

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER CONSTANTINI : CIVIL ACTION
 :
 v. :
 :
 ROBERT HESS, ET AL. : NO. 03-5402

MEMORANDUM

Padova, J.

November 1, 2004

Plaintiff has brought this civil rights action pursuant to 42 U.S.C. § 1983 against the City of Philadelphia and certain of its employees, arising from Plaintiff's treatment by employees at the Riverview Home ("Riverview"), a personal care facility owned and operated by the City of Philadelphia, and Plaintiff's eviction from that facility. Before the Court is Defendants' Motion for Partial Summary Judgment. For the reasons which follow, Defendants' Motion is granted in part and denied in part.

I. BACKGROUND

Plaintiff resided at Riverview between August 1, 2001 and January 26, 2002, when he was evicted following a fight with another resident. (Pl.'s Exs. 3, 42.) Plaintiff resided at Riverview during his treatment (including surgery) for prostate cancer. (Pl.'s Ex. 1 at 12-14.) Pursuant to his Admission Agreement for Personal Care Homes ("Admission Agreement"), executed on August 1, 2001, Plaintiff paid \$458.40 a month for room, board and personal care services at Riverview. (Pl.'s Ex. 3 ¶ 1.) Pursuant to the Admission Agreement, if Riverview chose to

discharge Plaintiff, the administrator of Riverview was required to give him thirty (30) days prior written notice, citing the reasons for the discharge. (Id. ¶ 9.a.) The Admission Agreement contains one exception to the thirty day prior written notice requirement, a discharge due to a change in resident's conditions. (Id. ¶ 10.)

The Admission Agreement provides as follows:

The administrator shall notify both the resident and the designated person, if any, of the need to transfer the resident in the following situations:

* * *

b) The resident's condition is such that the resident is a danger to self or other residents and the resident must be removed from the home. In this situation, the administrator shall take appropriate interim immediate action to protect the health and safety of the resident, other residents of the home and staff.

(Id. ¶ 10.)

Plaintiff claims to have been subjected to verbal and physical abuse by Riverview employees from the first day of his residency at Riverview. This abuse included verbal harassment by staff, staff refusing to provide Plaintiff with meals, or providing skimpy meals, staff refusing to allow him to use a desk in the dayroom, staff moving his things out of his room without prior notice, staff threatening him with physical injury, and staff failing to prevent, or stop, physical attacks on Plaintiff by other residents. This abuse culminated in an attack on Plaintiff by another resident

which Plaintiff claims was orchestrated by two staff members, who joined in the physical assault on Plaintiff.

Riverview did not have a procedure for residents to use to complain about their treatment. (Pl.'s Ex. 12 at 25-26.) Plaintiff consequently submitted written complaints about his treatment to Maggie McCourt, a social work supervisor. (Pl.'s Ex. 11, 15, 21-27, 29, 30.) He also submitted written complaints to Catherine Kimerey, who oversaw resident care, food service, maintenance and capital programs for Riverview (Pl.'s Exs. 16, 17 at 10, 39), and Sally Fisher, who was the Acting Supervisor of Riverview while Plaintiff lived there. (Pl.'s Exs. 6 at 12, 37-41.)

Plaintiff was evicted from Riverview, without prior written notice, on January 26, 2002. His eviction followed an altercation with another resident, Leonard Jordan, in which Riverview employees Rick Moore and Kevin Jefferson participated. Plaintiff's troubles began at lunchtime that day, when he had a confrontation with Moore, who was serving food in the Riverview kitchen. (Def.'s Ex. 6 at 606.) Moore gave Plaintiff an inadequate portion of spaghetti for lunch and then laughed at him. (Id.) Moore later followed Plaintiff into the dining room and continued to laugh at him. (Id. at 606-07.) Plaintiff reported this incident to the acting supervisor, Mrs. Walker, who told him to ignore Moore. (Id. at 607-08.) At dinner that evening, Plaintiff observed Moore and

Kevin Jefferson, who also worked in the Riverview kitchen, speaking with Leonard Jordan, a Riverview resident. (Id. at 608.) Jefferson gave Jordan a bag filled with fruit which Jordan attempted to remove from the dining room. (Id. at 608-09.) Plaintiff reported this incident to Joanne McClary, a resident supervisor. (Id. at 609.) McClary told Jordan to eat the fruit in the dining hall and left. (Id.) Plaintiff subsequently overheard Moore and Jefferson tell Jordan "to get the rat." (Id.) Jordan then ran up to Plaintiff's table and punched Plaintiff on the forehead. (Id. at 609-10.) Jordan has admitted that he struck the first blow in this altercation. (Pl.'s Ex. 43 at 39.) Plaintiff attempted to restrain Jordan by putting him in a headlock and asked that the police be summoned. (Def.'s Ex. 3 at 610.) He claims that, instead of breaking up the fight, Moore and Jefferson joined in, kicking Plaintiff in the face, arms and legs. (Id.) Plaintiff suffered bruising on his face. (Pl.'s Ex. 44.)

