

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HENRY D. LIU,

3:14-CV-00908-BR

Plaintiff,

OPINION AND ORDER

v.

PORTLAND STATE UNIVERSITY, et
al.,

Defendants.

MICAH D. FARGEY

Fargey Law PC
5 Centerpointe Drive, 4th Floor
Lake Oswego, OR 97035
(503) 946-9426

Attorneys for Plaintiff

P.K. RUNKLES-PEARSON

SHARAE M. WHEELER

Miller Nash LLP
111 S.W. Fifth Avenue
Suite 3400
Portland, OR 97204
(503) 205-2314

Attorneys for Defendants Portland State University,
Jacqueline Balzer, Domanic Thomas, and Joseph Schilling

TRACY REEVE

Portland City Attorney

J. SCOTT MOEDE

WADE H. TUCKER

Deputy City Attorneys

1221 S.W. Fourth Avenue, Suite 430

Portland, OR 97204

(503) 823-4047

Attorneys for Defendants City of Portland and James
Crooker

KAREN O'KASEY

JASON R. POSS

Hart Wagner LLP

1000 S.W. Broadway, Twentieth Floor

Portland, Oregon 97205

(503) 222-4499

Attorneys for Defendant Oregon Health & Sciences
University

DUNCAN K. FOBES

Patterson Buchanan Fobes & Leitch

2112 Third Avenue, Suite 500

Seattle, WA 98121

(206) 462-6700

Attorneys for Defendant Cascadia Behavioral Healthcare

BROWN, Judge.

This matter comes before the Court on the Renewed Motion (#162) for Summary Judgment of Defendant Cascadia Behavioral Healthcare, Inc. For the reasons that follow, the Court **GRANTS** Cascadia's Motion and **DISMISSES with prejudice** Plaintiff's claims against Cascadia.

BACKGROUND

The following facts are taken from the Agreed Facts in the parties' Pretrial Order and the parties' materials related to Cascadia's Motion for Summary Judgment and are undisputed unless otherwise noted.

Plaintiff Henry D. Liu was enrolled as a graduate student in the Conflict Resolution Program at Portland State University (PSU) from the beginning of the fall term in 2011 through June 21, 2012.

On April 20, 2012, another graduate student in the Conflict Resolution Program told PSU Professor Rachel Cunliffe that Plaintiff had made statements about the faculty that the student found threatening. At some point the student also reported her conversation with Plaintiff to PSU Campus Public Safety (CPS) Officer Sergeant Joseph Schilling. The student specifically advised Sergeant Schilling that she was a classmate of Plaintiff and that Plaintiff told the student during a break from class on April 12, 2012, that (1) Plaintiff "had issues" with the Conflict Resolution Program and its Director, Professor Robert Gould, because of an unsatisfactory grade that he had received after he caused another student to cry in class; (2) he "had issues" because a fellow student had allegedly used the word "chink" while speaking with him; and (3) he made statements that made the student believe he was angry because he felt faculty members were

treating him differently due to his ethnicity. The student also advised Sergeant Schilling that Plaintiff told her after class on April 12, 2012, that he had a back or spinal injury and was taking a large amount of pain medication that often interfered with his thinking and daily activity. The student suggested alternatives such as yoga and meditation to relieve stress, but Plaintiff stated: "[T]his situation is really pushing me over the edge and we know what happens when students are pushed over the edge." The student emailed Plaintiff shortly after April 12, 2012, and Plaintiff responded he was very stressed, upset, and unable to sleep and was "becoming aware of repressed emotions of anger." The student told Sergeant Schilling that the student talked to Plaintiff after class on April 19, 2012, about Professor Gould, and Plaintiff became agitated, raised his voice, used profanity, and stated: "I'm about ready to stick a .45 in his ass." Plaintiff then lowered his voice and apologized, but he continued to express frustration and stated he was unable to sleep. He also repeated he was taking a lot of pain medication, but it was not helping his pain level. Plaintiff added: "Professor Stan Sitnick giving him a [bad] grade did not help . . . , 'he could get shot.'" Plaintiff told the student that he was noticing he had "a lot of hatred." The student became alarmed, changed the subject, and asked Plaintiff if he had weekend plans. Plaintiff responded he planned to go to "target

practice on Sunday.” Sergeant Schilling believed the student’s statements were credible and felt concerned.

Sergeant Schilling ascertained Plaintiff was living off of the PSU campus. Accordingly, Sergeant Schilling contacted the Portland Police Bureau and shared with Portland Police Officer James Crooker the student’s statements about Plaintiff.

