UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JEANNE D. BIRON,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil Docket No. 96-195-P-H***
	)	
WILLIAM H. BETTERS, III, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM DECISION ON DEFENDANTS' MOTION TO BIFURCATE

This action arises out of a traffic stop in the early hours of June 24, 1994, in Wells, Maine, that was followed by the death of the operator of the stopped vehicle. The plaintiff, the administratrix of the estate of the operator, raises claims under 42 U. S. C. § 1983, the Americans with Disabilities Act ("ADA"), and Maine state law. The defendants, a Wells police officer and the Town of Wells, move for summary judgment on all counts of the amended complaint and for separate trials. I recommend that the motion for summary judgment be granted in part and denied in part. I deny the motion to bifurcate.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). 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.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); 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 Assn. of Machinists & Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. Factual Background

On June 24, 1994, Officer Thomas Baran of the York Police Department was traveling on

patrol southbound on U. S. Route 1 in York, Maine, at approximately 4:40 a.m. Affidavit of Thomas M. Baran ("Baran Aff."), Exh. B to Defendants' Statement of Uncontroverted Facts ("Defendants' SMF") (Docket No. 14), ¶ 2. A blue sedan, traveling northbound in the southbound lane, came directly at Baran's cruiser and almost hit it. *Id.* Baran reversed direction, activated his blue lights, and pursued the sedan. *Id.* The driver of the sedan increased speed and moved from the northbound lane into the southbound lane. *Id.* ¶ 3. Baran noted speeds from 50 to 70 miles per hour and requested his dispatcher to notify Ogunquit police of the sedan's approach. *Id.* Baran noted strong braking, erratic maneuvering, and continued driving in the southbound and turning lanes by the sedan's driver as he followed the sedan north. *Id.* ¶ 4.

In Ogunquit, where the sedan's speed was 40 to 45 miles per hour in a zone with a posted speed limit of 25 miles per hour, and up to 77 miles per hour after the sedan passed Ogunquit Square, Officer Lizanecz of the Ogunquit Police Department joined the pursuit. *Id.* ¶ 5. Lizanecz observed several southbound vehicles that were required to take evasive action to avoid head-on collision with the blue sedan. Affidavit of John P. Lizanecz ("Lizanecz Aff."), Exh. D to Defendants' SMF, ¶ 3. Baran then requested his dispatcher to notify Wells police of the pursuit and his location. Baran Aff. ¶ 5. Defendant Betters, a sergeant in the Wells Police Department, and Officer Bean of that department drove their cruisers to the parking lot of Jake's Restaurant on Route 1. Affidavit of William H. Betters, III ("Betters Aff."), Exh. A to Defendants' SMF, ¶¶ 1-3. The sedan slowed to 40 to 45 miles per hour as it approached the Wells town line. Baran Aff. ¶ 6. Betters told Bean by radio that they would attempt to establish a rolling road block around the blue sedan. Betters Aff. ¶ 3. Lizanecz was aware of this plan. Lizanecz Aff. ¶ 3.

When the blue sedan came into view, Bean activated his emergency lights. Affidavit of

Daniel R. Bean ("Bean Aff."), Exh. C to Defendants' SMF, ¶ 3. The driver of the sedan then braked hard and appeared to attempt to turn left or make a U-turn. Baran Aff. ¶ 7, Betters Aff. ¶ 5, Bean Aff. ¶ 3, Lizanecz Aff. ¶ 4. The blue sedan came to rest briefly facing east in the southbound lane of Route 1. Lizanecz Aff. ¶ 4. Betters pulled his cruiser out of the restaurant parking lot and stopped it facing southbound on Route 1 with its front several feet from the driver's door of the blue sedan. Betters Aff. ¶ 6; Bean Aff. ¶ 3. Bean moved his cruiser to a position parallel to the front of the blue sedan. Bean Aff. ¶ 3. Baran placed his cruiser facing the passenger side door of the blue sedan. Baran Aff. ¶ 8. Lizanecz placed his cruiser to the rear and left of Baran's vehicle. Lizanecz Aff. ¶ 4. The blue sedan was not blocked in at the rear. Bean Aff. ¶ 3.

