UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MOSES SEBUNYA,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 97-202-P-C***
	)	
CUMBERLAND COUNTY, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiff, Moses Sebunya, filed suit against Cumberland County and eight individual defendants[1] in June 1997 for alleged violations of his civil rights stemming from adverse employment actions during his tenure as the program manager for the Cumberland County Jail. Complaint (Docket No. 1). The plaintiff, who is black and a Ugandan native, contends that he was

[1]The original individual defendants were Francine Breton, Esther Clenott, Lyle Cramer, Carol Granfield, Dewey A. Martin, Jeffery L. Newton, Gary E. Plummer and Wesley W. Ridlon, all of whom were sued in their individual and official capacities. Sebunya subsequently dismissed his claims against Cramer, Plummer and Ridlon. Stipulation of Dismissal of Certain Defendants (Docket No. 25). Suit against an official in his or her "official" capacity is merely another way of styling suit against the entity of which the official is an agent. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

disciplined, harassed, demoted and ultimately terminated on the basis of his race and nationality and in retaliation for his exercise of his free-speech rights. *Id*. These actions, he asserts in his First Claim, violated his federal and state constitutional rights to free speech, free association and equal protection under the law.[2] *Id*. ¶¶ 33-34. They also, per his Second Claim, constituted illegal employment discrimination in violation of 42 U.S.C. § 1981. *Id*. ¶¶ 35-36. He seeks compensatory and punitive damages as well as declaratory and injunctive relief. *Id*. at 10.

The defendants now move for summary judgment on all counts. Following oral argument before me on September 10, 1998, I recommend that the motion be granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute 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).

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[2]To the extent Sebunya predicates his suit on violations of the Maine constitution, he has no cause of action. A private right of action exists only for Maine constitutional rights alleged to have been violated through physical force or violence, damage or destruction of property, trespass on property or threats thereof. *Andrews v. Department of Envtl. Protection*, No. Ken-97-657, 1998 WL 472039, at *8 (Me. Aug. 3, 1998). Such is not the case here. In any event, the parties have focused on the redress of federal constitutional violations through 42 U.S.C. § 1983 in briefing the First Claim.

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

To facilitate the evaluation of summary judgment motions, the Local Rules of the court require parties to file certain materials with their legal memoranda. Specifically, the moving party must furnish "a separate, short and concise statement of material facts, supported by appropriate record citations, as to which the moving party contends there is no genuine issue to be tried." [3] Loc. R. 56. The opponent of a summary judgment motion must also provide a factual statement with record citations, pointing to contested issues of fact that require trial. *Id.* These statements of material fact are critical to the outcome of the motion. *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995) ("The parties are bound by their [Local Rule 56] Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein.") Consistent with this principle, I have not credited any factual assertions that do not appear in the statements duly filed pursuant to Rule 56 — wherever else they may happen to appear.

II. Factual Context

Moses Sebunya commenced work as the program manager for the Cumberland County Jail on May 30, 1995 at a salary of $33,743 per year. Answers to Plaintiff's First Set of Interrogatories by Defendant Cumberland County ("County Interrog. Answers") (contained in Docket No. 12) ¶ 2.

[3]Sebunya complains that the defendants' motion for summary judgment is defective in that their Statement of Facts is supported solely by interrogatory answers of one of the parties, Carol Granfield, whom Sebunya asserts "clearly lacks personal knowledge of many of the matters asserted in the answers." Plaintiff's Objection to Defendants' Motion for Summary Judgment (Docket No. 17) ("Plaintiff's Objection") at 3 n.1. Because Granfield declares her statements true and correct under penalty of perjury, and because Sebunya does not point to specific statements as to which Granfield may lack personal knowledge, I have accepted the defendants' submissions.

Sebunya was one of nine management level and sixteen supervisory level employees for the jail, and the first black ever to hold a management position there. Deposition of Jeffery Newton ("Newton Dep.") at 12; Defendant Cumberland County's Answer to Plaintiff's First Request for Admissions ("County Admissions") ¶ 1.

The position of program manager was then a new one at the jail. County Interrog. Answers ¶ 10. The position had been created in response to a basic change in the nature of the jail's operations. The jail previously had been operated through a "linear" method of supervision, in which inmates were located on one side of the cell bars and corrections personnel on the other. *Id*. The "new jail" was premised on a "direct supervision" model, in which corrections officers were located in the same pod with inmates. *Id*. The program manager position was a social services type of position deemed necessary because of the nature of the direct supervision model used at the new jail. *Id*.

Dewey Martin, chief deputy of the Cumberland County Sheriff's Department, considered the programs aspect essential to the success of the jail, as important as gasoline to the operation of a car. *Id*. ¶ 2; Deposition of Dewey Martin dated April 15, 1998 ("First Martin Dep.") at 56. Nonetheless, the Cumberland County Budget Advisory Committee (the "BAC"), a nine-member advisory panel, had questioned the scope of operations of the "new jail" in 1994. County Interrog. Answers ¶¶ 2, 4. Richard Dietz, then chair of the BAC, wrote in a memorandum dated November 14, 1994: "We also question whether the wide-range of social services offered to the inmates in [sic] warranted, considering this facility was built to house people awaiting trial or incarcerated for less than one year." *Id*.

Sebunya, a native of Uganda, possessed qualifications that included an associate degree in

applied science in criminal justice, two baccalaureate degrees and a master's degree in human services administration. Deposition of Moses Sebunya dated April 30, 1998 ("First Sebunya Dep.") at 4, 16-17; Exh. 1 thereto. He was found qualified for the program manager job by a three-person interview panel, and his candidacy was supported by both Martin and Cumberland County Sheriff Wesley Ridlon. First Martin Dep. at 122-23; County Interrog. Answers ¶ 2. On or about July 10, 1995 Sebunya received a written commendation from Ridlon for acquiring donated furniture for the jail. County Admissions ¶ 4.

Cumberland County commissioners Esther Clenott, Lyle Cramer and Gary Plummer were not consulted in advance of the decision to hire Sebunya. County Interrog. Answers ¶ 2; Deposition of Lyle Cramer ("Cramer Dep.") at 14-15. Upon learning of that decision, all three expressed reservations about Sebunya's qualifications for the job. *Id*.