Officer Crooker contacted Cascadia’s Project Respond Team and asked them to assist in a visit to Plaintiff’s residence for a mental-health evaluation and possible Director’s Hold pursuant to former Oregon Revised Statute § 426.233.

On April 20, 2012, Officer Crooker, Portland Police Officer Jason Walters, Sergeant Schilling, CPS Officer David Baker, and Cascadia Project Respond personnel Rachel Phariss and Sarah Schellhorn went to Plaintiff’s residence to address what they considered to be Plaintiff’s possible threat to the community. Phariss and Schellhorn waited around the corner from Plaintiff’s apartment while Officers knocked on Plaintiff’s door.

Officer Crooker testifies in his Declaration that Plaintiff “appeared dazed and confused and was unable to communicate clearly” when he answered the door. Decl. of James Crooker at ¶ 8. Plaintiff permitted the officers to enter his apartment. Officer Crooker asked Plaintiff if there were any firearms in his apartment, and Plaintiff stated he did not have any firearms. When the officers entered Plaintiff’s apartment, however, they

observed pamphlets for firearms on a table as well as an empty rifle box. At that point Officer Crooker asked Plaintiff again if there were any firearms in his apartment. Officer Crooker testifies in his Declaration that Plaintiff "began to back away from [Officer Crooker] and the other officers. In response [Officer Crooker] took [Plaintiff's] wrist and handcuffed Plaintiff 'for his own safety' and read Plaintiff his *Miranda* rights. After some discussion Plaintiff told the officers that he had firearms and agreed to tell the officers where to find them in his apartment. Officers eventually found unloaded .22 and .45 caliber handguns, an unloaded M4 carbine assault rifle, an unloaded 9mm handgun, and 'thousands of rounds of ammunition.'" Crooker Decl. at ¶ 10. Officers also found "various knives, survival tools (including an axe), a canteen, water bottles, dressings for wounds, rope, extra magazine clips, and flashlights." *Id.* Officer Crooker testified in his Declaration that in his experience "[t]he manner in which all these items were laid out was consistent with that of a moment's-notice preparedness for immediate accessibility to grab pre-packed grab bags in the event that combat were to occur suddenly." *Id.* The officers also found prescriptions for Percocet and Tramadol in Plaintiff's name, two bottles of Oxycodone prescribed to Plaintiff's father, and several empty bottles of alcohol. Officer Crooker spoke with Plaintiff, and,

"after a lengthy conversation," Plaintiff admitted he had made "bone-headed" comments "including something about using a .45 caliber handgun to kill a professor." Crooker Decl. at ¶ 11.

Phariss and Schellhorn entered Plaintiff's apartment after Officer Crooker handcuffed Plaintiff. Phariss and Schellhorn interviewed Plaintiff for 30 or 40 minutes. Phariss testifies in her Declaration that Plaintiff agreed the police could remove the firearms from his apartment. Plaintiff, however, "appeared to be confused and . . . kept sending the police to the wrong places to locate the weapons he had throughout his apartment." Decl. of Rachel Phariss at ¶ 6. Phariss states:

[Plaintiff] said he could not remember making the threatening comments he made to [the student], but he admitted that he may have made such comments. [Plaintiff's] conversation was vague and he kept going off on tangents. His thought process was circular. He denied hearing voices or having hallucinations. I could not tell if he was disoriented, but he did appear to be confused. He denied any mental health history, and he denied having any intent to harm himself. He seemed to marginalize the allegation that he had made threats about shooting one of his professors. He also denied having any intention to shoot anyone at PSU.

I observed the following things while I was in [Plaintiff's] apartment: (1) the receipt from his recently purchased AR 15 indicated that he had bought it after his problems with PSU began; (2) [Plaintiff] had ammunition and tactical gear, including duffle bags with dehydrated food, knives, and "quick stop", which will stop bleeding if a person is shot by a bullet; (3) there were empty beer, liquor, and wine bottles strewn about the apartment; and (4) there were Percocet and Tramadol pills on his coffee table as well as two

bottles of Oxycodone with [Plaintiff's] father's name on them.