Bean got out of his cruiser, drew his gun, and ordered the driver of the blue sedan to get out of his car. *Id.* ¶ 4. The blue sedan then rammed the rear of Bean's cruiser. *Id.;* Baran Aff. ¶ 9; Lizancz Aff. ¶ 5. Both Baran and Lizancz then got out of their cruisers and drew their guns. Baran Aff. ¶ 9; Lizancz Aff. ¶ 5. As the blue sedan began to back up, Betters moved his cruiser forward until it met the left side of the sedan, in an attempt to prevent the sedan from escaping from the block established by the cruisers. Betters Aff. ¶ 7. The blue sedan continued to rock back and forth, from forward to reverse and back again, with the engine revolving at a high speed and the tires burning rubber and smoking. *Id.*; Baran Aff. ¶¶ 9-10; Bean Aff. ¶ 4; Lizancz Aff. ¶ 5.

Bean opened the driver's door of the blue sedan and saw Biron with his left hand on the steering wheel and his right hand on the gearshift. Bean Aff. ¶ 5. He attempted unsuccessfully to pull Biron out of the sedan. *Id*. Biron continued to move the sedan back and forth. Betters Aff. ¶ 9. Betters got out of his cruiser, ordered Bean out of the way, and sprayed pepper mace into Biron's face. *Id.* ¶¶ 10-11. The pepper mace had no apparent effect on Biron. *Id.* ¶ 11; Baran Aff. ¶ 11;

Bean Aff. ¶ 5; Lizanecz Aff. ¶ 6. Biron continued to move the sedan back and forth. Betters Aff. ¶ 11; Bean Aff. ¶ 6. Baran got onto the hood of Betters' cruiser in order to help remove Biron from the blue sedan. Baran Aff. ¶ 11. With great effort, Betters and Bean were able to pull Biron's left hand off the steering wheel, and Bean applied handcuffs to his left wrist. Bean Aff. ¶ 6; Betters Aff. ¶ 15. Bean then attempted unsuccessfully to gain access to the sedan through the passenger door. Bean Aff. ¶ 7.

Betters continued to order Biron out of the sedan. Lizancz Aff. ¶ 7. There was no response. *Id.* He then struck Biron in the head, having already struck him on the hand, with his bare fist. Betters Aff. ¶ 14; Baran Aff. ¶ 12; Bean Aff. ¶ 7; Lizancz Aff. ¶ 7. Betters estimates that he struck four to seven blows. Betters Aff. ¶ 14. A bystander estimates the number of blows at fifteen to twenty. Affidavit of Robert I. Olson, Jr. ("Olson Aff."),[1] Exh. E to Plaintiff's Statement of Controverted Facts ("Plaintiff's SMF") (Docket No. 16), attached transcript at 2. Biron's head moved only slightly in response to the blows, and they did not appear to affect him. Bean Aff. ¶ 7; Lizancz Aff. ¶ 7. The officers' recollections differ concerning whether Biron's left hand was on the steering wheel or handcuffed when the blows were struck. *Compare* Betters Aff. ¶ 14 *with* Baran Aff. ¶ 12 and Bean Aff. ¶ 7.

Betters was then able to reach through the sedan's steering wheel and turn off the ignition. Betters Aff. ¶ 15; Bean Aff. ¶ 7. All four officers, working together, then managed to remove Biron

[1] The Olson affidavit is made in part on information and belief. Fed. R. Civ. P. 56(e) requires that affidavits submitted in opposition to a motion for summary judgment "be made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." However, the defendants have not objected to the affidavit on the basis of this noncompliance with Rule 56, and I will therefore rely on those statements from the affidavit which appear to be within Olson's personal knowledge.

from the sedan. Baran Aff. ¶ 12; Bean Aff. ¶¶ 7-8; Lizancz Aff. ¶ 8. Biron resisted these efforts. Lizancz Aff. ¶ 8; Bean Aff. ¶ 8. Bean finished handcuffing Biron. Betters Aff. ¶ 16. Bean called for an ambulance at 4:55 a.m., three minutes after he first got out of his cruiser. Bean Aff. ¶ 9. Lizancz checked Biron's pulse three or four times before an EMT arrived soon thereafter. Lizancz Aff. ¶ 9. The ambulance arrived at 5:02 a.m. Ambulance Run Sheet, Exh. F-1 to Defendants' SMF. Upon his arrival at the hospital at 5:39 a.m., *id*., Biron was brain dead as a result of intraventricular hemorrhage, Affidavit of Bruce A. Chaffee, M. D. ("Chaffee Aff."), Exh. G to Defendants' SMF, ¶¶ 2, 3.