The police were called and Officer Patricia Rosati responded. (Pl.'s Ex. 45 at 13.) Officer Rosati offered to take Plaintiff to the hospital. (Id. at 22.) McClary called Fisher, who was not at Riverview at the time, to tell her about the incident and recommended that Plaintiff be discharged from Riverview that night. (Pl.'s Ex. 6 at 68.) Fisher instructed McClary that Plaintiff was not to be allowed to return to Riverview. (Pl.'s Ex. 43 at 85.) No arrangements were made for Plaintiff to stay anywhere else.

(Pl.'s Ex. 43 at 85, Pl.'s Ex. 12 at 93.) Plaintiff was not informed that he had been discharged from Riverview before leaving for the hospital with Officer Rosati. (Def.'s Ex. 8 at 83.) Officer Rosati could not take Plaintiff to the hospital of his choice so she left him at a bus stop at Frankford and Rhawn Streets in Philadelphia. (Pl.'s Ex. 45 at 22.)

Plaintiff contacted the Pennsylvania Department of Public Welfare, Office of Social Programs ("DPW") following his eviction from Riverview. His complaints were investigated and Kathleen Gerrity, Eastern Regional Manager, issued a Report of DPW's Investigation on August 30, 2002. DPW's investigation resulted in the following findings regarding Plaintiff's eviction:

- As a result of the 1/26/02 incident, Philadelphia Police charged staff Frederick Moore and Kevin Jefferson with simple, then aggravated, assault. The case is currently proceeding through the Philadelphia Court System. The Department ensured, and supported, the immediate disciplinary actions taken against Mr. Moore and Mr. Jefferson. Mr. Moore was placed on a plan of supervision; Mr. Jefferson was suspended. Neither are employed at Riverview at this time.

* * *

- The conclusion in Riverview's Internal Complaint Report is that there were conflicting reports of the altercation from witnesses, but that Mr. Moore and Mr. Jefferson "may have set up the conflict."
- While Riverview believes that the

conditions for an emergency termination of [Peter Constantini ("PC")] existed on 1/26/02 following the altercation, the Department is requesting that a Policy for Emergency Terminations be developed and used by staff facing such decisions.

(Pl.'s Ex. 42 at 4.) DPW also reached the following findings regarding Plaintiff's other complaints of abuse by Riverview staff:

- PC's allegations regarding staff attitudes have generally been substantiated. At least one resident attributed recent changes in Riverview's environment to Mr. C's efforts.

* * *

- There was corroboration that staff mock and taunt residents. Riverview's conclusion that Mr. Moore and Mr. Jefferson "may have set up the conflict" on 1/26/02, was based on the fact that Mr. Jefferson had offered fruit to L.J. and not to PC, and that Mr. Moore had engaged in behavior earlier that day that was perceived by the complainant and witnesses as antagonistic. Such behavior included providing PC with a minute serving of spaghetti at mealtime, and laughing inappropriately at PC's reaction. This behavior is unacceptable and violates Regulations § 2620.61(6) and § 2620.74(K).
- Residents reported that some staff persons yell at residents. This is unacceptable and violates Regulations § 2620.61(6) and § 2620.74(k).

(Pl.'s Ex. 42 at 6-7.) DPW reached the following conclusions with respect to Riverview:

The investigation of the 1/26/02 assault on PC and its aftermath, revealed systemic issues of [sic] Riverview that must be

addressed. While there is no denying that Riverview is an institution that houses hundreds of residents, it must begin to break down the institutional mentality that exists towards residents. A tone of dignity and respect towards residents above all must be set. While there are undoubtedly many well-intentioned and respectful staff at Riverview, staff as a whole must begin to buy-in to elevating current standards.

The Personal Care Home Regulations are meant to ensure that PCHs such as Riverview provide safe, humane, comfortable and supportive residential settings for residents. It is expected that residents will receive the encouragement and assistance they need to develop and maintain maximum independence and self-determination.