Phariss Decl. at ¶¶ 7-8. Phariss testifies "[d]iagnosing [Plaintiff] was difficult because it was unclear whether his behavior was due to alcohol, drugs, or mental illness." Phariss Decl. at ¶ 9. Phariss, therefore, deferred diagnosis, but she decided Plaintiff "would benefit from a full psychological evaluation." Phariss and Schellhorn consulted with Meg Kaveny, Cascadia Project Respond Supervisor, and Kaveny consulted with Jay Auslander, Cascadia's Director of Emergency Services. Ultimately Phariss, Kaveny, and Auslander concluded a Director's Hold on Plaintiff was justified because there was probable cause to believe Plaintiff was

dangerous to others and [in] need of immediate psychological evaluation based on (1) [Plaintiff's] speech latency, which did not appear to be a language issue; (2) [Plaintiff's] apparent confusion; (3) [Plaintiff's] vague explanations of his behavior; (4) [Plaintiff] minimizing the allegations against him and not appreciating the seriousness of making threats; (5) the information regarding his statements threatening to shoot one of his professors; and (6) the large amount of weapons, ammunition, and tactical gear found in his apartment.

Phariss Decl. at ¶ 9. Phariss completed a Report of Peace Officer Custody of an Allegedly Mentally Ill Person as Directed by a Community Mental Health Director and issued a Director's Hold on Plaintiff for the following reasons:

Concerns about targeted specific threats, large number of firearms, ammo & tactical gear, speech latencies, confusion & vague explanation of behavior & previous statements that minimize concerns. Extreme risk of potential harm to others as evidenced by the above risk factors.

Phariss Decl., Ex. 1 at 1. The Report directed Officer Crooker to take Plaintiff into custody and to transport Plaintiff to Oregon Health and Science University (OHSU) for evaluation.

Officer Crooker transported Plaintiff to OHSU in his patrol car.

Plaintiff remained at OHSU from April 20, 2012, through April 25, 2012, during which time he was evaluated by numerous medical professionals including Drs. Anne Gross, Bridgid Crowley, Joshua Russell, and Robert Henrickson.

In June 2012 Plaintiff was expelled from PSU.

On May 2, 2014, Plaintiff filed *pro se* a first amended complaint in Clatsop County Circuit Court against 40 Defendants alleging seventeen claims for relief related to Plaintiff's interactions with Portland police officers, the seizure of Plaintiff's guns, Plaintiff's commitment to the OHSU psychiatric ward, Plaintiff's expulsion from PSU, and articles about Plaintiff's expulsion published by the PSU newspaper, *The Vanguard*, all occurring between April 2012 and June 2012.

On June 5, 2014, Defendants removed the matter to this Court on the basis of federal-question jurisdiction.

At some point before June 30, 2014, Plaintiff obtained counsel.

On August 15, 2014, Plaintiff filed a Second Amended Complaint against 29 Defendants alleging nine claims for relief related to Plaintiff's interaction with various Portland police officers, the seizure of Plaintiff's guns, Plaintiff's commitment to the OHSU psychiatric ward, and Plaintiff's expulsion from PSU, all occurring between April 2012 and June 2012.

On August 28, 2015, PSU Defendants filed a Motion for Summary Judgment as to all of Plaintiff's claims against them.

On November 23, 2015, Plaintiff filed a Motion for Extension of Summary Judgment-Related Court-Imposed Deadlines, which PSU Defendants opposed.

On December 4, 2015, the Court held a status conference. Based on the parties' representations at that conference, the Court ordered the parties to meet in person and to confer regarding the dismissal of certain parties and claims from this proceeding. The Court struck all pending Motions and directed the parties to file a preliminary Pretrial Order setting out the parties, claims, and defenses that remained in this matter after the parties' conferral.

On December 18, 2015, the parties filed a Joint Proposed Pretrial Order in which they dismissed numerous claims and parties and advised the Court that this matter would proceed only as to Plaintiff's claims (1) against the City of Portland and Officer Crooker pursuant to 42 U.S.C. § 1983 for unlawful seizure

in violation of Plaintiff's rights under the Fourth Amendment to the United States Constitution; (2) against OHSU pursuant to 42 U.S.C. § 1983 for unlawful confinement in violation of the Fourth Amendment to the United States Constitution; (3) against PSU, Defendant Jacqueline Balzer, and Defendant Domanic Thomas pursuant to 42 U.S.C. § 1983 for violation of Plaintiff's right to due process under the Fourteenth Amendment to the United States Constitution; (4) against the City of Portland and Officer Crooker for false arrest and/or confinement in violation of state law; (5) against Cascadia Behavioral Healthcare for unlawful confinement in violation of state law; (6) against PSU, Sergeant Schilling, and Cascadia for negligence "based on their respective roles in the arrest of Plaintiff"; and (7) against PSU, Balzer, and Thomas for negligence in "failing to exercise due care in connection with the process and proceedings that led to Plaintiff's expulsion from PSU."

On December 23, 2015, PSU Defendants filed a Renewed Motion for Summary Judgment.