At some unspecified time, Biron had been diagnosed as suffering from bi-polar mental disorder with manic and depressive stages. Affidavit of Jeanne D. Biron ("Plaintiff's Aff."),[2] Exh. A to Plaintiff's SMF, ¶ 3. He was employed as a research physicist. *Id.* ¶ 2. He was 40 years old, Exh. F-1 to Defendants' SMF, and "a pretty big guy," Olson Aff., attached transcript at 2. The plaintiff was informed "late on the day of June 24, 1994," that Biron's death had been caused by "a pre-existing medical condition, specifically a brain aneurysm." Plaintiff's Aff. ¶ 4. She was informed "[d]uring the spring of 1995" that the cause of death had been changed, due to "additional autopsy results," to "brain damage caused by hemorrhage and swelling caused by a closed head injury." *Id.* ¶ 5. In the summer of 1995 the plaintiff obtained access to materials concerning the investigation of Biron's death, for which she had been "required to petition the Court" "[d]espite requests for access to the investigation." *Id.* ¶ 6. It was not until this time that she learned that Biron had been "punched in the head multiple times by defendant Betters." *Id*. She filed a notice of claim

---

[2] The plaintiff's affidavit also fails to comply with Rule 56(e). The defendants have not objected to the use of this affidavit, and it will be treated in the same manner as the Olson affidavit.

on September 8, 1995, within 180 days after learning this. *Id.* ¶ 7.

It is the opinion of the physician who performed the neuropathology examination of Biron after his death that the cause of death was "the multiple blows to the head delivered by Sgt. Betters during the arrest and extraction of Mr. Biron from the vehicle." Affidavit of James B. McQuillen, M.D.,[3] Exh. D to Plaintiff's SMF, ¶¶ 1-2, 4. It is Dr. Chaffee's opinion that the type of head injury suffered by Biron is "not normally to be expected to result from being struck with a closed hand." Chaffee Aff. ¶ 4.

The complaint in this action was filed on June 21, 1996. Docket No. 1.

III. Section 1983 Claim

The defendants seek summary judgment on Count I of the amended complaint, which asserts violations of Biron's rights by defendant Betters, in both his individual and his official capacity**,** under the Fourth, Eighth and Fourteenth Amendments to the United States Constitution, Amended Complaint (Docket No. 7) ¶¶ 5-16, and Count II of the amended complaint, which assets violations of the same rights by the defendant Town as a result of its alleged failure to train defendant Betters, *id.* ¶¶ 18-20. Initially, the defendants point out that the Eighth Amendment does not apply to the factual basis presented for the plaintiff's claims in this case. Claims that law enforcement officials have used excessive force in the course of an arrest or other "seizure" of a citizen are to be characterized as invoking the protections of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989). The plaintiff does not dispute this point in her objection. Plaintiff's Objection to

---

[3] Again, Dr. McQuillen's affidavit does not meet the requirements of Rule 56(e). Again, the defendants have raised no objection on this basis.

Defendants' Motion for Summary Judgment ("Plaintiff's Objection") (Docket No. 15). The defendants are entitled to summary judgment to the extent that any of the plaintiff's claims are based on the Eighth Amendment.

A. The Claim Against Betters

The defendants contend that defendant Betters did not use deadly force against Biron, that his use of force was reasonable under the circumstances as a matter of law, and that Betters is entitled to qualified immunity under the circumstances.