On July 13, 1995 Sebunya attended a noon rally at Portland City Hall in which he criticized Portland Mayor Jack Dawson and other city leaders for failing to speak out against hate crimes aimed at black Somalian refugees. Plaintiff's Objections, Responses and Answers to Interrogatories and Request for Production Propounded by Defendant Cumberland County ("Plaintiff's Interrog. Answers") at 15; Deposition of Moses Sebunya dated May 8, 1998 ("Second Sebunya Dep.") at 91-92. The event was the subject of both a news story and editorial in the Portland Press Herald. Declaration of Moses Sebunya ("Sebunya Decl.") (Docket No. 19) ¶ 2. Sebunya spoke solely in his capacity as a private citizen and president of the Portland chapter of the NAACP, and made no references to his employment during the rally. Plaintiff's Interrog. Answers at 15. There is conflicting evidence in the record as to the manner in which Sebunya's participation in the rally came to the attention of Ridlon, Martin and Clenott; however, there is no dispute that all three knew about

it within a short time of the event. Deposition of Wesley W. Ridlon dated March 17, 1998 ("First Ridlon Dep.") at 25-26; Deposition of Dewey Martin dated April 22, 1998 ("Second Martin Dep.") at 14-15; Deposition of Esther Clenott ("Clenott Dep.") at 38, 41-42, 46-47.

Shortly after the rally Clenott ran into Dawson, who informed her of his "distress" at Sebunya's criticisms. Clenott Dep. at 42-43, 47. Clenott, a Dawson supporter, sympathized and agreed that he had been unfairly criticized. *Id*. at 19, 51. Clenott is a "lady that speaks her mind." First Ridlon Dep. at 30. At some point — the timing again is unclear from the record — Clenott encountered Martin and mentioned that she "was angry that Mr. Sebunya had spoken so badly of a man and incorrectly." Clenott Dep. at 58-59. Dawson had been Martin's high school teacher and football coach, and Martin too was a Dawson supporter. Second Martin Dep. at 33-35. Martin had a goal of reducing public criticism of the Sheriff's Department by its employees. First Martin Dep. at 52-53. Clenott avers that she did not intend that Martin take any adverse action against Sebunya — "[a]bsolutely not." Clenott Dep. at 60-61. She did not, however, instruct Martin *not* to do so. *Id*. Ridlon and Martin acknowledge that Sebunya's participation in the July 13th rally did not provide a legitimate basis upon which Cumberland County could take action against him. First Ridlon Dep. at 28-29; Second Martin Dep. at 22. Cumberland County managers were allowed to work a non-standard workday and attend private functions during the day. Second Martin Dep. at 40.

The record reveals that, commencing on August 1, 1995, Sebunya's relationship with his employer deteriorated. On that day, Martin informed Sebunya that Clenott was angry at him for criticizing Dawson at the July 13th rally. Plaintiff's Interrog. Answers at 15. Martin told Sebunya that Clenott had also complained to Ridlon. *Id*. Martin also mentioned Clenott's anger over the

Sebunya comments to Ridlon. First Ridlon Dep. at 29-30.

On or about September 4, 1995 Martin told Sebunya that he was getting a lot of heat for hiring him and that the commissioners were very upset that he had been hired. Plaintiff's Interrog. Answers at 16. He made similar statements to Sebunya on or about October 2, 1995. *Id*. The parties dispute the reason given for the commissioners' ire. Sebunya states that, when asked, Martin declined to give a reason. *Id*. Martin contends that the commissioners "complained greatly" about Sebunya's lack of participation in the Cumberland County Criminal Justice Advisory Committee, and that he accordingly counseled Sebunya to increase his interaction with it. Second Martin Dep. at 26-27.

On October 18, 1995 Sebunya met with Martin in Martin's office. Plaintiff's Interrog. Answers at 16. Sebunya avers that, during this meeting, Martin questioned whether Sebunya understood English because he was not born here. *Id*. Martin then asked insulting questions such as, "Do you understand when someone says we don't want a black eye?" and "What does a touchdown mean?" *Id*. On that day Martin also told Sebunya that he should be proud to be the only black person on the Cumberland County Criminal Justice Advisory Committee. Sebunya Decl. ¶ 3.

On October 24, 1995 Martin met with Sebunya at Denny's Restaurant in Portland. Plaintiff's Interrog. Answers at 16. The parties' versions of this meeting differ. Sebunya contends that Martin stated that Sebunya was "a duck waiting to be shot," and that the commissioners were pressuring him to get rid of Sebunya. Second Sebunya Dep. at 96, 103. Martin told Sebunya he had three choices: to transfer to one of two other county jobs or to resign. Plaintiff's Interrog. Answers at 16.

While Martin recalls making "similar comments" at Denny's, he states he then considered

Sebunya a friend and was concerned about Sebunya's continued employment. Second Martin Dep. at 26-27, 52-53. Among the issues he discussed with Sebunya at Denny's were "major problems" in Sebunya's performance, including Sebunya's lack of progress on a fly-tying program for inmates. *Id*. at 52, 57-58, 65. He questioned Sebunya's interest in remaining program manager. *Id*. at 58.

On November 20, 1995 Martin called Sebunya into a meeting and repeated that he was taking a lot of heat for hiring him. Plaintiff's Interrog. Answers at 16. He also informed Sebunya that he was a Catholic and that "a lot of Catholics don't like you." *Id*. Sebunya took this as a reference to a perception by some Catholics that Sebunya's public comments chastised the efforts of the Catholic Church in assisting Somalian refugees. Second Sebunya Dep. at 121-23.

Sebunya had a standard six-month probationary period with the county, which was not extended when it ended. First Martin Dep. at 69. During Sebunya's entire term of employment with Cumberland County, he did not receive a written performance evaluation. Second Martin Dep. at 7-8. Nor did any other jail manager. *Id.*

The total jail budget for 1996 was about $9 million. First Martin Dep. at 97. In late 1995, the BAC was looking for savings of $60,000 in that budget. First Ridlon Dep. at 17; Second Martin Dep. at 50-51. The evidence conflicts as to whether the BAC specified these cuts should be made in management. *Compare* First Ridlon Dep. at 17 *with* First Martin Dep. at 95. In any event, Martin recommended in response to the BAC that Sebunya's position be downgraded effective January 1, 1996, entailing a cut in pay that would save the county about $6,000. First Martin Dep. at 92-93, 95. Martin had predicted in September 1995 that there would be a surplus of approximately $600,000 in the 1995 budget. Second Martin Dep. at 139; Exh. 1 to Clenott Dep. That surplus was achieved. Second Martin Dep. at 139.

