No. 18-1303

United States Court of Appeals
for the First Circuit

JUDITH GRAY

Plaintiff - Appellant

v.

THOMAS A. CUMMINGS; TOWN OF ATHOL, MASSACHUSETTS

Defendants - Appellees

ON APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS (WORCESTER)

BRIEF FOR THE DEFENDANTS - APPELLEES
THOMAS A. CUMMINGS; TOWN OF ATHOL, MASSACHUSETTS

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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STATEMENT OF THE ISSUES

I. Whether qualified immunity protects Officer Cummings from the Plaintiff's claim of excessive force?

- Whether Officer Cummings' single application of a taser on the Plaintiff after she had assaulted and battered him and then actively resisted arrest was reasonable under the Fourth Amendment?
- Whether it was clearly established by May 2, 2013 that the application of a taser on a person who had assaulted and battered a police officer and then actively resisted lawful arrest constituted excessive force?

II. Whether Title II of the ADA applies to arrests at all and whether, even if it does, the Town is entitled to summary judgment because Officer Cummings faced exigent circumstances throughout his encounter with the Plaintiff?

STATEMENT OF THE CASE

A. Procedural History

On February 6, 2015, Judith Gray (Plaintiff) filed a complaint in the United States District Court against the Defendants Thomas Cummings and the Town of Athol, Massachusetts. RA 2.[1] The Defendants answered. RA 3. On June 25,

[1] The Defendants refer to the Record Appendix as "RA" followed by a page number.

2015, the Plaintiff filed an Amended Complaint, and the Defendants answered. RA 4. In the Amended Complaint, the Plaintiff asserted claims under 42 U.S.C. § 1983 against Officer Cummings and the Town, a claim under the American With Disabilities Act ("ADA") against the Town, and state law claims against Officer Cummings alleging a violation of the Massachusetts Civil Rights Act ("MCRA"), assault and battery, and malicious prosecution. RA 9-17.

On March 1, 2016, the Defendants filed a Motion for Summary Judgment. RA 5. The Plaintiff opposed, and the Defendants filed a Reply. RA 6. On March 15, 2017, the Court's (Hennessy, M.J.) Report and Recommendation recommended that the Defendants' Motion for Summary Judgment be allowed. Plaintiff's Add. at 1-31. With respect to the Plaintiff's § 1983 claim against Officer Cummings, the magistrate judge concluded that the undisputed record established that Officer Cummings' single deployment of a taser in stun drive mode did not violate the Plaintiff's Fourth Amendment rights and that, even if there had been a constitutional violation, Officer Cummings would be entitled to qualified immunity because his actions did not violate any clearly established right. Id. at 14-15. In finding that qualified immunity applies, the magistrate judge determined the question to be "whether at the time of the incident in May 2013, it was clearly established that the single application of a taser constituted excessive force against

a person who had assaulted a police officer and when immediately brought to the ground by the officer actively resisted arrest." Id. at 15.

The magistrate judge also concluded that the ADA claim against the Town failed as a matter of law because the Plaintiff could not establish either that Officer Cummings misperceived the effects of the Plaintiff's disability as a criminal activity or that he failed to reasonably accommodate her causing her to suffer greater injury than otherwise would have occurred. Id. at 20-24. The magistrate judge recommended the entry of summary judgment in favor of Officer Cummings and the Town on all of the Plaintiff's § 1983 and state law claims. The Plaintiff objected to the Report and Recommendation. RA 6, 7, 294.

On March 15, 2018, the District Court (Hillman, J.) entered an Order adopting the Report and Recommendation. RA 7; Plaintiff's Add. 32. The Court took "no position" on the magistrate judge's determination that Officer Cummings employed reasonable force under the circumstances because it agreed that "the right not to be tased while offering non-violent, stationary, resistance to a lawful seizure was not clearly established at the time of the confrontation between Ms. Gray and Officer Cummings." Plaintiff's Add. 32. The Court entered Judgment in favor of the Defendants that same day. RA 7. On April 6, 2018, the Plaintiff filed a notice of appeal. RA 8.

B. Statement of the Facts

On May 2, 2013, at about 10:17 a.m., Athol Memorial Hospital informed the Athol Police Department that the Plaintiff, a Section 12 patient, had left the hospital and needed to be returned. RA 28, 40. She was wearing a gray shirt, green shorts, and no shoes. RA 28, 40. A "Section 12" is a person who is civilly committed for either being a danger to themselves or others. RA 28, 47.[2]

Officer Cummings was dispatched to the area to look for the Plaintiff. RA 28, 40. A short time later, he observed the Plaintiff walking on the sidewalk on Main Street. Cummings radioed to the dispatcher that he had made contact with the Plaintiff and he gave the location. Id.

Officer Cummings pulled over and began to step out of his cruiser. RA 28, 40. Immediately after Officer Cummings existed his car, the Plaintiff yelled, "Fuck you!" Id. When Officer Cummings told the Plaintiff that she needed to go back to the hospital, the Plaintiff yelled, "I'm not fucking going back!" Id. With the Plaintiff being uncooperative, Officer Cummings radioed for back-up officers to respond. RA 28, 48.

The Plaintiff continued to walk westbound on the sidewalk of Main Street. RA 40. Officer Cummings followed behind her, explaining that she needed to go

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[2] M.G.L. c. 123, § 12 reads, in part, "failure to hospitalize such person would create a likelihood of *serious harm* by reason of mental illness." (emphasis added).

back to the hospital. Id. He followed the Plaintiff on foot for about 20-25 seconds at a distance of about 100 feet. RA 48-49. Many times, he asked the Plaintiff to stop and speak with him. RA 48. The Plaintiff repeatedly responded, "Fuck you!" and kept walking away. Id.

Officer Cummings eventually closed the distance. From a distance of about five feet, the Plaintiff abruptly stopped and faced him. RA 29, 40. She clenched her fists and teeth, flexed her body tightly, and appeared to be looking right through him. RA 29, 40. The Plaintiff again yelled, "Fuck you!" to Officer Cummings. Id. The Plaintiff suddenly approached Officer Cummings very quickly. Id. Believing the Plaintiff was going to try to harm him, Officer Cummings got into a defensive position to protect himself. Id. The Plaintiff, however, continued to approach closer to Officer Cummings, causing him to reach out with a stiff arm and grab the Plaintiff's shirt in an attempt to hold her back. Id. When the Plaintiff continued to push closer to Officer Cummings, he took her to the ground in an attempt to gain control of the situation. Id.

While on the ground, the Plaintiff tucked her arms underneath her chest and flexed tightly. RA 30, 40. Officer Cummings ordered the Plaintiff to stop resisting and to place her hands behind her back. Id. The Plaintiff continued yelling, "Fuck you!" Id., p. 2. Although Officer Cummings again ordered the Plaintiff to stop

resisting and to place her hands behind her back, the Plaintiff continued to ignore and resist his orders. Id.

Officer Cummings again told the Plaintiff to stop resisting and that she would get "tased" if she did not place her hand behind her back. RA 30, 40. The Plaintiff refused to comply and eventually said "fucking do it." Id. Officer Cummings then pulled out his department issued taser, removed the cartridge so that it was in the "drive stun" mode, placed the taser in the middle of the Plaintiff's back, and pulled the trigger. Id. Officer Cummings continued to request that the Plaintiff stop resisting and to place her hands behind her back. Id. The taser was on the Plaintiff's back for four to six seconds. RA 30, 40.

The deployment of the taser worked. The Plaintiff released her arms from underneath her chest and placed them behind her back. RA 30, 40. Officer Cummings then holstered his taser and placed the Plaintiff in handcuffs. RA 31, 40. Officer Cummings did not use any force after the Plaintiff was secured in handcuffs. RA 31, 40-41. Meanwhile, a back-up officer arrived. RA 31, 41.

