprive an individual of his constitutional rights and they then devised schemes to keep their conduct secret, pursuant to an established 'custom' that was known or should have been known by York county's official decision makers (presumptively Sheriff Cote). While this complaint alleges a significant number of officers conspired to deprive Allen of his rights, it simply does not allege that sort of behavior was so widespread that the official decision maker can be said to have acquiesced in it and Allen has not pled that Cote had supervisory liability to this conduct.

Allen does plead certain facts that could be construed as arising pursuant to a custom or policy of the York County decision makers. For instance, he does mention overcrowding at the jail and the recurrent problems with spider and ant bites. He additionally refers to a custom surrounding removal of the insulation from the windows.

None of these allegations either singly or in tandem state a claim for a deprivation of constitutional magnitude. To be actionable the custom must have been the cause of and "'the moving force'" behind the deprivation of constitutional rights. Miller, 219 F.3d at 12 (quoting Bordanaro v. McLeod, 871 F.2d 1151, 1156 (1st Cir.1989)). Even if in a theoretical way these sorts of prison conditions might give rise to a constitutional claim, there is nothing in these complaints that suggests that the unpleasant recurring conditions Allen describes had anything to do with the claimed constitutional violations relating to the physical and sexual abuse he suffered at the hands of guards and inmates.

Finally Allen's complaint in Civil No. 02-158 makes reference to the jail riot and the conduct of the other prisoners and the corrections officers while all of the inmates were outside awaiting the arrival of the fire department. Allen references a report done by some agency following that riot and cites the report's conclusions regarding inadequate training. The fact that Allen makes this rather obtuse reference to the investigation of the riot situation does not convert these complaints into actions alleging municipal liability based upon inadequate training of corrections officers. Allen surely is not claiming that poor training is responsible for the cruel treatment he received at the hands of Lynard and Dubois. The conduct he attributes to them is sadistic in nature and, if true, would certainly not be the product of poor training. It cannot form the basis of a claim of municipal liability for failure to adequately train.

Conclusion

Based upon the foregoing, I recommend that the court **GRANT** the motions for judgment on the pleadings and enter judgment in favor of the York County Jail in Civil

No. 01-224-P-C and dismiss the complaint in Civil No. 02-158-P-C, as it does not state a claim against any of the named defendants.[8]

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

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

Dated January 30, 2003

BANGOR
PR1983

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 02-CV-158

ALLEN v. YORK COUNTY SHERIFFS, et al Filed: 07/31/02
Assigned to: JUDGE GENE CARTER Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 550
Lead Docket: None Jurisdiction: Federal Question
Dkt # in Alfred Superior : is CV-02-169

Cause: 28:1442 Notice of Removal

BERT J ALLEN, III
plaintiff

BERT J ALLEN, III
[COR LD NTC] [PRO SE]
03861-036-2A
FCI SCHUYLKILL

[8] In the past Mr. Allen has responded to my orders on recommended decisions by attempting to prematurely file a notice of appeal in the First Circuit. I note for the benefit of Mr. Allen that, even if the court affirms this recommended decision, Civil No. 01-224 P-C remains pending.

	PO BOX 759 MINERSVILLE, PA 17954-0759
v.	
YORK COUNTY SHERIFF'S DEPT defendant	MICHAEL J. SCHMIDT, ESQ. [COR LD NTC] WHEELER & AREY, P.A. 27 TEMPLE STREET P. O. BOX 376 WATERVILLE, ME 04901 873-7771
PHILIP COTE, Individually and in his official capacity as Sheriff defendant	MICHAEL J. SCHMIDT, ESQ. (See above) [COR LD NTC]
UNKNOWN CORRECTIONAL OFFICERS defendant	MICHAEL J. SCHMIDT, ESQ. (See above) [COR LD NTC]