Martin states that he recommended downgrading Sebunya's job to save it. First Martin Dep. at 92-93. He hoped to appease the BAC by downgrading the program manager position and eliminating a vacant daytime correction officer's security position. *Id*. at 93-96. As a result, and in keeping with Ridlon's wishes, "no one lost their job." *Id*. at 94; First Ridlon Dep. at 15. Ridlon denies that the downgrading of Sebunya's position had anything to do with the commissioners being angry with Sebunya. First Ridlon Dep. at 32.

On December 8, 1995 Sebunya met with Ridlon to express his concerns about Martin's threats and harassment. Plaintiff's Interrog. Answers at 16. Ridlon stated that "Dewey knows nothing about corrections," but failed to take any corrective action. *Id*.

At a meeting in December 1995 at which Dale Austin, the county's human resources director, was present, Martin told Sebunya words to the effect, "you're going to follow orders just like anyone else." County Interrog. Answers ¶ 2. Austin had heard Martin say that before "a number of times" and considered it a "very fair, up-front statement to make." Deposition of Dale E. Austin ("Austin Dep.") at 36. Martin apologized to Sebunya when Sebunya claimed it was a racist statement, saying, "That's not how I meant it, not in any way." Second Martin Dep. at 173.

In December 1995 the Cumberland County commissioners voted to approve a new budget for 1996 that eliminated Sebunya's program manager position and replaced it with a lower- level unit-manager position. County Admissions ¶ 8.

Effective January 1, 1996 Sebunya's position was downgraded from program manager to unit manager, entailing a reduction in pay to $28,408.12 per year. County Interrog. Answers ¶¶ 2, 5. He was the only Cumberland County Sheriff's Department employee whose pay was cut at that time. *Id*. ¶ 5. He also was the only management employee at the jail who did not receive a raise on

January 1, 1996. Second Martin Dep. at 186-87. County Manager Carol Granfield told Sebunya he did not receive the raise because he was still on probation. Sebunya Decl ¶ 7. That was not true. Second Martin Dep. at 187. On March 15, 1996 Sebunya received a 3 percent raise retroactive to January 1, correcting an "administrative oversight." County Interrog. Answers ¶ 2.

On January 10, 1996 Sebunya met with Austin and his new immediate supervisor, Francine Breton. County Interrog. Answers ¶¶ 2, 7. Sebunya disclosed his intention to use eight hours of sick leave for a day (January 8) on which he met with Governor King following a dentist's appointment. Sebunya Decl. ¶ 5. The parties agree that Sebunya was told that meeting with Governor King was an inappropriate use of sick time, County Interrog. Answers ¶ 7, Sebunya Decl. ¶ 5; however, Sebunya states that he was told not to use sick time that way in the future, Sebunya Decl. ¶ 5. He submitted a time sheet requesting eight hours of sick leave for the day that he met with the governor. County Interrog. Answers ¶ 7.

By letter dated January 17, 1996 Sebunya's attorney informed Cumberland County that Sebunya believed he had a claim of race discrimination in employment because of his recent demotion and continuing harassment by Martin. County Admissions ¶ 12; Exh. 2 to Clenott Dep. The letter criticized "the county's shabby treatment of minorities" and named Martin as a perpetrator of racially motivated harassment. Exh. 2 to Clenott Dep. On January 20, 1996 the Portland newspaper reported the Sebunya complaint. Exh. 1 to Deposition of Francine Breton ("Breton Dep."). These accusations angered, hurt and embarrassed Martin. Second Martin Dep. at 141, 172.

In the latter part of January 1996 Martin initiated an inquiry into a potential sexual harassment claim against Sebunya. County Interrog. Answers ¶ 2; Exh. 5 to Austin Dep.; Exh. 1 to Deposition of Carol Granfield dated February 18, 1998 ("First Granfield Dep."). Martin contends

the inquiry stemmed from a tip from a newspaper reporter, Jason Wolfe, that an employee had alleged sexual harassment against Sebunya. County Interrog. Answers ¶ 2; First Martin Dep. at 128-30. Wolfe does not recall telling Martin "that someone at my newspaper had been told that Moses Sebunya had sexually harassed someone named Nikki Darling." Declaration of Jason Wolfe (Docket No. 20) ¶ 2. Martin directed Breton to check into the sexual harassment allegation. Exh. 5 to Austin Dep.; Exh. 1 to First Granfield Dep. Breton questioned the employee, Nikki Darling, who denied any complaint of sexual harassment against Sebunya. *Id.* This ended the inquiry, and no disciplinary action was taken against Sebunya. *Id.* While Sebunya was employed by Cumberland County, no complaints of sexual harassment were made against him. County Admissions ¶ 14.

On February 21, 1996 Granfield met with Ridlon, Martin, Breton, Austin and another employee, Brian Morrison. Austin Dep. at 59-60. She suggested that Sebunya's file be compiled and presented to the county's attorney, Pat Dunn, for review for potential termination. *Id.* at 60. Those present arrived at a consensus that Sebunya should be terminated from employment. *Id.* at 67.

By letter dated February 23, 1996 counsel for Sebunya sent notice to Granfield that Sebunya was being unfairly investigated for sexual harassment solely because of his race and pending complaint about race discrimination. Exh. 3 to Clenott Dep.

Sebunya met with Austin and Breton on February 27, 1996. County Interrog. Answers ¶ 2. Breton told Sebunya that she would like to meet with him every Monday morning to review what he had accomplished during the previous week and to plan assignments for the next week. *Id.* Sebunya said he would not attend such meetings. *Id.* This reporting requirement was not imposed on any other manager. Plaintiff's Interrog. Answers at 17. At the end of the meeting, Breton gave

Sebunya a written reprimand for improper use of sick leave on January 8. County's Interrog. Answers ¶ 2. In response, Sebunya laughed. *Id*.

On February 29, 1996 Sebunya made a written complaint to Ridlon that Martin and Breton were subjecting him to unreasonable warnings and reprimands and other harassment because of his prior complaints about race discrimination in the workplace. First Ridlon Dep. at 47; Exh. 8 to First Granfield Dep. The memorandum indicates that Martin and Breton, among others, were copied. Exh. 8 to First Granfield Dep.

As a result of Sebunya's treatment of Breton at the February 27 meeting, a so-called predetermination hearing was held on March 8, 1996. County Interrog. Answers ¶ 7. Those in attendance included Martin, Breton, Sebunya and counsel for Sebunya. *Id*.