Once the Plaintiff was handcuffed, she was brought up to a seated position and then assisted onto her feet. RA 31, 41. Officer Cummings radioed for dispatch to send an ambulance. Id. During this time, the Plaintiff continued to yell obscenities at people as they drove by with their car windows down. Id. She repeatedly yelled "Fuck you!" to people across the street pumping gas. Id. The

officers told the Plaintiff to be quiet. RA 31, 41. She ignored the officers' requests and continued to yell obscenities at members of the public. Id. The ambulance arrived on scene and returned the Plaintiff to the hospital. Id.

The Plaintiff acknowledges that she cannot identify any inaccuracies in Officer Cummings' version of events in his police report because she was in "full-blown manic phase" and does not know what happened.[3] RA 8, 27. The Plaintiff has no memory of any physical contact with Officer Cummings. RA 27, 38.

Officer Cummings graduated from the Boylston Regional Police Academy on December 16, 2011. RA 32, 50-51. Less than one and one-half years later, Officer Cummings had the interaction with the Plaintiff on May 2, 2013. RA 32, 50-51. At the police academy, Officer Cummings received training on interacting with people with mental health issues. RA 51-53. As part of this training, Officer Cummings received 12 hours of training in "Crisis Intervention and Conflict Resolution" and six hours of training regarding "People with Special Needs." RA 51-52, 58-96. During his police academy training in "Crisis in Intervention and Conflict Resolution," Officer Cummings was trained in, among other things, intervening and resolving situations with emotionally disturbed persons, people with mental illness, people with emotional illness, and people with disorientation.

[3] As the magistrate judge correctly noted, a police report is admissible as a public record pursuant to Fed. R. Evid. 803(8). Plaintiff's Add. 2.

RA 55-63. During his training in "Persons with Disabilities and the Criminal Justice System," Officer Cummings was trained in, among other things, interactions with individuals with mental illness, issues in treatment, Department of Mental Health, forms of mental illness, assessment and response, and the Americans with Disabilities Act ("ADA"). RA 55-57, 71-95.

As for the taser, Officer Cummings has received extensive training, testing and annual re-certifications. RA 46, 96-99. He became certified on the taser on September 7, 2012. RA 97, 101. This certification consisted of eight (8) hours of instruction. RA 102. Officer Cummings answered 50 out of 50 questions correctly on the written portion of the taser certification. RA 97, 101. The stun-drive mode of the Taser, as used by Officer Cummings, is a less painful mode of the taser. It causes only temporary localized pain and not neuromuscular incapacitation. RA 103.

SUMMARY OF THE ARGUMENT

The District Court should be affirmed. Officer Cummings is protected by qualified immunity because: (1) the single application of a taser against the Plaintiff after she had assaulted and battered him and then actively resisted arrest was reasonable under the circumstances and therefore not a constitutional violation; and (2) it was not clearly established by May 2, 2013 that the application of a taser against a person who had assaulted a police officer and actively resisted

lawful arrest constitutes excessive force. Indeed, no such proposition is clearly established to this day.

The Town is entitled to summary judgment on the Plaintiff's ADA claim because Officer Cummings faced exigent circumstances throughout his encounter with the Plaintiff. The law of whether and how the ADA applies to arrests remains unclear.

ARGUMENT

I. The Standard of Review

Review of a district court's grant of summary judgment is *de novo*. Rodriguez v. Am. Int'l Ins. Co., 402 F.3d 45, 46-47 (1st Cir. 2005). In opposing summary judgment, the required evidence of the non-moving party must consist of something more than conclusory allegations, improbable inferences and insupportable speculation. Fragoso v. Lopez, 991 F.2d 878, 886 (1st Cir. 1993). This Court is "not bound by the lower court's rationale but may affirm the entry of judgment on any independent ground rooted in the record." Int'l Ass'n of Machinists and Aerospace Works, AFL-CIO v. Winship Green Nursing Center, 103 F.3d 196, 200 (1st Cir. 1996). It is well settled, however, that the Plaintiff is precluded on appeal from raising any argument not specifically raised in her Rule 72(b) objections. See Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 3 (1st Cir. 1999).

II. Summary Judgment Properly Entered in the Defendants' Favor on All Counts

The District Court properly granted the Defendants' motion for summary judgment because there is no genuine dispute of material fact appearing in the record and the Defendants are entitled to judgment as a matter of law on all of the Plaintiff's claims.

A. Qualified Immunity Precludes Plaintiff's Excessive Force Claim

Qualified immunity protects Officer Cummings from the Plaintiff's § 1983 excessive force claim. Qualified immunity protects police officers from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity involves a two-step inquiry in no particular order: (1) whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right, and (2) whether the right at issue was clearly established at the time of defendant's alleged misconduct. Pearson v. Callahan, 555 U.S. 223, 232 (2009). As to the second prong, the Supreme Court has repeatedly told courts not to define clearly established law at a high level of generality and the dispositive question is whether the violative nature of *particular* conduct is clearly established. Mullenix v. Luna, 136 S.Ct. 305, 308 (2015) (emphasis in original). Existing precedent must have placed the statutory or

constitutional question confronted by the official "beyond debate." Plumhoff v. Richard, 134 S.Ct. 2012, 2023 (2014). [4]

Specificity is especially important in the Fourth Amendment context, where the Supreme Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Kisela v. Hughes, 138 S. Ct. 1148, 1152–53 (2018), citing Mullenix v. Luna, 136 S.Ct. at 308. Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Kisela, 138 S. Ct. at 1152–53. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful. Id.

Once an officer invokes qualified immunity, the Plaintiff bears the "heavy" burden of demonstrating that the law in the particular context of the Plaintiff's case was clearly established at the time of the alleged violation. Mitchell v. Miller, 790 F.3d 73, 77 (1st Cir. 2015). Because Officer Cummings has claimed qualified

[4] Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). Based on the undisputed facts of the present case and the existing case law in May 2013, or even now, it cannot be credibly argued that Officer Cummings acted incompetently or knowingly violated the law.

immunity, the burden is now on the Plaintiff to show that the protection does not apply. See Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011); Mitchell v. Miller, 790 F.3d at 77; Lopera v. Town of Coventry, 640 F.3d 388, 395-96 (1st Cir. 2011) ("[W]hen a movant raises qualified immunity, the non-movant bears the burden of demonstrating that qualified immunity does not apply.").

Applying this doctrine to the undisputed facts in the record establishes that summary judgment should be affirmed for Officer Cummings because: (1) he did not violate the Plaintiff's constitutional rights; (2) no such rights were clearly established; and (3) the Plaintiff cannot meet her burden of pointing to a similar case to demonstrate that qualified immunity does not apply.

1. No Violation of A Constitutional Right

Officer Cummings did not violate the Plaintiff's rights because his single use of the taser was reasonable under the circumstances. The Plaintiff assaulted and battered him and then actively resisted arrest by refusing to give up her hands for handcuffing. Excessive force claims are evaluated under the Fourth Amendment's "objective reasonableness" standard. Graham v. Connor, 490 U.S. 386, 388 (1989). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Id. at 396. Relevant

factors for consideration include (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. Id.

In weighing the Graham factors "[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. A court's assessment must also account for the fact that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Id. at 396–97.

The test is objective: "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. at 397; Parker v. Gerrish, 547 F.3d 1, 9 (1st Cir. 2008) ("The calculus of reasonableness also must make allowance for the need of police officers to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation.").

Here, applying this test to the undisputed facts establishes that Officer Cummings' use of the taser was reasonable and not in violation of the Plaintiff's Fourth Amendment rights. First, the Plaintiff committed the serious offense of assaulting and battering a police officer when she suddenly turned and continued to

approach Officer Cummings without stopping. This offense is serious because of the potential for violence and injury. Parker, 547 F.3d at 9 ("Though driving while intoxicated is a serious offense, it does not present a risk of danger to the arresting officer that is presented when an officer confronts a suspect engaged in an offense like robbery or assault."). The Plaintiff's acts of assaulting and battering a police officer jeopardized the safety of Officer Cummings, herself and members of the public.