> A civil rights claim alleging official use of excessive force in effecting an arrest must contend with the familiar fourth amendment "reasonableness" standard, which balances the public interest in effective law enforcement against the intrusiveness of the challenged police action in light of all the circumstances disclosed by the evidence. *See Graham v. Connor*, 490 U. S. 386, 109 S. Ct. 1865, 104 L. Ed.2d 443 (1989). As with any judicial inquiry into the realm of the reasonable, we first identify our perspective. The inquiry is an objective one and the "question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id*. 109 S. Ct. at 1872. We examine with care the particular facts and circumstances of the case, *id*., to determine whether the force used exceeded "the . . . force . . . necessary" to effect the arrest from the perspective of an objectively reasonable officer at the scene, with due "allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving . . . ." *Id*.

Dean v. City of Worcester, 924 F.2d 364, 367 (1st Cir. 1991).

> By comparison, to establish the qualified immunity defense, a police officer must satisfy one of two tests: *either* that his conduct did not violate "clearly established rights" of which a reasonable person would have known, or that it was "objectively reasonable" to believe that his acts did not violate those clearly established rights.

Finnegan v. Fountain, 915 F.2d 817, 823 (2d Cir. 1990).

"Where the officer has probable cause to believe that the suspect poses a threat of serious

physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.[4]" *Tennessee v. Garner*, 471 U. S. 1, 11 (1985). The defendants argue that Biron was attempting to escape when Betters struck him and that Biron posed a threat of serious physical harm to the other officers because he had been ramming their cruisers with his sedan. However, it is not possible to conclude from the summary judgment record that Biron was attempting to escape at the time; the videotape, appended to Exh. E to Defendants' SMF, shows that it is highly unlikely that Biron could have escaped in his sedan once the cruisers had surrounded him on all sides except the rear, which was off the road. In addition, it is not sufficiently clear from the record to provide a basis for summary judgment that there was probable cause to believe that Biron continued to pose a threat of serious physical harm, through the use of his sedan, to the officers by the time Betters struck him. The Supreme Court's standard of reasonableness "is comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present." *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994). However, it does not immunize conduct where the law clearly proscribes the actions taken. *Id.*

---

[4] The defendants argue that Betters was not using deadly force when he struck Biron in the temple with his fist because he did not intend to kill Biron. Even *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), the authority upon which the defendants rely in this regard, is not so limited in its definition. Holding that whether deadly force has been used must be determined in the context of each case, the Sixth Circuit in *Robinette* considered as well "the probability, known to the officer but regardless of the officer's intent, that the law enforcement tool, when employed to facilitate an arrest, creates a 'substantial risk of causing death or serious bodily harm.'" *Id.* at 912. Betters states in his affidavit that he had not been trained that his hand was classified as an impact weapon, Betters Aff. ¶ 19, but this does not address the *Robinette* definition. The plaintiff has provided evidence, albeit not in appropriate Rule 56 form, which suggests that a reasonable Maine police officer would have known that repeated blows with the hand to a suspect's temple create a substantial risk of causing death or serious bodily harm. Excerpts from Maine Law Enforcement Officer's Manual of Self Defense and Tactics, Exh. F to Plaintiff's SMF. In any event, whether the force used by Betters was deadly or not, the question for summary judgment purposes is whether it was excessive.

The Fourth Amendment right to be free from the use of excessive force is unquestionably an established right. *Fernandez v. Leonard*, 784 F.2d 1209, 1217 (1st Cir. 1986). For the purposes of defendant Betters' qualified immunity defense, therefore, the analysis must focus on the second-step reasonableness inquiry. The court must determine whether an objectively reasonable officer would have known that the degree of force used against Biron violated his Fourth Amendment rights. Betters is protected from liability even if he acted erroneously, so long as he acted reasonably in his use of force. *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1228 (D. Me. 1996). Although the circumstances presented to Betters in this case were more extreme than those with which the officers in *Comfort* had to deal, *Comfort* provides guidance for the resolution of this summary judgment issue.

In measuring reasonableness, the court considers the specific facts at issue, paying particular attention to the crime committed, its severity, the threat of danger to the officer and society, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Id.*; *Graham*, 490 U. S. at 396. Police are authorized to use the level of force "consistent with the amount of force that a reasonable police officer would think necessary to bring the arrestee into custody." *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 205 (1st Cir. 1990).