On April 30, 1996 Sebunya made a written complaint to jail administrator Jeffery Newton about the racist comments of a corrections officer concerning a minority inmate, including the statements, “Why don't they stay where they came from?” and “Why do they bring them here?” Second Martin Dep. at 167-68; Exh. 10 to Second Martin Dep. The memorandum indicates that Ridlon, Martin and Breton were copied. Exh. 10 to Second Martin Dep.

By memorandum dated May 1, 1996 Martin reprimanded Sebunya for his conduct toward Breton at the February 27th meeting. County Interrog. Answers ¶ 7. Specifically, he found Sebunya guilty of failing to provide what was appropriately requested, acting in a threatening manner toward Breton by pointing his finger at her and using an aggressive tone of voice, and showing disrespect by laughing. *Id*. Sebunya states that, at the March 8 predetermination hearing, he heard Breton admit he had never threatened or been rude to her. Sebunya Decl. ¶ 6. He contends that he never raised his voice to Breton. Second Sebunya Dep. at 169.

On May 6, 1996 Sebunya made a written complaint to Ridlon concerning complaints he had received from minority employees at the jail about racial slurs and the use of racist tactics to perpetuate racism in the institution. First Ridlon Dep. at 49; Exh. 9 to First Granfield Dep. The memorandum indicates that Granfield, Martin, Newton and Breton, among others, were copied. Exh. 9 to First Granfield Dep.

On May 17, 1996 Martin gave Sebunya a written reprimand for failing to notify Breton of an absence from work. County Interrog. Answers ¶ 7. Sebunya was absent on the date in question because he was too sick to work. Sebunya Decl. ¶ 8. He declares that he left a message to that effect that morning on the administrative secretary's voice mail. *Id*. Sebunya had no major problem with absenteeism and did not miss a lot of work. Second Martin Dep. at 207.

In June 1996 Ridlon received a copy of a notice of claim on behalf of Sebunya claiming he had been demoted and harassed because of his race. First Ridlon Dep. at 57; Exh. 4 to Clenott Dep.

On or about June 20, 1996 Martin received a copy of a written complaint from Sebunya to Newton concerning alleged inappropriate questioning of African American visitors to the jail. Second Martin Dep. at 161-62; Exh. 3 to Newton Dep. On the same date, Sebunya sent a memorandum to Newton noting that he was uncomfortable with Newton's repeated references to his claims of race discrimination and requesting that Newton discuss only work-related issues with Sebunya. Sebunya Decl. ¶ 9; Exh. 4 to Newton Dep.

On or about July 1, 1996 Sebunya sent county employee Brian Morrison a written complaint about race discrimination in the workplace, including inappropriate interrogation of people of African descent and use of the term “slave labor” to refer to a black inmate. Exh. 6 to Newton Dep. Martin and Newton recalled receiving a copy. Second Martin Dep. at 155; Newton Dep. at 92-93.

Sometime between June and July 1996 an employee reported to Newton that Sebunya had made inappropriate comments in the public lobby area of the jail on June 9, 1996. County Interrog. Answers ¶ 7. She said this was not the first time he had done so. *Id*. Sebunya allegedly referred to Martin as an "asshole" and implied that he was a liar. *Id*. This allegation led to a predetermination hearing on July 19, 1996, which Sebunya attended with his attorney. *Id*.

Ridlon informed Sebunya by memorandum dated November 4, 1996 that he had concluded Sebunya had engaged in improper conduct in the jail lobby but that too much time had elapsed since the predetermination hearing to impose discipline. *Id*. Sebunya contents that he neither termed Martin an "asshole" nor suggested he was a liar. Sebunya Decl. ¶ 10.

By memoranda dated November 13, 1996 County Manager Carol Granfield informed both Sebunya and Steven Searcy, support service director, that their positions would be eliminated "as a result of budgetary considerations that involve a review of management positions." County Interrog. Answers ¶ 2. Searcy is a white male. *Id*. Sebunya was offered a position as a corrections officer, and Searcy as an entry-level patrol officer. *Id*. Sebunya declined, and Searcy accepted. *Id*.

The BAC had wanted to eliminate three management positions in the 1997 budget. Newton Dep. at 52-53. Granfield represented that Sebunya's position was eliminated as a result of budgetary concerns that had nothing to do with performance or seniority. Deposition of Carol Granfield dated May 22, 1998 ("Second Granfield Dep.") at 21-24; Exh. 12 to Second Granfield Dep. Martin, however, states that performance was a factor, and that Granfield should have been aware of that. First Martin Dep. at 72-73. Newton avers that performance factored into the recommendation to eliminate both Sebunya's and Searcy's positions. Newton Dep. at 59, 62-64, 72. Ridlon believed that the elimination of Sebunya's position in late 1996 was unnecessary and that the position was needed.

First Ridlon Dep. at 20, 22. Other management positions could have been eliminated instead of Sebunya's. First Martin Dep. at 99-100.

In November 1996 Newton restricted Sebunya from "access into facility, secured or otherwise." Newton Dep. at 35; Exh. 1 thereto. There was no basis for restricting Sebunya from unsecured areas of the jail as of that time. Second Martin Dep. at 160.

On December 9, 1996 the county commissioners held a public hearing on the proposed 1997 budget. Sebunya Decl. ¶ 11. At the hearing citizens expressed concern that race and retaliation for unpopular speech were playing a role in the decision to eliminate Sebunya's position. *Id.* Commissioner Plummer responded to those concerns by stating that it was unfortunate that this was what people legitimately believed. *Id.*

By letter dated December 20, 1996 Granfield confirmed to Sebunya that the county commissioners on December 16th had adopted a 1997 budget eliminating the unit manager program position. County Interrog. Answers ¶ 2; Exh. 4 to Ridlon Dep. The 1997 budget also provided raises of approximately 13 percent for Granfield and 3 percent for all managers employed at the jail. County Admissions ¶¶ 15-16. Sebunya's position was terminated effective December 31, 1996. County Interrog. Answers ¶ 2. Sebunya's job duties were taken over by Breton, who does not have a college degree. First Martin Dep. at 103; Second Martin Dep. at 200. The written job description for Sebunya's position in 1996 required a four-year college degree. Austin Dep. at 143-44; Exh. 9 to Second Martin Dep. Martin believed that Breton was qualified to perform the job duties by virtue of training and experience. First Martin Dep. at 103-04.