Second, the Plaintiff's act of violence toward Officer Cummings and her active and physical refusal to be handcuffed posed an immediate threat to the safety of the officer and others. Prior to that, the Plaintiff was found to pose "a likelihood of serious harm by reason of mental illness" under section 12. This situation is unlike the cases where a person with mental health issues may exhibit volatile and erratic behavior, but the behavior was not directed toward the officer, and thus not found to pose or convey a threat. Cf. Bryan v. MacPherson, 630 F.3d 805, 827-828 (9th Cir. 2010). Here, the Plaintiff's acts threatened the officer.

Third, the Plaintiff resisted seizure by actively and physically refusing to release her arms to be handcuffed, which necessitated Officer Cummings' use of the taser. Indeed, the Plaintiff's active resistance was consistent with her defiance of Officer Cummings' lawful orders throughout the encounter.

More specifically, the undisputed facts of this case shows that Officer Cummings entered a situation where the Plaintiff posed a likelihood of serious harm, either to herself or others. When Officer Cummings advised the Plaintiff that she needed to go back to the hospital she swore at him repeatedly and walked away. RA 40. When Officer Cummings followed her on foot, she turned and quickly approached him with clinched fists and teeth, and with her body flexed tightly, while yelling "fuck you!" RA 40. Officer Cummings reasonably thought that the Plaintiff was attempting to harm him. RA 40.

As the Plaintiff continued to approach, Officer Cummings was forced to grab a hold of the Plaintiff's shirt in an attempt to hold her back to stop the threat. RA 40. Instead, the Plaintiff continued to push closer to Officer Cummings, thereby committing an assault and battery upon him, which she concedes.[5] See M.G.L. c. 265, § 13D. In response to the Plaintiff's conduct toward him and the threat it posed to the officer's safety and that of others, Officer Cummings took the Plaintiff to the ground and sought to handcuff her to secure the situation.

While on the ground, the Plaintiff resisted Officer Cummings' authority and his efforts to handcuff her. See United States v. Almenas, 553 F.3d 27, 34 (1st Cir.

[5] As noted by the magistrate judge, a fair reading of paragraph 48 of the Plaintiff's Complaint is a concession that she assaulted Officer Cummings. RA 15, ¶ 48 ("Officer Cummings should have respected her comfort zone . . . rather than precipitating an assault and battery.").

2009) (resisting arrest involves resisting the authority of a police officer). Despite Officer Cummings repeatedly telling her to stop resisting and to place her hands behind her back, the Plaintiff tucked her arms under her chest, flexed tightly, and continued to swear.

The Plaintiff inaccurately attempts to characterize her conduct as "passive" and merely refusing to "follow police commands." But, the undisputed evidence establishes that her conduct was both active, violent and a violation of law, including an assault and battery on a police officer. As a matter of law, by refusing to place her hands on her back, the Plaintiff *actively* – not passively – resisted arrest. See Caie v. West Bloomfield Township, 485 Fed.Appx. 92, 93–97 (6th Cir. 2012) (plaintiff actively resisted by refusing to move his hands for handcuffing); Commonwealth v. Dinovo, 94 Mass. App. Ct. 1104 (2018) (unpublished) (defendant's refusal to place his hands behind his back was active refusal to submit to authority of arresting officers).

Furthermore, Officer Cummings warned the Plaintiff numerous times that if she did not stop resisting and give up her hands so that she could be handcuffed he would use the taser. Despite those warnings the Plaintiff actively refused to put her hands behind her back. It was only after the Plaintiff continually refused to

produce her hands that Officer Cummings used the taser in the "drive stun" mode,[6] which caused the Plaintiff to comply by placing her hands behind her back. RA 40. Officer Cummings then holstered his taser and put on the handcuffs. RA 40. He did not use any force after the Plaintiff cooperated and was secured in handcuffs. RA 40-41.

Based on these undisputed facts, Officer Cummings' use of the taser in drive-stun mode was reasonable under the Fourth Amendment. His use of the taser in the temporary pain compliance mode was safer and a lesser use of force than available alternatives. Due to Officer Cummings' actions, the Plaintiff suffered no injury and only 4-6 seconds of temporary pain. However, had Officer Cummings responded to the Plaintiff's active resistance by attempting to physically wrench her arms behind her back for cuffing it is far more likely and foreseeable that the Plaintiff would have suffered an arm or shoulder injury.

[6] Tasers generally have two modes. Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 897 (4th Cir. 2016). "In dart mode, a taser shoots probes into a subject and overrides the central nervous system." Estate of Booker v. Gomez, 745 F.3d 405, 414 n.10 (10th Cir. 2014). Drive stun mode, on the other hand, "does not cause an override of the victim's central nervous system"; that mode "is used as a pain compliance tool with limited threat reduction." Id. The drive stun mode on the TASER X26 is intended to be used for pain compliance rather than incapacitation. Estate of Armstrong, at 897.

2. Case Law Supports No Violation of a Constitutional Right

Case law in similar situations supports that Officer Cummings did not violate the Plaintiff's constitutional rights. In taser cases, it is not unreasonable for law enforcement officers to use such devices against individuals who are actively resisting arrest. See Crowell v. Kirkpatrick, 400 Fed. App'x 592, 595 (2d Cir. 2010); Caie, 485 Fed.Appx. 93–97 (drive-stun taser use reasonable where officers attempting to secure Plaintiff and take him to a hospital for a mental health evaluation actively resisted by refusing to move his hands for handcuffing); Kent v. Oakland Cty., 810 F.3d 384, 392 (6th Cir. 2016) (we have often found that the reasonableness of an officer's use of a taser turns on active resistance: "When a suspect actively resists arrest, the police can use a Taser [ ] to subdue him; but when a suspect does not resist, or has stopped resisting, they cannot.") [7]

[7] This present case contrasts with those cited by the Plaintiff, including for example Garcia v. Dutchess County, 43 F. Supp.3d 281 (S.D.N.Y. 2014), which *inter alia* did not involve an individual who was actively resisting arrest when tased. See also Phillips v. Cmty. Ins. Corp., 678 F.3d 513, 524 (7th Cir. 2012) (plaintiff "never exhibited any aggressive behavior toward the officers" before or after they located her car). However, some federal courts have held that officers may use tasers against passively resisting subjects. In Schumacher v. Halverson, 467 F.Supp.2d 939 (D.Minn. 2006), the court explained that the use of a Taser in drive-stun mode against a passively resisting subject was "reasonable and in accord with established constitutional principles." In Ward v. Olson, 939 F. Supp. 2d 956, 964 (D. Minn. 2013), the court held that the use of a taser in drive-stun mode against a passively-resistant subject does not result in per se excessive force.

In Crowell v. Kirkpatrick, 400 Fed. App'x at 594-59, the Second Circuit affirmed the district court's grant of summary judgment, holding that the officers' use of stun guns was objectively reasonable and not excessive, even though the suspects were political protesters who "were arrested for relatively minor crimes of trespass and resisting arrest and were not threatening the safety of any other person with their behavior." The Court also found it relevant that officers warned the Plaintiffs that a taser would be used. Id. at 595. The Court explained that a taser on "drive stun" mode typically causes temporary, if significant, pain and no permanent injury. Id., citing Brooks v. City of Seattle, 599 F.3d 1018, 1027 (9th Cir. 2010) ("The use of the Taser in drive-stun mode is painful, certainly, but also temporary and localized, without incapacitating muscle contractions or significant lasting injury."), *rehearing en banc granted,* 623 F.3d 911 (9th Cir. 2010).