Here, Biron had driven his vehicle at high speeds in the wrong lane of Route 1 for some distance, forcing several drivers, including Officer Baran, to take evasive action in order to avoid head-on collision. However, at the time defendant Betters struck Biron, his vehicle was surrounded on three sides by police cruisers, one of which was touching the driver's side of his sedan. It is not clear from the summary judgment record whether Biron's left hand had been removed from the steering wheel and his wrist handcuffed before Betters struck the blows; it is also not clear whether

Biron was continuing to drive the sedan back and forth, striking the cruisers, at this time. While Biron clearly refused to comply with the officers' orders to leave his car, there is no evidence that he threatened them in any way other than by moving his sedan back and forth. In addition, the record presents a dispute about the number of times Betters struck Biron in the head. This evidence is central to the excessive force claim. Based on the summary judgment record, a reasonable jury could find that Betters' alleged use of force went beyond the level of force necessary to remove the threat represented by Biron's position behind the wheel of the sedan, and therefore conclude that this force violated Biron's Fourth Amendment rights. Resolution of the question of the lawfulness of Betters' use of force is thus preserved for the finder of fact, and he is not entitled to summary judgment on the basis of qualified immunity. *Comfort*, 924 F. Supp. at 1228-29.

B. The Claim Against the Town of Wells

The plaintiff asserts that her claim against Betters' employer, the Town of Wells, is based upon its failure to train Betters concerning the use of force. Amended Complaint ¶ 19. The defendants argue that the claim against the town is merely based on a theory of *respondeat superior*, which is insufficient under section 1983. *City of Canton v. Harris*, 489 U. S. 378, 385 (1989). The plaintiff responds that the inadequacy in Betters' training in the use of force is so obvious that it amounts to deliberate indifference to the constitutional rights of suspects, the correct test for municipal liability under *Canton*. 489 U. S. at 390 n.10.

The Supreme Court has recently provided the courts with additional guidance in dealing with claims under section 1983 against municipalities based on inadequate training of police officers. In *Board of County Comm'rs v. Brown*, — U. S. — , 1997 WL 201995 (Apr. 28, 1997), the Court noted

that it has "required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Id*. at *4. "The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id*. at *5.

This is not a case in which the plaintiff has demonstrated that the alleged failure to train itself violates federal law or directs an employee to do so. Cases without such evidence "present much more difficult problems of proof." *Id.* at *6. "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Id.* at *5. A plaintiff seeking to establish municipal liability on this basis must demonstrate that the municipal action was taken with "deliberate indifference" to its known or obvious consequences. *Canton*, 489 U. S. at 388.

The plaintiff has presented no evidence in the summary judgment record that the town had a deficient training program intended to apply over time to multiple employees. *Id.* at 390.

> Existence of a "program" makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequence of their action — the "deliberate indifference" necessary to trigger municipal liability.

Board of County Comm'rs at *7 (discussing the *Canton* standard). The plaintiff has made no attempt

in the summary judgment record to establish a pattern of tortious conduct by town employees. Factors peculiar to the officer involved in a particular incident are not usually sufficient to establish that the lack of training by the municipality is the "moving force" behind the plaintiff's injury. *Id.*

In *Canton*, the Supreme Court left open

> the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations[.] [The Court] simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decisions not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice — namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation — that the municipality's indifference led directly to the very consequence that was so predictable.

Id. at *8. Here, the plaintiff offers nothing to suggest that she could establish this "high degree of predictability" at trial. The defendant town is entitled to summary judgment on this claim. *Benjamin v. Aroostook Med. Ctr.*, 937 F. Supp. 957, 963-64 (D. Me. 1996) (summary judgment appropriate when nonmoving party fails to put forth sufficient evidence to establish element essential to its claim).