In 1997 an educational coordinator position opened up at the Cumberland County Jail and was filled. First Martin Dep. at 58. The parties dispute whether the county contacted Sebunya to inform

him of the opening. *Compare, e.g.*, Sebunya Decl. ¶ 12 *with* Deposition of Brian Morrison at 81-82, 90.

III. Discussion

In racial-discrimination cases in which there is no direct evidence of discriminatory animus, a plaintiff must first establish a prima facie case of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). In the context of employment termination, a plaintiff satisfies this burden by showing his or her (i) membership in a protected class, (ii) satisfactory job performance, (iii) discharge and (iv) eventual replacement by a person with his or her qualifications. *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 95 (1st Cir. 1996). The defendants concede that the plaintiff was a member of a protected class, was qualified to perform his job and that his position at the jail was eliminated. Motion for Summary Judgment by the Cumberland County Defendants ("Motion") (Docket No. 11) at 6.

Establishment of a prima facie case raises a presumption of employment discrimination, which the defendant may rebut by adducing evidence that the adverse actions were taken for legitimate, nondiscriminatory reasons. *St. Mary's Honor*, 509 U.S. at 507. This having been done, the presumption of discrimination falls away. *Id.* at 507-08. The plaintiff then must ultimately persuade the trier of fact, by a preponderance of the evidence, not only that the proferred reasons were pretextual but also that the real reasons were racial. *Id.* Rejection of an employer's reasons as pretextual permits, but does not compel, a finding that the employer was in fact motivated by racial animus. *Id*. at 511. The same burden-shifting analysis applies in both the section 1983 and section

1981 contexts.[4] *Id.* at 506 n.1.

Turning to the speech-retaliation components of Sebunya's claims, the analytical framework for these too is well-established. A public employee must first show that he or she was speaking on a matter of public concern. *Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 170 (1st Cir. 1995). If so, the court must balance the employee's interest in commenting upon matters of public concern against any resultant disruption to the employer's public business. *Id*. Third, the employee must prove that his or her speech was a substantial or motivating factor in the adverse employment action. *Id*. Finally, the employer must be afforded an opportunity to prove that it would have reached the same decision even absent the protected conduct. *Id*. The mere fact that a speech is made privately, or internally within a municipal office, is not decisive of the question whether it addresses a public concern. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979). Protection encompasses "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76 n.8 (1990) (citation and internal quotation marks omitted).

Sebunya in this case seeks punitive damages. A defendant in a civil rights action may be subject to such damages for conduct "shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." [5] *Smith v. Wade*, 461 U.S. 30, 56 (1983). The First Circuit has indicated that, to the extent the record raises material

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[4]The defendants argue that section 1981 pertains only to formation of contracts and thus is inapplicable in this case. Motion at 4. Congress broadened the scope of the statute in 1991 to include "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304-05 (1994).

[5] Sebunya concedes that a municipal defendant may not be held liable for punitive damages. Plaintiff's Objection at 19.

issues as to state of mind, summary judgment is inappropriate with respect to punitive damages. *See, e.g.*, *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987) (stating, in context of employment-discrimination case, that decision whether to award punitive damages within jury's discretion in cases requiring proof of intentional wrongdoing).

Sebunya also seeks injuntive relief, to which the defendants argue he is not entitled because he demonstrates no likelihood of immediate irreparable injury. Motion at 13. Sebunya correctly rejoins that injunctive relief (such as reinstatement) is an available remedy in the context of a section 1981 employment-discrimination claim. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).

Looking beyond the merits of Sebunya's underlying causes of action, there are yet several hurdles to an ultimate finding of liability. These include the special proof needed to hold a municipal defendant liable, and the affirmative defenses of absolute legislative immunity and qualified immunity that individual defendants may assert.

Municipalities may not be held liable for the acts of their employees on a respondeat superior theory. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121-22 (1988). Rather, they may be held liable only to the extent that the acts complained of result from an official "policy" or "custom" of the municipality or, if isolated acts of individuals, can be considered tantamount to municipal "policy" because taken by "final policymakers" or those to whom final policymaking authority clearly was delegated. *Id*. at 121-23, 126. The question whether an actor is a "final policymaker" is determined with reference to state law. *Id*. at 123. If the final policymaker — or its clear delegee[6] — ratifies

[6] Determination whether authority has been delegated sufficiently to warrant the imposition of municipal liability can be thorny. *See,e.g.,Silva v. Worden*,130 F.3d 26, 31 (1st Cir. 1997) (fact that subordinate was "head guy" at yard did not establish delegation of final policymaking authority).

both the subordinate's decision and the underlying basis for it, the municipality may be held liable for those acts. *Id*. at 127.

The defendants raise two shields applicable to those sued in their individual capacities, the affirmative defenses of absolute legislative immunity and qualified immunity. To the extent that an act of a municipal official is legislative, the official is absolutely immune from any liability flowing from that act. *Bogan v. Scott-Harris*, 118 S. Ct. 966, 973 (1998). Motive and intent are irrelevant. *Id*. Non-legislators too are entitled to the protection of this immunity to the extent they are performing legislative acts. *Id*. (mayor entitled to absolute immunity for roles in introducing budget, signing ordinance into law). Sebunya concedes that the county commissioners are entitled to absolute legislative immunity for their acts of voting on the Cumberland County budget. Plaintiff's Objection at 17.

Qualified immunity is afforded to individual plaintiffs to the extent that a reasonable person would not have known his or her conduct was wrong based on the state of the law as it existed at the time of the acts in question. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). The Court in *Harlow* underscored the "objective" nature of this test, consciously rejecting any "subjective" component that would entail inquiry into an official's state of mind. *Id*. at 815-17. "[B]are allegations of malice," the Court reasoned, "should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id*. at 817-18.

Sebunya asserts, Plaintiff's Objection at 19, and no one could reasonably dispute, that the causes of action upon which his suit is based were clearly established as of the time of the events at issue. But this does not end the inquiry. The question, for purposes of qualified-immunity analysis,

is whether a reasonable person would not have known that his or her conduct was wrong. In the context of discrimination cases, this analysis is problematic. Does the conduct at issue encompass the actor's purported impermissible animus, despite the seeming *Harlow* prohibition against inquiry into the actor's subjective state of mind?