On January 15, 2016, Cascadia filed a Renewed Motion for Summary Judgment. The Court took Cascadia's Motion under advisement on March 1, 2016.

On March 28, 2016, the Court issued an Opinion and Order in which it granted PSU Defendants' Renewed Motion for Summary Judgment and dismissed with prejudice Plaintiff's claims against

PSU Defendants.

STANDARDS

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Washington Mut. Ins. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). See also Fed. R. Civ. P. 56(a). The moving party must show the absence of a dispute as to a material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine dispute as to a material fact for trial. *Id.* "This burden is not a light one The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted).

A dispute as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010). "Summary

judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9th Cir. 2004) (citation omitted). A "mere disagreement or bald assertion" that a genuine dispute as to a material fact exists "will not preclude the grant of summary judgment." *Deering v. Lassen Cmty. Coll. Dist.*, No. 2:07-CV-1521-JAM-DAD, 2011 WL 202797, at *2 (E.D. Cal., Jan. 20, 2011) (citing *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989)). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1137 (9th Cir. 2009) (citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

DISCUSSION

As noted, Plaintiff's remaining claims against Cascadia are for unlawful confinement in violation of state law and negligence "based on [its] role[] in the arrest of Plaintiff." Cascadia moves for summary judgment on both of Plaintiff's claims against it on the grounds that former Oregon Revised Statute § 426.355(6)

grants Cascadia complete immunity from liability or, in the alternative, Plaintiff's claims against Cascadia are meritless.

Former Oregon Revised Statute § 426.233 authorized Director's Holds at the time Phariss placed a Director's Hold on Plaintiff. Former § 426.233 provided in pertinent part:

(1)(a) A community mental health program director . . . may take one of the actions listed in paragraph (b) of this subsection when the community mental health program director or designee has probable cause to believe a person:

(A) Is dangerous to self or to any other person and is in need of immediate care, custody or treatment for mental illness.

* * *

(b) The community mental health program director or designee under the circumstances set out in paragraph (a) of this subsection may:

(A) Notify a peace officer to take the person into custody and direct the officer to remove the person to a hospital or nonhospital facility approved by the Oregon Health Authority.

The Director's Hold authorized under former § 426.233 permits only transportation of the individual to a hospital or facility. After the individual is transported, former Oregon Revised Statute § 426.232 permitted physicians to issue independently a two-physician hold that authorized a physician to cause an individual to be admitted to or retained at a hospital only after consulting with a second physician and after determining the individual is dangerous to himself or to others and in need of

emergency care or treatment for mental illness. As noted, Cascadia only issued the Director's Hold authorized by former § 426.233 and did not have any involvement in deciding to admit or to retain Plaintiff when he arrived at OHSU.

Former Oregon Revised Statute § 426.335(6) provided:

No peace officer, person authorized under ORS 426.233, community mental health director or designee, hospital or other facility, physician or judge shall in any way be held criminally or civilly liable for actions pursuant to ORS 426.228 to 426.235 if the individual or facility acts in good faith, on probable cause and without malice.

Cascadia asserts this provision provides Cascadia with immunity as to Plaintiff's claims because Phariss acted in good faith, without malice, and with probable cause when she placed a Director's Hold on Plaintiff.

Plaintiff, however, asserts Phariss did not have probable cause¹ to issue the Director's Hold because the threats that Plaintiff made were "merely hyperbolic," he did not do anything illegal, he lawfully owned the firearms found at his apartment, he was legally prescribed the Percocet and Tramadol, his father left the Oxycodone when he visited Plaintiff's apartment, and Plaintiff stated during his conversation with Officer Crooker that he did not intend to commit any act of violence.

Probable cause is not defined in Chapter 426. Oregon

¹ Plaintiff appears to concede that Phariss acted in good faith and without malice and does not present any evidence to the contrary.

courts, however, have analogized probable cause in Chapter 426 to the definition set out in Oregon Revised Statute § 131.005² and have held it is defined as "a substantial objective basis for believing that more likely than not a person is mentally ill." See *Pyles v. Winters*, No. 1:12-cv-00346-CL, 2013 WL 3475331, at *4 (D. Or. July 9, 2013) (citing *State v. Smith*, 71 Or. App. 205, 211 (1984)). When "determining whether objective probable cause exists, [the court must] consider the totality of the circumstances presented to the officer and reasonable inferences that may be drawn from those circumstances; no single factor is dispositive." *State v. Kelly*, 274 Or. App. 363, 372 (2015) (quotation omitted).