IV. ADA Claim

The defendants also seek summary judgment on the plaintiff's ADA claim, Count IV of the amended complaint, on the grounds of lack of causation. The claim is asserted only against the town. The defendants focus their argument on the arrest of Biron. However, there is no allegation in the amended complaint that the arrest of Biron was itself the discriminatory act alleged to have

violated the ADA. Indeed, there is no evidence in the summary judgment record concerning the identity of the officer who actually arrested Biron. There is ample evidence in the summary judgment record, undisputed by the plaintiff, to establish that the police had probable cause to arrest Biron regardless of his actions after his sedan was surrounded on three sides by police vehicles. The act of discrimination of which the plaintiff complains appears to be the blows struck by defendant Betters during the attempt to extricate Biron from his vehicle. Amended Complaint ¶¶ 15-16, 20, 28-29. The ADA's legislative history, *see Gorman v. Bishop*, 919 F. Supp. 326, 328-30 (W. D. Mo. 1996), as well as *Jackson v. Inhabitants of the Town of Sanford*, 63 USLW 2351, 1994 WL 589617 (D. Me. 1994), the unreported decision of this court[5] upon which all parties rely, deal with situations in which a person is arrested because of his disability; that is not the situation presented here.

However, the plaintiff offers only a sketchy illustration of what might have been different on June 24, 1994, if defendant Betters had been trained, as she alleges the ADA requires, to recognize mental disability: "[H]e would have realized that Mr. Biron was not resisting his authority . . . . That knowledge would have diffused the escalation at the scene." Plaintiff's Objection at 10. This vague statement is insufficient to establish a violation of the ADA.

In addition, the factual support offered by the plaintiff for her allegation that Biron suffered from a mental disability that substantially limited a major life activity, a requirement for invoking the protection of the ADA, 42 U.S.C. § 12102(2), *Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37, 47-48 (D. Me. 1996), *aff'd* 105 F.3d 12 (1st Cir. 1997), is similarly insufficient. Her affidavit

[5] The First Circuit has indicated that unpublished opinions are never to be cited in unrelated cases, either in the district court or on appeal. *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 523 n.5 (1st Cir. 1988). Practice in this court must be bound by that directive. *See People's Heritage Sav. Bank v. Recoll Management, Inc.*, 814 F. Supp. 159, 163 n.8 (D. Me. 1993).

states only this: "David Biron had been diagnosed as suffering from bi-polar mental disorder with manic and depressive stages. It is my understanding that, on occasion, he would become delusional and 'out of touch . . . .'" Plaintiff's Aff. ¶ 3. The plaintiff offers nothing beyond sheer speculation to support the necessary element of her claim that Biron's actions on June 24, 1994, resulted from a manic-stage manifestation of his mental illness. She offers nothing at all to establish that Biron, who was apparently working in a demanding position, was substantially limited in any major life activity, as that term is defined by 29 C. F. R. § 1630.2(i). The plaintiff bears the burden of proof on the elements of her ADA claim, and she has not pointed to specific facts demonstrating that there is a trialworthy issue on this claim. *National Amusements*, 43 F.3d at 735. Failure to establish disability, one of the elements of a prima facie case under the ADA, will result in the entry of summary judgment against the plaintiff on an ADA claim. *E.g., Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319-20 (8th Cir. 1996). I conclude that the defendants are entitled to summary judgment as a matter of law on this claim.[6]

V. State Law Claim

The defendants seek summary judgment on the plaintiff's claim, Count III of the amended complaint, on the grounds that timely notice was not served under the Maine Tort Claims Act, 14

---

[6] The plaintiff also seeks punitive damages on all counts. Amended Complaint at 6. The defendants seek summary judgment on this element of damages with a one-sentence argument and a citation to *Smith v. Wade*, 461 U. S. 30 (1983). Defendants' Motion for Summary Judgment (Docket No. 12) at 19. *Smith* does establish that punitive damages may be considered by a jury in a section 1983 action when the evidence shows reckless or callous disregard for the plaintiff's rights, as well as intentional violation of federal law. *Id.* at 51. Contrary to the defendants' brief assertion, it is far from "obvious" on this record that the evidence could not show such disregard. The defendants are not entitled to summary judgment on the claim for punitive damages.