As indicated throughout this report, violations to PCH regulations are being cited. A detailed plan of correction will be required. Departmental staff will be meeting with the Interim Superintendent and Deputy Managing Director in the near future to address every issue.

(Pl.'s Ex. 42 at 9.) DPW's investigation of Plaintiff's complaint led to Riverview being cited for four regulatory violations.

(Pl.'s Ex. 18.)

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could

return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999) (citing Petruzzi's

IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993)). The Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. However, "mere allegations, bare assertions or suspicions are not sufficient to defeat a motion for summary judgment." Felton v. Southeastern Penn. Transp. Auth., 757 F. Supp. 623, 626 (E.D. Pa. 1991) (citation omitted).

III. DISCUSSION

The Amended Complaint alleges causes of action against Moore and Jefferson for assault and battery (Count I); against Robert Hess, Sally Fisher, Joanne McClary, Joseph Golden, Margaret Galatig, and Catherine Kimerey for violation of Plaintiff's Fourteenth Amendment right to procedural due process pursuant to 42 U.S.C. § 1983 (Count II); against Riverview and the City of Philadelphia for breach of contract (Count III); against Robert Hess, Sally Fisher, Frederick Moore, Joanne McClary, Joseph Golden, Margaret Galatig and Catherine Kimerey for retaliation in violation of Plaintiff's First Amendment right to free speech pursuant to 42 U.S.C. § 1983 (Count IV); against the City of Philadelphia for maintaining policies, customs and practices of deliberate indifference to the needs of the citizens of Philadelphia and Plaintiff and for failure to train its personnel in violation of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983 (Counts V and VII); and against Riverview and the City of Philadelphia for common

law fraud (Count VIII).¹ Defendants have moved for the entry of summary judgment in their favor, and against Plaintiff, on Counts II-V, VII and VIII. Plaintiff does not contest the dismissal of all claims against Defendants Riverview, Golden and Galatig, and the dismissal of Count VIII in its entirety. Accordingly, Defendants Riverview, Golden and Galatig are dismissed, with prejudice, as Defendants to this proceeding, and Count VIII is dismissed with prejudice. Furthermore, as no claims have been asserted against Defendants Ida Taylor, Ira Dixon, John Taylor, Kathy De Lee, Ramona Turner, and Valerie Howell, those individuals are also dismissed, with prejudice, as Defendants to this action.

A. Counts II, V and VII

Counts II, V and VII assert claims pursuant to 42 U.S.C. § 1983 for violation of Plaintiff's Fourteenth Amendment right to procedural due process. Section 1983 "provides a remedy against 'any person' who, under the color of law, deprives another of his constitutional rights. To establish a claim under § 1983, a plaintiff must allege (1) a deprivation of a federally protected right, and (2) commission of the deprivation by one acting under color of state law." Price v. Pa. Prop. & Cas. Ins. Co. Ass'n, 158 F. Supp. 2d 547, 550 (E.D. Pa. 2001) (citing Carter v. City of Philadelphia, 989 F.2d 117, 119 (3d Cir. 1993); Lake v. Arnold, 112

¹Count VI purported to state a claim against Officer Rosati. Officer Rosati was dismissed, with prejudice, as a defendant in this proceeding pursuant to Court Order on June 2, 2004.

F.3d 682, 689 (3d Cir. 1997)). The Fourteenth Amendment to the United States Constitution protects a person from state action that deprives him of "life, liberty or property, without due process of law." U.S. Const. am. XIV § 1. "The essential principle of procedural due process is that a deprivation of life, liberty or property should be preceded by 'notice and opportunity for a hearing appropriate to the nature of the case.'" Price, 158 F. Supp. 2d at 552 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)). Plaintiff contends that Defendants, acting under color of state law, deprived him of his Fourteenth Amendment right to procedural due process by evicting him from Riverview without prior notice and without medical treatment and assistance in relocating as required by his Admission Agreement and Pennsylvania law. The Court uses a two stage analysis in examining a claim for failure to provide procedural due process pursuant to Section 1983, inquiring: "(1) whether 'the asserted individual interests are encompassed within the fourteenth amendment's protection of "life, liberty, or property"'; and (2) whether the procedures available provided the plaintiff with 'due process of law.'" Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000) (quoting Robb v. City of Philadelphia, 733 F.2d 286, 292 (3d Cir. 1984)).