This Circuit recognized the Eleventh Circuit's decision holding that an officer (Reynolds) reasonably fired his taser at a stopped driver (Draper) who yelled profanities at the officer, repeatedly and defiantly challenged the officer's commands, and failed to produce his license and other documents after five requests. See Parker, supra, citing Draper v Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004). In Draper, "[f]rom the time Draper met [Officer] Reynolds at the back of the truck, Draper was hostile, belligerent, and uncooperative." Draper, at 1278. Draper "repeatedly refused to comply with Reynolds's verbal comments." Id. The

Draper Court found that the officer's use of taser without warning was justified when suspect in traffic stop repeatedly refused to comply with commands. See also Roell v. Hamilton Cty., 870 F.3d 471, 481 (6th Cir. 2017) (recognizing numerous cases holding that an officer's use of a taser against a plaintiff who is actively resisting arrest by physically struggling with, threatening, or disobeying officers is not a violation of the plaintiff's clearly established Fourth Amendment rights, even if the plaintiff is suspected of committing only a misdemeanor).

Accordingly, based on similar case law, Officer Cummings' single deployment of the taser in the drive stun mode to overcome the Plaintiff's active resistance to handcuffing was reasonable under the Fourth Amendment and therefore judgment should enter for him.

For her part, the Plaintiff argues that Officer Cummings should have waited for a backup officer to arrive, among other things. She speculates that she would have been more compliant with a greater show of force. This argument does not take into account that the Plaintiff actively assaulted and battered the officer while he was following her on foot and talking to her. In addition, an objectively reasonable officer would believe that, while waiting at a distance, the Plaintiff may attempt to harm herself or others. The "calculus of reasonableness" must make allowance for an officer's need to make split second judgments in rapidly unfolding circumstances such as those here.

3. The Use of The Taser Did Not Violate Clearly Established Law

Officer Cummings is entitled to qualified immunity because, at the time of the incident in May 2013, it was not clearly established that the single application of a taser against a person who had assaulted a police officer and then resisted arrest would have violated the Plaintiff's constitutional rights. A law is "clearly established when the plaintiff can point either to cases of controlling authority" in her jurisdiction at the time of the incident, or a consensus of cases of persuasive authority such that a reasonable officer could not have believed his actions were lawful. See Kent, 810 F.3d 395, quoting Wilson v. Layne, 526 U.S. 603, 617 (1999).

Case law in and outside of the First Circuit confirms that a reasonable officer in Officer Cummings' position would not have understood that the single deployment of a taser in these circumstances would have violated the Plaintiff's Fourth Amendment rights.

In the First Circuit, as of 2008, it was clearly established that a person arrested for an offense that does not present a risk of danger, who offered no significant active resistance to being handcuffed, and who posed no threat to the safety of officers could not be tased without warning. See Parker, 547 F.3d at 9-11. This Court acknowledged that, in some circumstances, defiance and insolence might reasonably be seen as a factor which suggests a threat to the officer. Parker,

however, had been largely compliant and twice gave himself up for arrest to the officers. That was not the case here.

Rather, the reasoning of Parker establishes qualified immunity in the present case because the use of the taser was preceded by an assault and battery on Officer Cummings, resistance to arrest, and a warning that a taser would be deployed if resistance persisted. See id. at 10 ("We do not hold that the officers would have been required to physically wrestle Parker to the ground without recourse to the Taser. Rather, we find that the jury could have concluded that such a struggle would not have been necessary—that in the absence of the Taser, Parker would have submitted to cuffing without presenting a risk to the officers.").

There is a consensus of cases from other circuits which establish that Officer Cummings' actions were constitutional. Cases addressing qualified immunity for taser use fall into two groups. The first -- like the present case -- involves plaintiffs who are tased while actively resisting arrest by physically struggling with, threatening, or disobeying officers. In the face of such resistance, courts conclude either that no constitutional violation occurred, or that the right not to be tased while resisting arrest was not clearly established at the time of the incident. See Cockrell v. City of Cincinnati, 468 Fed. Appx. 491, 495 (6th Cir. 2012) (Tasing of a "non-violent misdemeanant fleeing from the scene of a non-violent misdemeanor [jaywalking]" is not a violation of a clearly established right).

This first group of taser cases confirms that Officer Cummings is entitled to qualified immunity. See, e.g., Mattos v. Agarano, 661 F.3d 433 (9th Cir. 2011) (holding in consolidated cases that taser deployments did not violate clearly established law, where one plaintiff, a pregnant woman pulled over for speeding, refused to sign citation, became agitated, screamed at officers, clung to steering wheel, and was tased three times, and other plaintiff was shot with taser in dart mode as she stood between officers and her large, drunken, aggressive husband who was under arrest); McKenney v. Harrison, 635 F.3d 354 (8th Cir. 2011) (holding that taser deployment against misdemeanant who made sudden move toward window while being questioned by police and told not to "try anything stupid" did not constitute excessive force, even though misdemeanant fell out of window to his death after being tased).

In the second group of cases, a law-enforcement official tases a plaintiff who has done nothing to resist arrest or who is already detained. Courts faced with this scenario have held that a § 1983 excessive-force claim is available, since "the right to be free from physical force when one is not resisting the police is a clearly established right." Cockrell, 468 Fed. Appx. at 496. The second group of cases is inapplicable here given the undisputed facts that the Plaintiff assaulted and battered Officer Cummings and then actively resisted arrest by physically refusing to be handcuffed.

4. Plaintiff Cannot Identify Case Law To Overcome Qualified Immunity

The Plaintiff cannot meet her burden of identifying cases that would put all reasonable officers in Officer Cummings' position on notice that the use of the taser would violate the Plaintiff's civil rights. Instead, she cites to cases that stand for the inapplicable proposition that it is unlawful to deploy a taser on a misdemeanant who is not actively resisting arrest and who does not pose a danger, which do not help her here.

The Plaintiff cites cases from this Circuit that do not involve resistance. See Plaintiff's Brief, pp. 23-24. For example, she cites to Ciolino v. Gikas, 861 F.3d 296, 304 (1st Cir. 2017), which is not a taser case and where the plaintiff "disobeyed an order but showed no inclination to resist arrest or to attempt to flee from arrest." The Plaintiff cites to cases that distinguish between "active resistance" and "noncompliance" and suggests that this distinction hinges on whether a person was moving or was stationary. Plaintiff's Brief, n.8. But, those cases acknowledge that active resistance can include a "verbal showing of hostility" and/or "deliberate acts of defiance" in using one's body, including deliberately locking one's arms together and kicking. See Goodwin v. City of Plainville, 781 F.3d 314, 326 (6th Cir. 2015).

Even assuming *arguendo* that the Plaintiff's conduct could be characterized as "nonviolent and stationary," it remains that a person's right -- including people

suffering from serious mental health issues -- not to be tased while offering stationary and non-violent resistance to a lawful seizure was not clearly established at the time Officer Cummings used the taser. The Fourth Circuit's decision in Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 909 (4th Cir. 2016) is instructive. In that case, Armstrong suffered from a bipolar disorder and paranoid schizophrenia. Id. at 896. In April 2011, he had been off his medications and was poking holes in his skin to "let the air out." Id. Armstrong's sister persuaded him to check into a hospital, but Armstrong became frightened while in the emergency room and fled. Id. A doctor determined Armstrong to be a danger to himself and police officers were called to return him. Id. Officers located Armstrong at a busy traffic intersection and approached him. Armstrong reacted by grabbing a post that supported a traffic sign. Id. The officers' attempt to pry him away was unsuccessful. Id. at 897. An officer drew his taser, set it to "drive stun mode," and announced that if Armstrong did not let go of the post, he would be tased. That warning had no effect, so the officer deployed the taser. Id. An officer tased Armstrong five times, none of which succeeded in obtaining his compliance. Eventually the officers successfully removed him from the post and laid him facedown on the ground. Armstrong died from this encounter. Id.

In granting the officers qualified immunity, the Fourth Circuit recognized case law that could be construed to sanction the officers' decision to use a taser.