In a carefully reasoned decision, the First Circuit held that *Harlow* did not foreclose inquiry into motive in cases in which "the official's state of mind is a necessary component of the constitutional violation he allegedly committed." *Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 45 (1st Cir. 1988). Thus, if there were a triable issue as to whether an official acted with discriminatory motive, a grant of qualified immunity at the summary judgment stage would be inappropriate. *Id*. at 47. Hewing to this holding in 1997, the First Circuit noted the "unresolved tension" between "specific-intent torts and the objective *Harlow-Anderson* qualified immunity test," expressing hope that the Supreme Court would shed light on this murky area in a case from the District of Columbia Circuit that it had accepted for review. *Tang v. State of Rhode Island*, 120 F.3d 325, 327-28 (1st Cir. 1997).

The Supreme Court did indeed address the issue — at least in dictum — in the case to which the First Circuit referred. *Crawford-El v. Britton*, 118 S.Ct. 1584 (1998). In *Crawford-El*, a prison inmate alleged that a shipment of his belongings had been misrouted for allegedly improper motives. In rebuffing the lower court's attempt to impose a heightened standard of proof upon the plaintiff, the Court devoted considerable attention to the related issue of qualified-immunity analysis. In so doing, it distinguished between general malicious motivation — which, per *Harlow*, remains irrelevant to qualified-immunity analysis — and impermissible discriminatory animus — which constitutes the "primary focus" in an intent-based cause of action. *Id*. at 1592, 1594. Thus, evidence of plain-vanilla

animus (that the prison official hated the prisoner) would not suffice to defeat a qualified-immunity defense. *Id*. at 1594. On the other hand, the Court implied, evidence demonstrating the key element of the cause of action (in that case, that the official intended to retaliate against the prisoner's speech) could suffice to do so. *Id*. I conclude that this dictum leaves the First Circuit's well-reasoned precedents intact.

A. Francine Breton

Sebunya complains that as of January 1996, when Francine Breton became his direct supervisor, she participated in a campaign of baseless disciplinary actions against him. Plaintiff's Statement of Material Facts in Support of Objection to Motion for Summary Judgment by the Defendants ("Plaintiff's SMF") (Docket No. 18) at 16-19. The record reveals that Breton imposed one written reprimand on Sebunya, on February 27, 1996, for improper use of sick time. She also on the same day sought to require him to report his progress on projects weekly and work with her to plan his assignments for the following week. Finally, she was involved at least peripherally in several other actions of which Sebunya complains: investigation in late January 1996, at Martin's request, into an allegation of sexual harassment against Sebunya, and reprimands by Martin on May 1, 1996 for rudeness to Breton, and on May 17, 1996 for failure to notify Breton of an absence.

These actions took place against the backdrop of Sebunya's escalating series of complaints of racial discrimination on behalf of himself and other minorities employed or incarcerated by the county, commencing with a January 17, 1996 condemnation of the county's treatment of minorities that was publicized in the Portland newspaper. This was followed by a February 29, 1996 memorandum to Ridlon (which indicates Breton was copied) complaining about Martin and Breton's "retaliative hostility"; an April 30, 1996 complaint (which Breton investigated) concerning racist comments by

a corrections officer; and a May 6, 1996 memorandum to Ridlon (which indicates Breton was copied) deploring poor treatment of minority employees.

Construing the record in the light most favorable to Sebunya, he establishes the basic elements of a prima facie case of racial discrimination against Breton: that (i) he is black, (ii) he was performing his job satisfactorily, and (iii) Breton took adverse actions against him. The defense counters with evidence that the actions complained of were taken legitimately on the basis of Sebunya's poor performance. At this point, the presumption of race discrimination dissolves; however, Sebunya on this record makes a strong enough case to survive the defendants' motion for summary judgment. Were a trier of fact to credit Sebunya's version of the basis (or lack thereof) for Breton's disciplinary acts, particularly if "accompanied by a suspicion of mendacity" on the part of the defendants, it could discern a motivation of racial animus. *See, e.g., St. Mary's Honor*, 509 U.S. at 511.

Sebunya likewise makes out a case against Breton sufficient to survive summary judgment on the issue of retaliation based upon speech. The speech at issue, concerning racial discrimination, clearly addressed a "public" matter, even when contained in internal memoranda. *See, e.g., Tao v. Freeh*, 27 F.3d 635, 640 (D.C. Cir. 1994) (internal statement "concerning racial discrimination on the part of a public agency is a matter of public concern"). There is no showing in the record that this speech disrupted the business of the jail or the sheriff's department. Breton was aware of at least some of Sebunya's stream of allegations against the county. If Sebunya's version of events is believed, and in view of the timing of the disciplinary actions, a trier of fact could infer that Sebunya's protected speech was a motivating factor for Breton's adverse actions and that those actions would not have been taken "but for" the speech.

Breton's defense of qualified immunity is unavailing — despite the fact that the behavior of

which Sebunya complains is innocuous on its face. This is so because (i) any reasonable official should have known in 1996 that racial discrimination and retaliation against "public" speech were impermissible and because (ii) there are genuine issues of material fact as to Breton's motivations for taking her seemingly harmless acts. For the same reasons, I am reluctant to judge at this point in these proceedings that punitive damages are clearly out of line. A supervisor's imposition of discipline, standing alone, is hardly evil, outrageous or recklessly indifferent to an employee's rights. Yet, could not that calculus change were those same incidents of discipline determined to have been imposed because of the color of that employee's skin or because the employee had spoken out against racism in the workplace? Such a decision should be reserved to the trier of fact.

B. Esther Clenott

Sebunya concedes that Clenott is entitled to absolute legislative immunity for her role in voting on the 1996 and 1997 Cumberland County budgets. Plaintiff's Objection at 17. The summary judgment record reveals, however, that she also took actions outside of this protected sphere. She expressed reservations whether Sebunya was qualified for the job of program manager, she complained to Martin that Sebunya had wronged the Portland mayor, and (viewing the record in the light most favorable to Sebunya) in the fall of 1995 she and the other commissioners pressured Martin for unstated reasons to dismiss Sebunya. While not copious, this constitutes sufficient evidence to raise triable issues of material fact.

Construing the record in the light most favorable to Sebunya, he makes out a prima facie case of racial discrimination in establishing that (i) he is black, (ii) he was performing his job satisfactorily, and (iii) Clenott took adverse actions against him (i.e., pressuring Martin to dismiss him). Were a trier of fact to credit Sebunya's assertions, and disbelieve the defendants' side of Clenott's story, it could

infer that Clenott's actions were taken on account of race.