M.R.S.A. § 8101 *et seq.* While the amended complaint styles this count as one for wrongful death, the plaintiff does not dispute that the claim is subject to the Maine Tort Claims Act. Under the Act, a written notice must be filed with the potential defendant within 180 days after the cause of action accrues, or at a later time within two years after the cause of action accrues, "when a claimant shows good cause why notice could not have reasonably been filed within the 180-day limit." 14 M.R.S.A. § 8107(1).

The plaintiff filed her notice of claim in this action on September 8, 1995. Plaintiff's Aff. ¶ 7. That date is more than 180 days after June 24, 1994, the day when David Biron died. The plaintiff asserts that she did not learn until "the summer of 1995" that her son "had been punched in the head multiple times by defendant Betters," and that she was informed at the time of his death that her son's death had resulted from a brain aneurysm. *Id.* ¶¶ 4, 6. She does not state who so informed her; she also states that "[d]espite requests for access to the investigation of David's death, I was required to petition the Court to obtain information." *Id.* ¶ 6. She does not provide the dates of these requests, the identity of the person or persons to whom they were made, or any details concerning the court petition. She argues that her lack of knowledge concerning the actions of defendant Betters on June 24, 1994, constitutes good cause under section 8107 for her failure to file notice of her claim within 180 days.

The plaintiff relies on this court's *dictum* in *Springer v. Seaman*, 658 F. Supp. 1502, 1512 (D. Me. 1987), construing the section 8107 "good cause" exception: "If Plaintiff can show that he was unaware of the acts of [the defendant] constituting the alleged [tort] until 180 days or less before

the filing of notice . . ., then the Court might find the 'good cause' standard to be met."[7] However, since that opinion was issued, the Law Court has addressed the "good cause" standard several times, always holding that "good cause" pertains only to a plaintiff's inability to file the claim, *Bruno v. City of Lewiston*, 570 A.2d 1221, 1222 (Me. 1990), or to a plaintiff who was "in some meaningful way prevented from learning of the information forming the basis of [her] complaint," *Gardner v. City of Biddeford,* 565 A.2d 329, 330 (Me. 1989). *See also Smith v. Voisine*, 650 A.2d 1350, 1352 (Me. 1994). While the plaintiff's affidavit suggests in conclusory fashion that someone did not respond to her requests, made at an unspecified time, for information concerning an investigation into her son's death, she has not demonstrated that she was prevented from obtaining information concerning the possible cause of her son's death,[8] or even which of the "materials" she eventually received was the source of the information without which she could not file a notice of claim. *See generally Gardner*, 565 A.2d at 330 (failure to make timely inquiry, even if such inquiry would be "extremely difficult and embarrassing," shows lack of good cause). On the summary judgment record provided by the plaintiff, the defendants are entitled to summary judgment on the state law claim.

VI. Motion to Bifurcate

[7] This court later found that the plaintiff in that case did not have knowledge of the alleged defamation until he learned of the exact contents of the letter at issue, approximately three months before he filed his notice of claim, and therefore had good cause for his failure to meet the 180-day standard. *Springer v. Seaman*, 662 F. Supp. 229, 230 (D. Me. 1987).

[8] Indeed, the ambulance run report completed by Wells Emergency Medical Services on the date of the incident states, *inter alia*, "40 year old male who . . . also suffered multi blows to head with fist . . . ." Exh. F-1 to Defendants' SMF. The plaintiff makes no showing that she was unable to obtain a copy of this document at any time.

The defendants' motion to bifurcate (Docket No. 13) seeks separate trials on the section 1983 claims against Betters and the town, on the theory that evidence that may be admitted on the claim against the town would unfairly prejudice defendant Betters, in that it may involve incidents unrelated to the one which forms the basis of the claim against him. If my recommended decision on the defendants' motion for summary judgment is adopted by the court, there will be no claims to be tried against the town. The motion to bifurcate is denied without prejudice to its renewal in the event that the court does not adopt my recommended summary judgment disposition of the section 1983 claim against the town.

VII. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED** as to Counts II, III and IV of the amended complaint and as to any claims based on the Eighth Amendment and in all other respects **DENIED**. The defendants' motion to bifurcate is **DENIED** without prejudice.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review

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

Dated this 1st day of May, 1997.

____
David M. Cohen
United States Magistrate Judge