The court explained that because Armstrong was not complying with the officers' commands, these cases negated the existence of any "consensus of cases of persuasive authority" across our sister circuits "such that a reasonable officer could not have believed that his actions were lawful." Estate of Armstrong, at 908-09. That court recognized that the Eleventh Circuit had held that the use of a taser gun to effectuate an arrest was reasonably proportionate to the difficult, tense and uncertain situation faced by a police officer when an arrestee used profanity, moved around and paced in agitation, yelled at the officer, and repeatedly refused to comply with verbal commands. Draper, 369 F.3d at 1278.

The Estate of Armstrong court also recognized that the Sixth Circuit found that numerous cases from multiple circuits had held that if a suspect resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a taser to subdue him. Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505, 509 (6th Cir. 2012). The Hagans court provides examples in which the Sixth Circuit had held the use of a taser reasonable simply because "[t]he suspect refused to be handcuffed" or "the suspect ... refused to move his arms from under his body." Id.

Other circuits, in short, have sometimes distinguished permissible and impermissible tasing based on facts establishing bare noncompliance rather than

facts establishing a risk of danger. Estate of Armstrong, at 908-09. The Fourth Circuit ruled that the officers were entitled to qualified immunity:

> Armstrong's right not to be tased while offering stationary and non-violent resistance to a lawful seizure was not clearly established on April 23, 2011. Indeed, two months after Appellees' conduct in this case, one of our colleagues wrote, "the objective reasonableness of the use of Tasers continues to pose difficult challenges to law enforcement agencies and courts alike . . . 'That the law is still evolving is illustrated in cases granting qualified immunity for that very reason.'"

Id. at 909.

Finally, to the extent that the Plaintiff relies on this Court's case of Parker v. Gerrish, supra, that situation is easily distinguishable from Officer Cummings's use of the taser. In Parker, the First Circuit found that a jury could have reasonably found that the plaintiff, who had one wrist handcuffed, was compliant and merely positioning his other wrist to be handcuffed when the defendant officer shot him, without warning, with a taser in probe mode. Parker v. Gerrish, 547 F.3d at 9–10.

Here, in sharp contrast, it is undisputed that the Plaintiff was actively resisting the officer's efforts to handcuff her, the Plaintiff was non-complaint, the Plaintiff was neither handcuffed nor partially handcuffed, and Officer Cummings deployed his taser in the less significant drive-stun mode.

Accordingly, based on this state of the law in May 2013, a reasonable officer in Officer Cummings' position would not have understood that using a taser to gain compliance for handcuffing was unlawful.

5. The Plaintiff Never Argued in the District Court that Qualified Immunity Should Be Modified or Overruled

The Plaintiff now argues that the doctrine of qualified immunity should be modified or overruled. She never raised this argument below and cannot raise it here. Rosaura Bldg. Corp. v. Municipality of Mayaguez, 778 F.3d 55, 63 (1st Cir. 2015) (arguments not advanced before the district court are waived); Vaughner v. Pulito, 804 F.2d 873, 877 n.2 (5th Cir. 1986) ("If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal.").

The Plaintiff claims to raise this issue merely "to preserve the issue for potential Supreme Court review," citing United States v. Edwards, 857 F.3d 420, 422 (1st Cir. 2017), but that case does not support her argument. In addition, the Plaintiff refers this Court to a Petition for Writ of Certiorari in Allah v. Milling, which the Supreme Court has since declined to review on September 4, 2018. See 2018 WL 1993794.

In any event, Supreme Court precedent establishing the doctrine of qualified immunity should not be modified or overruled. Qualified immunity maintains a delicate equilibrium between "two important—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009), quoted in Matalon v.

Hynnes, 806 F.3d 627, 632–33 (1st Cir. 2015). The doctrine serves the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). It gives government officials breathing room to make reasonable but mistaken judgments about open legal questions while simultaneously exposing to liability officials who—from an objective standpoint—should have known that their actions violated the law. Matalon, 806 F.3d at 632–33.

It would be unfair to hold a public official accountable in damages for violations of rights under legal principles that were not clearly established at the time. Harlow, at 818-819. To that end, qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. There is no basis warranting modification or overruling of this doctrine.

B. Defendants Are Entitled to Summary Judgment on the Plaintiff's Section 1983 Claim Against the Town

The Plaintiff's failure to train claim against the Town under § 1983 fails as a matter of law because Officer Cummings' use of force was reasonable. A municipality cannot be held liable under § 1983 for failure to train absent an underlying constitutional violation by one of its officers. Rivera v. City of

Worcester, No. CIV.A. 12-40066-TSH, 2015 WL 685800, at *5 (D. Mass. Feb. 18, 2015).

Furthermore, for municipalities to be liable under a theory of failure to train, a "policy or custom must have caused the deprivation of the plaintiff's constitutional rights and the municipality must have the requisite level of culpability: deliberate indifference to the particular constitutional right of the plaintiff." Crete v. City of Lowell, 418 F.3d 54, 66 (1st Cir. 2005). "Triggering municipal liability on a claim of failure to train requires a showing that municipal decision makers either knew or should have known that training was inadequate but nonetheless exhibited deliberate indifference to the unconstitutional effects of those inadequacies." Haley v. City of Boston, 657 F.3d 39, 52 (1st Cir. 2011). A plaintiff may succeed only if he shows "that the constitutional violation had a 'direct causal link' to the deficiency in training." Jones v. City of Boston, 752 F.3d 38, 59 (1st Cir. 2014), quoting Canton v. Harris, 489 U.S. 378, 385 (1989).

A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. Connick v. Thompson, 563 U.S. 51, 61 (2011). A plaintiff must generally offer "[a] pattern of similar constitutional violations by untrained employees," because "[w]ithout notice that a course of training is deficient in a particular respect, decision makers can hardly be said to

have deliberately chosen a training program that will cause violations of constitutional rights." Id.

Here, the Plaintiff's failure to train claim fails because there is no evidence establishing that: the Town's mental health and/or taser training programs are defective; the Town was on notice that the unconstitutional use of force against a person with mental health issues was likely to result from the failure to provide sufficient mental health and/or taser training; Officer Cummings or any other of the Town's other police officers' lack of mental health or taser training had caused serious injuries resulting from excessive use of force by taser on previous occasions; or that there exists a prior pattern of conduct by Officer Cummings, or any other police officers, of violating constitutional rights by using a taser to employ excessive force while responding to calls involving a person experiencing a mental health crisis.

Absent such evidence, the Plaintiff cannot raise a genuine issue of material fact for trial as to whether the Town's mental health and/or taser training policies or procedures were inadequate. Accordingly, judgment should enter for the Town on the Plaintiff's § 1983 claim.

C. The Defendants Are Entitled to Summary Judgment on the Plaintiff's State Law Claims

Summary judgment on the Plaintiff's state law claims for assault and battery, violation of the MCRA, and malicious prosecution should not be reversed even if

Officer Cummings is not entitled to qualified immunity on the excessive force claim because the claims independently fail.

Common law immunity protects Officer Cummings from the Plaintiff's intentional tort claims. See Nelson v. Salem State Coll., 446 Mass. 525, 537-38, 845 N.E.2d 525 (2006). Under Massachusetts common law, government employees acting within their discretion as public officials and in good faith are shielded from liability. See Najas Realty, LLC v. Seekonk Water Dist., 821 F.3d 134, 145-146 (1st Cir. 2016) (discussing how, in affirming dismissal of intentional tort claims, "a public official, exercising judgment and discretion, is not liable for negligence or other error in the making of an official decision if the official acted in good faith, without malice, and without corruption"), quoting Nelson, 446 Mass. at 437. Here, there are no facts in the record to suggest that at any time Officer Cummings acted in bad faith or with malice or corruption.

Furthermore, as to the assault and battery claim, the determination of the reasonableness of the force used under § 1983 also "controls [the] determination of the reasonableness of the force used under the common law assault and battery claims." Hunt v. Massi, 773 F.3d 361, 372 (1st Cir. 2014). However, the assault and battery tort can independently fail due to state law immunity and because the record shows that it was reasonable for Officer Cummings to take the Plaintiff to the ground to protect himself and gain control of the situation, and that it was

reasonable for him to use the taser in drive-stun mode based on the Plaintiff's active resistance. Accordingly, Officer Cummings is entitled to summary judgment on this claim. See Hunt, at 372.