As regards Sebunya's claim of retaliation based on speech, a trier of fact could find for Sebunya by (i) crediting Sebunya's assertions that, according to Martin, the commissioners were complaining and pressuring him to dismiss Sebunya, (ii) discrediting the defendants' claim that any such criticisms were made for legitimate, non-discriminatory reasons, (iii) discrediting Clenott's denial that she intended Martin to take any adverse action against Sebunya on account of the rally, and (iv) inferring that Clenott's acknowledged anger toward Sebunya fueled her actions toward him, and that she would not have taken those actions "but for" Sebunya's speech.

Clenott's defense of qualified immunity, and her motion to dismiss as regards punitive damages, fail for the same reasons discussed in the context of Sebunya's complaints against Breton.

C. Carol Granfield

Sebunya targets county manager Granfield for her decision to recommend termination of his position effective as of the 1997 Cumberland County budget year. Plaintiff's SMF at 20-23. Like the mayor in the Supreme Court's *Bogan* decision, Granfield acted in a legislative capacity in recommending that the county commissioners adopt a 1997 budget that eliminated Sebunya's and Searcy's positions. Her recommendations, as well as her motives and comments concerning them, all are encompassed by absolute legislative immunity. *Bogan*, 118 S.Ct. at 973.

At oral argument, Sebunya contended that Granfield stepped outside the boundaries of legislative immunity in terminating his position in November, several weeks prior to the commissioners' vote on the budget in which the position officially was eliminated. The cases that Sebunya cites for this proposition, *Jessen v. Eastchester*, 114 F.3d 7, 8 (2d Cir. 1997), and *Carver v. Foerster*, 102 F.3d 96, 102 (3d Cir. 1996), both predate *Bogan* and are factually distinguishable from

the instant case. The plaintiff in *Jessen* and some of the plaintiffs in *Carver* were fired before any request was made to eliminate their positions as part of a legislative process. *Jessen*, 114 F.3d at 8; *Carver*, 102 F.3d at 98. The defendant in *Carver*, moreover, had unilaterally ordered all supporters of his political opponent fired. *Carver*, 102 F.3d at 100. Although Granfield considered firing Sebunya, he never was fired. Granfield merely notified him that his position would be terminated as part of the budgetary process, and indeed his position was not actually terminated until after the budget vote. Granfield's activities in terminating Sebunya's position formed "integral steps in the legislative process." *Bogan*, 118 S.Ct. at 973.

D. Dewey A. Martin

Deputy Sheriff Martin, whom Sebunya accuses of a campaign of harassment commencing after the July 1995 rally, figures prominently in this case. Sebunya's numerous allegations can be distilled into four categories: (i) a series of meetings in the fall of 1995 in which, among other things, Martin relayed criticism of Sebunya from the county commissioners, (ii) Martin's decision in the fall of 1995 to recommend that Sebunya's position be downgraded, (iii) Martin's initiation of an allegedly groundless sexual harassment inquiry in January 1996, and (iv) his participation in a series of allegedly baseless disciplinary actions against Sebunya in 1996.

Martin is entitled to absolute legislative immunity with regard to his role in the downgrading of Sebunya's position as part of the 1996 jail budget. This, like Granfield's action in recommending the elimination of the position the following year, formed an integral part of a legislative process.

Turning to the other three categories of acts of which Sebunya complains, it is not necessary to parse through their myriad details to conclude that Sebunya makes out a case sufficient to go to a trier of fact. A reasonable jury could, were it to disbelieve Martin's proferred reasons for his actions,

discern racial and/or national-origin animus in view of the volume and timing of those actions and the nature of certain insensitive remarks made to Sebunya.[7]

With respect to Sebunya's claims of retaliation on the basis of the July 13, 1995 speech, Sebunya produces undisputed evidence that Clenott informed Martin of her anger at Sebunya for denigrating Mayor Dawson, that Dawson happened to have been Martin's high school teacher and football coach, and that Martin desired to minimize public criticism of the Sheriff's Department by employees. The defendants proffer legitimate, non-discriminatory reasons for Martin's actions against Sebunya; however, to the extent these were disbelieved, a trier of fact could conclude that Martin had sufficient motive to retaliate against Sebunya for his July 1995 speech.

Likewise, Sebunya's escalating complaints of racism commencing in January 1996 could form the predicate for a finding by a trier of fact that one or more of Martin's actions during that year were taken in retaliation for those incidents of protected speech. Martin, whom Sebunya named in both public and private complaints of racism, was hurt and angered by these accusations. The defendants offer evidence that Martin's acts were taken purely for legitimate business reasons and that in fact

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[7]Sebunya argues that he has produced direct evidence of racial or national-origin animus on the basis of three statements Martin made to him: (i) "your [sic] going to follow orders just like anyone else," (ii) that he should be proud to be the only black on the Cumberland County Criminal Justice Advisory Committee, and (iii) in the context of questioning Sebunya's command of the English language, "Do you understand when someone says we don't want a black eye?" and "What does a touchdown mean?" Plaintiff's Objection at 12-13. The production of direct evidence of animus entitles a discrimination plaintiff, without further proof or analysis, to take its case to the trier of fact. *Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co.*, No. 97-2229, 1998 WL 432081, at *4 (1st Cir. Aug. 5, 1998). The three Martin statements, while insulting, do not (at least in cold type) clearly convey racial or national-origin animus. The second statement, for example, may have been intended (however crudely) to encourage or compliment Sebunya. And there is undisputed testimony that Martin had made comments to other employees similar to the first of the statements. *See, e.g.*, Austin Dep. at 36. What matters here is Martin's intention, not the listener's subjective reaction. In any event, Sebunya builds a sufficient case against Martin to reach a trier of fact.

Martin had endeavored to help a floundering Sebunya, whom he considered at one point a friend. But, again, to the extent these proffers were disbelieved, a finding of retaliation could be made.

A grant of qualified immunity, and a dismissal of the punitive-damages portion of Sebunya's case against Martin, are inappropriate for the reasons discussed above in the context of the claims against Breton.