"The determination of probable cause is a legal, not a factual, conclusion. Probable cause does not require certainty.'" *Pyles*, 2013 WL 3475331, at *4 (quoting *State v. Herbert*, 302 Or. 237, 241 (1986)). "[I]f there is probable cause, it is irrelevant if the person turns out to be noncommittable." *Id.* (citing *Chathas v. Smith*, 884 F.2d 980, 987 (7th Cir. 1989)). The issue, therefore, is not whether Plaintiff is mentally ill, but whether under the totality of the circumstances Cascadia had information sufficient to form a

² Oregon Revised Statute § 131.005(11) defines probable cause as "a substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it."

substantial objective belief that it was more likely than not that Plaintiff was a danger to himself or to others.

As noted, Phariss testifies in her Declaration that Plaintiff admitted he made threatening comments about PSU professors and staff to another student. In addition, evidence in Plaintiff's apartment indicated he purchased an assault rifle after his disagreements with his professors. Plaintiff's "conversation was vague and he kept going off on tangents. His thought process was circular." Phariss testified Plaintiff denied hearing voices or having hallucinations, but he did appear to be confused. Phariss testified although Plaintiff denied any intent to shoot anyone at PSU, Plaintiff "marginalized the allegation that he had made threats about shooting one of his professors." In addition, Phariss observed Plaintiff had numerous firearms in his apartment as well as ammunition; duffle bags with dehydrated food; knives; "quick stop"; empty beer, liquor, and wine bottles strewn about the apartment; and Percocet and Tramadol as well as two bottles of Oxycodone with Plaintiff's father's name on them.

Plaintiff testifies in his Declaration that he had "camping equipment, like backpacks, food, water, a first-aid kit, including QuikClot and emergency supplies, rope, and an ax" in his apartment on April 20, 2012, because his "fiancée was [going to] visit[] from Shanghai, and [he] planned to take her camping."

Decl. of Henry Liu at ¶ 15. Plaintiff also testifies he attempted to explain the presence of these items to officers, but "no one seemed to care." *Id.* As Cascadia points out, however, Phariss stated in her contemporaneous Report that Plaintiff "never explained his large amount of ammo or tactical gear to [her] or the police." In addition, Plaintiff's initial assessment notes from when he arrived at OHSU on April 20, 2012, reflect Plaintiff's statement that he "lives alone [and] does not have a girlfriend/ partner." Decl. of Micah D. Fargey, Ex. 2 at 9. Similarly, on April 21, 2012, during Plaintiff's initial psychiatric evaluation by Paul Leung, M.D., Plaintiff noted his current relationships were "family." Fargey Decl., Ex. 3 at 3. Plaintiff did not mention a girlfriend or partner. In Plaintiff's Discharge Summary completed by Bridgid Crowley, M.D., on April 25, 2012, however, Plaintiff reportedly stated the "packs found in his apartment were to be used for camping and spending time outdoors with his fiance." Fargey Decl., Ex. 2 at 19.

Plaintiff also testifies in his Declaration that he was not dazed or confused when officers arrived at his apartment, and he was polite, kind, respectful, patient, honest, and transparent. Liu Decl. at ¶ 12. The Declarations of Officer Crooker and Phariss, however, indicate Plaintiff was confused. Similarly, Phariss's contemporaneous Report indicated Plaintiff was confused

and disoriented. In addition, the OHSU intake notes from April 20, 2012, reflect Plaintiff's thought process was "disorganized, pt had trouble remembering questions, answering questions sequentially, etc." Fargey Decl., Ex. 2 at 9. Plaintiff's memory was described as "unreliable, pt was not forthcoming with either officers of SW, reports gaps in his memory." *Id.*

On this record the Court concludes Plaintiff has not established there is any genuine dispute of material fact as to whether Cascadia had information sufficient to form a substantial objective belief, based on the totality of the circumstances, that it was more likely than not that Plaintiff was a danger to himself or to others. Nevertheless, even when the record is viewed in the light most favorable to Plaintiff, the Court concludes as a matter of law that Cascadia had probable cause to issue a Director's Hold on Plaintiff pursuant to former § 426.233. Cascadia, therefore, is immune from Plaintiff's remaining claims against it pursuant to § 426.335(6).

Accordingly, the Court grants Cascadia's Motion for Summary Judgment.

CONCLUSION

For these reasons, the Court **GRANTS** Cascadia's Motion (#162) for Summary Judgment and **DISMISSES with prejudice** Plaintiff's

claims against Cascadia.

IT IS SO ORDERED.

DATED this 12th day of May, 2016.



ANNA J. BROWN
United States District Judge