As to the MCRA claim, it is subject to the same standard of qualified immunity for police officers that applies for § 1983 claims. Hunt, at 371 (statutes are coextensive). However, an MCRA claim has the added requirement that the Plaintiff's rights must have been violated by means of threats, intimidation or coercion. M.G.L. c. 12, §§ 11H, 11I. Critically, the Plaintiff cannot rely on the use of force as both the constitutional violation and the evidence of threats, intimidation, or coercion. Santiago v. Keyes, 890 F. Supp. 2d 149, 159 (D. Mass. 2012). In other words, as the Supreme Judicial Court of Massachusetts has explained, "[a] direct violation of a person's rights does not by itself involve threats, intimidation or coercion and thus does not implicate the Act." Longval v. Commissioner of Correction, 404 Mass. 325, 333, 535 N.E.2d 588 (1989); Gallagher v. Comm., No. CIV.A. 00-11859-RWZ 2002 WL 924243, at *3 (D. Mass. Mar. 11, 2002) (plaintiff cannot establish a violation of the MCRA by claiming that his right to be free from excessive force was violated by means of force). Where a constitutional violation itself cannot also serve as the prerequisite "threats, intimidation or coercion" and where the Plaintiff does not include any argument in her brief as to evidence of "threats, intimidation or coercion" under the

MCRA, Officer Cummings is entitled to summary judgment. See United States v. Benavente Gomez, 921 F.2d 378, 386 (1st Cir. 1990) (arguments not raised in opening appellate brief are waived).

As for malicious prosecution, the District Court adopted the Report and Recommendation that properly entered judgment because probable cause existed on all four of the charges filed against the Plaintiff.[8] Critically, in her brief, the Plaintiff makes no argument that judgment should not have entered on this claim. In addition, the malicious prosecution claim does not hinge on the issue of qualified immunity for an excessive force claim. Thus, the Plaintiff waives any malicious prosecution claim. See Benavente-Gomez, supra.

D. The Plaintiff's ADA Claim Fails as a Matter of Law

In Count III of the Amended Complaint, the Plaintiff makes a claim pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 101, alleging that the Town failed to provide a reasonable accommodation for her disability.[9] The

[8] This case differs from Rivera v. Murphy, 979 F.2d 259, 264 (1st Cir. 1992) wherein the district court, having dismissed the one federal claim, dismissed the pendent state law claims without deciding them.

[9] To prevail on a Title II ADA claim, the Plaintiff must establish that: (1) she is a qualified individual with a disability; (2) she was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and (3) such exclusion, denial of benefits, or discrimination was by reason of the Plaintiff's disability. Buchanan v. Maine, 469 F.3d 158, 170–71 (1st Cir. 2006).

District Court's ruling entering summary judgment on this claim should be affirmed.[10]

The law is unclear whether Title II of the ADA applies to arrests. The Supreme Court has not yet addressed the issue and the Circuits differ on whether and how the ADA applies to the arrests of individuals with mental health issues. The Supreme Court planned to address this issue by taking up the Ninth Circuit's decision in Sheehan v. City and Cty. of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014), explaining that whether the statutory language of the ADA applies to arrests "is an important question." The Court, however, did not decide the issue finding that the petition for certiorari had been improvidently granted based on the city changing its argument. City & Cty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765, 1773 (2015). In any event, in the present case, under any of the Circuits' applications of the ADA to arrests, the Town is entitled to summary judgment.

1. The ADA may not apply to arrests.

The First Circuit appears skeptical of whether Title II of the ADA applies to a police officer's decision in the context of an arrest. It has explained that "[i]t is

[10] The Report and Recommendation discussed the ADA claim and recommended that the Court grant the Defendants' summary judgment on the claim because the Plaintiff's theories under the ADA failed as a matter of law. Plaintiff's Add. 19-24. The District Court adopted that Report and Recommendation. Yet, without support, the Plaintiff now argues that this Court should remand for reconsideration because the District Court did not specifically mention the ADA claim.

questionable whether the ADA was intended to impose any requirements on police entering a residence to take someone into protective or other custody beyond the reasonableness requirement of the Fourth Amendment." Buchanan v. Maine, 469 F.3d 158, 176 n.13 (1st Cir. 2006). Indeed, the application of the ADA to arrests is unnecessary and only serves to increase confusion and complexity for law enforcement officers in difficult situations, especially where the objective reasonableness requirement of the Fourth Amendment adequately protects people with disabilities in the course of seizures.

It appears that, if anything, Title II is meant to apply at the entity level, rather than to individual officers. In Buchanan, as to plaintiff Buchanan's arguments on training, this Court ruled that "[w]hether obliged by Title II or not, the County had policies and did train officers on the needs of the mentally ill public" and, further, that "[a]n argument that police training, which was provided, was insufficient does not present a viable claim that Buchanan was "denied the benefits of the services ... of a public entity" by reason of his mental illness, as required under 42 U.S.C. § 12132. Id. at 177.

The text of the ADA indicates that Congress did not intend for Title II to apply to the decisions of individual police officers in the context of arrests. Title II prohibits discrimination in places of public accommodations and applies specifically to "services, programs, or activities of a public entity" and prohibits

discrimination "by any such entity." 42 U.S.C. § 12132. "Public Entity" is defined as "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government…" 42 U.S.C. § 12131. The language demonstrates that Title II was not intended to apply to the decisions of individual officers, but rather to policies of public entities. Furthermore, it stretches the common definitions of words to consider arrests as "services, programs, or activities of a public entity" under the ADA.

A comparison of the language in Title I of the ADA, which was enacted at the same time, lends further support to the conclusion that Title II does not apply to an individual officer's arrest. Title I, which applies to employment law, indicates that it applies to the actions of individuals in stating that "no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112. The term "covered entity" is defined as an "employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111. And "employer" in Title I is, in turn, defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person…." Id.

Had Congress intended for Title II to apply to the actions of individual officers in the context of arrests it could have used language like that in Title I and have included reference to "agents" of public entities. It did not. It is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion of particular language in one section of a statute but omits it in another section of the same Act. Dean v. United States, 556 U.S. 568 (2009). It is therefore clear that Congress did not intend for Title II to apply to the decisions of individual officers during the course of effectuating arrests.

2. The Circuits are split on whether and how the ADA applies to arrests.

In addition to this Circuit's skepticism expressed in Buchanan, other Circuits differ on the application of the ADA to arrests. The Fifth Circuit holds that Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life. Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000). As that court has explained, "[l]aw enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to identify, assess, and react to potentially life-threatening situations." Id. at 801. To require them to factor in whether their actions are going to comply with the ADA in the presence

of exigent circumstances and prior to securing the scene poses an unnecessary risk. Id.

The First Circuit should adopt this rule because it provides superior clarity and safety, does not require an officer to guess at a diagnosis or ADA compliance before securing a scene, and the reasonableness of force in the context of arrests should not be governed by 20/20 hindsight but rather by the factors established in Graham v. Connor, 490 U.S. at 396.

In contrast, the Fourth Circuit for example takes the view that exigent circumstances factor into whether the requested modification is reasonable under the totality of the circumstances. Waller ex rel. Estate of Hunt v. Danville, 556 F.3d 171, 175 (4th Cir. 2009); cf. Bircoll v. Miami–Dade Cty., 480 F.3d 1072, 1085 (11th Cir. 2007) (holding exigent circumstances surrounding an arrest "go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance," where a non-violent, deaf individual requested an accommodation).