E. Jeffery L. Newton

Sebunya complains that in November 1996 jail administrator Newton barred him from any access to the jail compound, including unsecured areas that are open to the public. Plaintiff's SMF at 20. He cites testimony from Martin, which the defendants do not counter, that there was no basis upon which to restrict Sebunya from unsecured areas. Newton was aware of Sebunya's claims of racial discrimination by the county, as evidenced by a June 1996 memorandum from Sebunya to Newton asking that Newton refrain from discussing Sebunya's legal claims.

Sebunya creates a triable issue of fact on both the racial-discrimination and speech-retaliation components of his claims against Newton. On the race-discrimination claim, Sebunya again makes out a prima facie case, construing the record in the light most favorable to him. A trier of fact could discern race as a motivating factor based upon Newton's lack of justification for the overly broad restriction on Sebunya's access to the jail. On the speech-retaliation claim, a trier of fact also could infer that Newton would not have groundlessly restricted Sebunya from even unrestricted areas of the jail were it not for Sebunya's unpopular and irritating speech.

For the same reasons outlined above, a grant of qualified immunity or dismissal of the punitive-damages portion of Sebunya's claims is inappropriate.

F. Cumberland County

In addressing the liability of Cumberland County in this case, it is necessary to determine who (or what) was the final policymaker with respect to the acts complained of and whether that policymaker in turn delegated any of those responsibilities.

Under Maine law, a county employee "may be laid off or dismissed, with the approval of the county commissioners or personnel board, to meet the requirements of budget reductions or governmental reorganization." 30-A M.R.S.A. § 501(3)(A). At oral argument, the parties stipulated that no personnel board exists in Cumberland County. In the instant case, the county commissioners exercised their final decision-making authority in voting to approve the budgets that reorganized and finally eliminated Sebunya's position. The county accordingly may be held liable for those decisions to the extent that the commissioners ratified not only those actions but also the underlying bases for them. *Praprotnik*, 485 U.S. at 127, 130. *See also Feliciano v. Cleveland*, 988 F.2d 649, 656 (6th Cir. 1993) (no evidence policymaker knew of manner in which drug test conducted); *Kujawski v. Board of Cmm'rs*, 999 F. Supp. 1234, 1239-40 (no evidence that reviewing authority knew of unconstitutional acts in reviewing decision). Even assuming, arguendo, that Clenott harbored an impermissible motive in criticizing Sebunya's speech, there is no evidence that the other two commissioners were aware of, much less shared, that view when they acted on the 1996 budget in late 1995. There is thus no basis upon which to find that a majority of the commissioners — whose acts would be imputable to the county — embraced an impermissible animus for the budgetary action.

With respect to the 1997 budget, the question is a closer one in that the commissioners were then well aware of Sebunya's allegations of discrimination and retaliation. Indeed, some community members at the public hearing on the 1997 budget expressed concern that elimination of Sebunya's position could be a racist and/or retaliatory act. Still, it is too great a stretch to equate this awareness

with *ratification* of those grounds for the job elimination. Granfield presented the rationale for her recommendation as strictly budgetary, noting that it had nothing to do with Sebunya's performance or seniority. There is no evidence that the commissioners believed otherwise, or ratified any other basis for the decision. At the public hearing on the 1997 budget, commissioner Plummer responded to concerns about Sebunya by stating it was unfortunate that people legitimately believed Sebunya's position was being eliminated on the basis of race or retaliation. The clear inference from his comment is that the commissioners did not believe this to be the case.

It is next necessary to consider whether Cumberland County could be held liable on the basis of adverse employment actions other than those connected to the budget. Applicable Maine law vests a "county officer or department head"[8] with authority to mete out discipline short of dismissal, subject to a right of appeal by the employee to the county personnel board, if one exists, or to the commissioners. 30-A M.R.S.A. § 501(3); *see also* 30-A M.R.S.A. § 523. These statutes — and in particular the existence of the right of appeal — are critical because they indicate that, as a matter of law, the commissioners were the "final policymaker" with respect to adverse employment actions against Cumberland County employees. As the Supreme Court makes clear in *Praprotnik*, "when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies." *Praprotnik*, 485 U.S. at 127 (emphasis in original). In *Praprotnik* the acts of two agency directors in transferring and laying off the plaintiff were deemed insufficient to form a basis for municipal liability because subject to review and final decision by the Civil Service Commission. *Id*. at 129. Likewise,

[8]The "county officer," in turn, is defined to include, in relevant part, the commissioners and the sheriff. 30-A M.R.S.A. § 1. The term "department head" is not defined, but it would seem logical that the sheriff would be considered the "head" of the sheriff's department.

here the adverse actions taken by Ridlon, Martin, Breton and others against Sebunya were subject as a matter of law to review and final decision by the county commissioners.

The parties stipulate that Sheriff Ridlon essentially did not serve as a final policymaker for the county. Stipulation of Dismissal of Certain Defendants (Docket No. 25). While this supports a strong inference that Ridlon delegated his duties, it does not address whether, in the first instance, the commissioners delegated authority to Ridlon, Martin or anyone else. The parties' Statements of Material Fact contain scant evidence of such a delegation.[9] And, while there is evidence in the record that Martin ran the sheriff's department on a day-to-day basis, such a de facto power structure does not, standing alone, prove that the board or commissioners delegated final policymaking authority to him. *Praprotnik*, 485 U.S. at 130. Sebunya hence adduces insufficient evidence, on this record, from which a trier of fact could conclude that the county commissioners delegated final policymaking authority with respect to the adverse employment actions taken against him.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' summary judgment motion be **GRANTED** as to all defendants with respect to allegations of violation of the Maine constitution, **GRANTED** as to defendants Carol Granfield and Cumberland County on all claims, **GRANTED** as to defendant Esther Clenott solely as concerns her role in voting on the 1996 and 1997 budgets, **GRANTED** as to defendant Dewey A. Martin solely as concerns his role in recommending the downgrading of the plaintiff's position as part of the 1996 budget, and in all other respects **DENIED**. If my recommended decision is accepted, issues remaining for trial are as follows: First Claim, minus

[9]One commissioner, Gary Plummer, testified that although he felt free "to express my concern in terms of the hiring or firing of someone," he did not believe that elected officials had the right to interfere "with the process." Deposition of Gary Plummer at 40.

its Maine constitutional aspect, and Second Claim as against Breton, Clenott (except for her votes on the 1996 and 1997 budgets), Martin (except for his recommendation on the downgrading of plaintiff's position as part of the 1996 budget) and Newton.

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 14th day of September, 1998.

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David M. Cohen
United States Magistrate Judge