Meanwhile, the Sixth Circuit did not decide whether Title II applies in the context of arrests because even if the plaintiff's failure-to-accommodate claim was cognizable, the officers in that case faced exigent circumstances while attempting to restrain and arrest the plaintiff. Roell, 870 F.3d 471, 489 (6th Cir. 2017). "[A]lmost immediately after the deputies arrived, Roell swiftly approached them

brandishing a hose with a metal nozzle and a garden basket. The deputies, in other words, were required to make a series of quick, on-the-spot judgments in a continuously evolving environment." Id. The court concluded that the plaintiff's proposed accommodations – that the officers use verbal de-escalation techniques, gather information from witnesses, and call EMS services before engaging with her were "unreasonable … in light of the overriding public safety concerns." Id.

Here, under any analysis, the Town is entitled to summary judgment because based on the undisputed facts of the case Officer Cummings faced exigent circumstances throughout his encounter with Plaintiff.

3. Theories of ADA applying to arrests.

At least two theories have emerged supporting disability discrimination claims arising out of arrests. Adle v. Maine Police Dep't, 279 F. Supp. 3d 337, 362–63 (D. Me. 2017), citing Gohier v. Enright, 186 F.3d 1216, 1220 (10th Cir. 1999). The first occurs where police misperceive the effects of an individual's disability as criminal activity and make an arrest based on their misperception. Id., citing Lewis v. Truitt, 960 F.Supp. 175, 176–77 (S.D. Ind. 1997) (deaf individual mistaken for someone resisting arrest); Jackson v. Town of Sanford, No. 94-12-P-H, 1994 WL 589617, at *1 (D. Me. 1994) (arrest of stroke victim for drunk driving).

To the extent that the Plaintiff is pursuing a theory that Officer Cummings wrongfully perceived her conduct as criminal, that claim fails because the record establishes that this was not a situation where Officer Cummings misperceived the Plaintiff's conduct as criminal. Rather, the Plaintiff assaulted and battered Officer Cummings, and then actively resisted arrest. As a result, Officer Cummings correctly perceived the Plaintiff's conduct as criminal. Adle, 279 F. Supp. 3d at 362–63. The wrongful arrest doctrine does not apply where police officers act on an accurate perception of the suspect's conduct as unlawful or posing a risk to the public. Id., citing Bates ex rel. Johns v. Chesterfield Cty., 216 F.3d 367, 373 (4th Cir. 2000) (autistic individual bit, scratched, and kicked police officers); Buchanan v. Maine, 417 F.Supp.2d 45, 73 (D. Me. 2006) (schizophrenic individual stabbed a police officer). Accordingly, based on the undisputed facts of this case, the Plaintiff's claim for wrongful arrest based on a misperception of the Plaintiff's disability fails as a matter of law.

For the first time in her appellate brief, the Plaintiff argues that the record supports a finding that Officer Cummings arrested her, not because he misperceived her conduct as criminal but because he "unreasonably misperceived" her as having "the mental state" required to turn her acts into crimes. Without case citations, she argues that the question is whether the conduct actually was not a crime "because the civilian lacked the requisite capacity or intent." Plaintiff's

Brief, p. 38. The Plaintiff did not raise this argument in terms of her ADA claim below and cannot do so now.[11] Rosaura Bldg. Corp., 778 F.3d at 63 (arguments not advanced before the district court are waived). Moreover, such a theory of liability would impose a heavy burden on police officers to diagnose the extent and severity of mental health issues, and guess at a person's state of mind.

The second theory supporting a disability discrimination claim occurs where police effectuate a lawful arrest based on criminal conduct unrelated to a person's disability, but they fail to accommodate the disability during the investigation or arrest process, resulting in the individual suffering greater injury than other arrestees. Adle, 279 F. Supp. 3d at 362–63, citing Gorman v. Bartch, 152 F.3d 907, 912–13 (8th Cir. 1998) (reversing dismissal of ADA suit alleging police had discriminated against arrestee by transporting him to police station in vehicle unequipped to safely accommodate wheelchairs). In the present case, the undisputed facts do not support a claim that the Plaintiff suffered greater injury than other arrestees, and, as addressed below, Officer Cummings provided reasonable accommodations until the Plaintiff's assault and battery against him.[12]

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[11] In her objection to the Report and Recommendation, the Plaintiff argued only that a jury could find that she did not commit a battery upon Officer Cummings. RA 307. No reasonable jury could make such a finding.

[12] In Adle, a district court addressed a third situation that is "logically intermediate between the two archetypes envisioned by those theories," where the police effectuate a lawful arrest based on criminal conduct that is related to a person's disability. Adle, 279 F. Supp. 3d at 362–63, citing Gohier, 186 F.3d at

After she was secured in handcuffs, the Plaintiff was returned to the hospital via ambulance.

In any event, under any analysis, summary judgment should enter for the Town because Officer Cummings faced exigent circumstances. Adle, 279 F. Supp. at 364–66 (regardless of whether there is a per se rule that the ADA does not apply in exigent circumstances or whether exigency is one factor among many to determine whether a requested accommodation is reasonable, the threshold question is whether exigent circumstances existed). Officer Cummings faced exigent circumstances from the time he arrived on scene (Plaintiff posed risk of serious harm) and continuing through the Plaintiff's assault and battery and active resistance to arrest which necessitated the use of the taser so that Officer Cummings could gain control of the situation. Once the Plaintiff abruptly turned

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1221. In Gohier, the Tenth Circuit affirmed dismissal of an ADA claim where a tense encounter ensued during which the officer concluded that the individual was mentally ill. The individual aggressively approached and lunged at the officer, and the officer fatally shot him. The Tenth Circuit stated: "Officer Enright did not use force on Mr. Lucero because he misconceived the lawful effects of his disability as criminal activity, inasmuch as Lucero's assaultive conduct was not lawful. Neither did Enright fail to accommodate Lucero's disability while arresting him for "some crime unrelated to his disability." This threatening conduct warranted the officer's use of force. Id. Under this theory, summary judgment should enter for the Town because Officer Cummings did not misperceive the lawful effects of the Plaintiff's disability as criminal activity, but rather the Plaintiff's assaultive conduct toward him and her active resistance of arrest was not lawful. Id. Furthermore, it would be impossible for Officer Cummings to know if the Plaintiff's criminal conduct was as a result of or related to her mental health issues.

and assaulted Officer Cummings he was faced with additional split-second circumstances and an immediate crisis. Waller, 556 F.3d at 175 (exigency is not confined to split-second circumstances - although the officers did not face an immediate crisis, the situation was nonetheless unstable). Accordingly, no reasonable jury could conclude that the situation faced by Officer Cummings did not involve exigent circumstances and a threat to human safety.

Even under the totality of the circumstances test set forth in Waller, the record indicates that Officer Cummings provided the Plaintiff with reasonable accommodations. Rather than immediately seizing her, Officer Cummings followed the Plaintiff on foot at a non-aggressive distance for about 20-25 seconds. He repeatedly used non-threatening communication by speaking with the Plaintiff, telling her that she needed to return to the hospital. Officer Cummings did not use any force until the Plaintiff abruptly turned and assaulted and battered him. At that point, Officer Cummings was forced to gain control of the situation by taking her to the ground and using the taser to gain control of her hands for cuffing. The single deployment of the taser in drive stun mode resulted in no injuries and resulted in the Plaintiff's compliance. Had Officer Cummings not used the taser, and instead attempted to physically pull on her arms, an injury would be more likely to occur. Once Officer Cummings had the situation safely under control, he

had the Plaintiff transported via ambulance to the hospital. Accordingly, Officer Cummings provided the Plaintiff with reasonable accommodations.

For her part, the Plaintiff speculates that the situation may have turned out differently had Officer Cummings employed "time, patience, nonthreatening communication, monitoring from a distance, and contacting and waiting for assistance such as an ambulance or a mental health care professional." Plaintiff's Brief, p. 36.[13] The record shows that some of these accommodations were attempted and others were unreasonable. See Waller, 556 F.3d at 175 ("Accommodations that might be expected when time is of no matter become unreasonable to expect when time is of the essence."). Also, this speculation ignores that reasonable officers must consider that continued inaction may allow the Plaintiff to harm herself or others. Instead, the Plaintiff only received temporary pain with no injuries, and was returned to the hospital. As a result, based on the record no reasonable jury could find that exigent circumstances did not exist and that Officer Cummings failed to reasonably accommodate the Plaintiff.

[13] The Plaintiff does not identify any accommodations that were needed and not implemented once Officer Cummings secured the scene and ensuring there was no threat.

E. Gray Cannot Seek Injunctive Relief and Monetary Damages

The Plaintiff argues to this Court that she should be permitted to seek both injunctive relief and damages on her ADA claim. Where Gray has not made out a claim under the ADA, any claim for injunctive relief and damages there under correspondingly fails. Moreover, the Plaintiff never raised any issue below on summary judgment vis-à-vis recovery under the ADA and cannot do so here for the first time. See Rosaura Bldg., supra.

In any event, even if the Plaintiff could proceed on such an ADA claim, a plaintiff seeking injunctive relief premised upon an alleged past wrong must demonstrate a "real and immediate threat" of repeated future harm to satisfy the injury in fact prong of the standing test. This requirement is independent of the substantive requirements for equitable relief. City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (plaintiff subjected to a "chokehold" by police "would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such a manner.") The Plaintiff makes no argument or showing of "real and immediate threat" of repeated future harm in her brief and a court cannot infer that the defendants routinely fail to

comply with applicable anti-discrimination statutes. The Plaintiff does not argue and cannot show that the Defendants' alleged discrimination is ongoing and that she is likely to be served by Defendants in the near future.

As for her claim of monetary damages, in Sheehan, the United States Supreme Court remarked on the parties' failure to address whether "a public entity can be liable for damages under Title II for an arrest made by its police officers." Sheehan, 135 S.C.t at 1773-74. The Court noted that only public entities are subject to Title II and that, while "the parties agree that such an entity can be held vicariously liable for money damages for the purposeful conduct of its employees…." "we have never decided whether that is correct, and we decline to do so here." Sheehan, at 1773-74. This Circuit, too, has never addressed whether a public entity can be held vicariously liable for money damages under the ADA.

There should be no vicarious liability under the ADA. First, Title II of the ADA, "addresses discrimination by governmental entities in the operation of public services, programs, and activities." 42 U.S.C. § 12132. Because Title II only prohibits discrimination by the "services, programs, and activities" it must be the "services, programs or activities" and the institution that operates it that discriminate, not merely one of its employees. And, Title II, like Title IX, does not include the terms "employee" or "agent" within the definitions of "public entity" or

"program or activity." Compare 42 U.S.C. § 12131 and 29 U.S.C. § 794(b) *with* 20 U.S.C. § 1687 ("interpretation of 'program or activity'").

In an analogous context, the U.S. Supreme Court in Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998), examined the text, purpose, and scope of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, to hold that a school district is not liable for damages for the conduct of its teachers under a theory of *respondeat superior* alone. Rather, a school district may be held liable with evidence of its actual notice and deliberate indifference. Id. at 292-93.

This Court has not delineated a standard of intent on a claim of damages under the ADA. Other decisions within this circuit though have recognized the distinction as to a claim of *respondeat superior*, including Manuel v. City of Bangor, No. 09-CV-339-B-W, 2009 WL 3398489, at *3 (D. Me. Oct. 21, 2009) wherein the court held that the "[Plaintiffs'] quest to recover money damages from the City of Bangor under Title II [of the ADA] ... cannot succeed without evidence that persons having supervisory oversight within the relevant city department had notice of the Manuels' allegations of discriminatory treatment yet failed to take reasonable measures to ensure compliance with federal law. Liability ... cannot be imputed to institutions based merely on the actions of lower-level employees.") Deliberate indifference can be demonstrated when the institution is provided with notice of harm to a federally protected right and an opportunity to rectify the

situation, but fails to take reasonable measures to ensure compliance. Manuel, supra at *3, citing Wills v. Brown Univ., 184 F.3d 20, 41 (1st Cir. 1999). See also City of Canton v. Harris, 489 U.S. 378 (1988); (O'Connor, J., concurring) (deliberate indifference requires both "some form of notice ... and the opportunity to conform to [statutory] dictates"). There are no such allegations, evidence or argument here.

Rather, here the Plaintiff's argument rests on Cummings' conduct at the scene. While it is unclear whether the deliberate indifference must be based on the part of the employee or the entity, based on Officer Cummings' action and the Town's policies and the training it provided to Officer Cummings through the police academy, no reasonable jury could find that either the officer or Town acted with deliberate indifference. Therefore, the Court should affirm summary judgment on the ADA claim.

CONCLUSION

In light of the foregoing, Thomas Cummings and the Town of Athol respectfully request that this Court affirm the District Court's grant of summary judgment on all of the Plaintiff's claims.

Respectfully submitted,

Defendants - Appellees
By their attorneys,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

In conformity with Fed. R. App. P. 32(a)(7)(B) and (C), the undersigned state that the Brief of the Defendants - Appellees is in compliance with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i). In this regard, according to the word count of the word processing system used to prepare the Brief, the number of words in the Brief is 11,918.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, I electronically filed the foregoing Brief of the Defendants - Appellees with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that counsel of record are registered as ECF filers and that they will be served by the CM/ECF system:

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ADDENDUM

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M.G.L.A. 12 § 11H

§ 11H. Violations of constitutional rights; civil actions by attorney general; venue; compensatory damages; fees and costs; civil penalties

Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.
If the attorney general prevails in an action under this section, the attorney general shall be entitled to: (i) an award of compensatory damages for any aggrieved person or entity; and (ii) litigation costs and reasonable attorneys' fees in an amount to be determined by the court. In a matter involving the interference or attempted interference with any right protected by the constitution of the United States or of the commonwealth, the court may also award civil penalties against each defendant in an amount not exceeding $5,000 for each violation.

M.G.L.A. 12 § 11I

§ 11*I*. Violations of constitutional rights; civil actions by aggrieved persons; costs and fees

Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

M.G.L.A. 265 § 13D

§ 13D. Assault and battery upon public employees; attempt to disarm police officer; assault and battery upon a police officer; penalties

Whoever commits an assault and battery upon any public employee when such person is engaged in the performance of his duties at the time of such assault and battery, shall be punished by imprisonment for not less than ninety days nor more than two and one-half years in a house of correction or by a fine of not less than five hundred nor more than five thousand dollars.

An officer authorized to make arrests may arrest any person upon probable cause and without a warrant if the person has committed an offense under this section upon a public employee when the public employee was operating a public transit vehicle and the officer may keep the person in custody during which period the officer shall seek the issuance of a complaint and request a bail determination with all reasonable promptness.

Whoever commits an offense under this section and which includes an attempt to disarm a police officer in the performance of the officer's duties shall be punished by imprisonment in the state prison for not more than 10 years or by a fine of not more than $1,000 and imprisonment in a jail or house of correction for not more than 2 ½ years.

[Paragraph added by 2018, 69, Sec. 128 effective April 13, 2018.]

Whoever commits an assault and battery upon a police officer when such officer is engaged in the performance of the officer's duties at the time of such assault and battery and who by such assault and battery causes serious bodily injury to the officer shall be punished by a term of imprisonment in the state prison for not less than 1 year nor more than 10 years, or house of correction for not less than 1 year, nor more than 2 ½ years. No sentence imposed pursuant to this section shall be for less than a mandatory minimum term of imprisonment of 1 year and a fine of not less than $500 nor more than $10,000 may be imposed but not in lieu of the mandatory minimum term of imprisonment. A prosecution commenced under this paragraph shall not be placed on file or continued without a finding and a sentence imposed upon a person convicted of violating this paragraph shall not be suspended or reduced, nor shall such person be eligible for probation, parole, work release, furlough or receive any deduction from the person's sentence for good conduct until such person shall have served said mandatory minimum term of imprisonment. For purposes of this section, the term "serious bodily injury" shall mean bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ or substantial risk of death.