1. Property interest

Defendants argue that they are entitled to the entry of summary judgment in their favor on Plaintiff's claims for violation

of his procedural due process rights because he cannot identify a legally protected property interest. Plaintiff maintains that he had a protected property interest in his residency at Riverview arising out of his Admission Agreement and state law. The word property, "in the constitutional sense," refers not only to real property, but also to "a benefit when an individual possesses a legitimate entitlement to it under existing rules or understandings." Pappas v. City of Lebanon, 331 F. Supp. 2d 311, 316 (M.D. Pa. 2004) (citations omitted). Indeed, "[t]he property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money . . . and the types of interests protected as 'property' are varied and often intangible, relating to the whole domain of social and economic fact." Dist. Council 33, Am. Fed'n of State, County and Mun. Employees, AFL-CIO v. City of Philadelphia, 944 F. Supp. 392, 395 (E.D. Pa. 1995) (citations omitted) (footnote omitted).²

Plaintiff contends that his property interest in his residency

²The Supreme Court has recognized constitutionally protected property interests in a wide variety of governmental benefits, licenses, and services such as: a horse trainer's license, see Barry v. Barchi, 443 U.S. 55, 65 n.11 (1979); utility services, see Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978); disability benefits, see Mathews v. Eldridge, 424 U.S. 319, 332 (1976); a high school education, see Goss v. Lopez, 419 U.S. 565, 573 (1975); government employment, see Connell v. Higginbotham, 403 U.S. 207 (1971); a driver's license, see Bell v. Burson, 402 U.S. 535, 539 (1971); and welfare benefits, see Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970). Dist. Council 33, 944 F. Supp. at 395 n.2.

at Riverview is a protected property interest in a benefit. The Supreme Court has explained that an individual may have a property interest in a benefit as follows:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972).

Not every state regulation, however, creates a constitutionally protected property interest, "[r]ather, 'the hallmark of property . . . is an individual entitlement grounded in state law which cannot be removed except for cause.'" Dist. Council 33, 944 F. Supp. at 395 (citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982)).

Plaintiff contends that his property interest in his residency at Riverview arises out of his Admission Agreement and state law. The Pennsylvania regulations governing personal care homes require

that, if a personal care home initiates a discharge or transfer of a resident, "the administrator shall give a 30-day prior written notice to the resident, the designated person, and the referral agent citing the reasons for the discharge or transfer." 55 Pa. Code § 2620.26. The Pennsylvania regulations permit discharge without thirty days prior written notice if:

The resident's condition is such that the resident is a danger to himself or other residents and the resident must be removed from the home. In this situation, the administrator shall take appropriate interim immediate action to protect the health and safety of the resident, other residents of the home and the staff.

(i) Appropriate interim immediate action shall include steps which a responsible person would take in a potentially volatile or dangerous situation such as one or more of the following:

(A) Prevent the resident from harming himself and others.

(B) Call the police.

(C) Notify local emergency mental health officials.

(D) Notify the resident's physician.

(E) Notify the resident's designated person, if any.

(F) Arrange to have the resident transferred.

55 Pa. Code § 2620.27(2).

The Court finds that Plaintiff had a legitimate claim to entitlement to his residency at Riverview which, in accordance with state law, could not be removed without thirty (30) days prior notice except for cause, in this case if his condition was such that he was "a danger to himself or other residents" such that he "must be removed from the home." See 55 Pa. Code § 2620.27(2).

Accordingly, the Court further finds that Plaintiff had a legally protected property interest in his continued residency at Riverview in accordance with the applicable state regulation which could not be terminated without procedural due process pursuant to the Fourteenth Amendment.³

2. Constitutionally adequate process

Having determined that Plaintiff had a protected property interest in his residency at Riverview, the Court must determine whether he received constitutionally adequate process with respect to his eviction. What constitutes constitutionally adequate process "is a flexible concept that varies with the particular

³In addition to Plaintiff's claim that his Fourteenth Amendment right to procedural due process was violated by Defendants in connection with his eviction from Riverview, Counts II, V and VII of the Complaint also allege claims against individual Defendants Hess, Fisher, McClary, and Kimeroy and against the City of Philadelphia for violating Plaintiff's Fourteenth Amendment right to procedural due process by: failing to provide Plaintiff with means of making complaints of abuse and discrimination; failing to refer Plaintiff to a local appropriate assessment agency; failing to secure adequate health care services; retaliating against Plaintiff for making complaints; requiring Plaintiff to obtain a pass in order to leave Riverview; failing to offer Plaintiff adequate portions of food; failing to offer Plaintiff alternative food; refusing to offer Plaintiff food when he missed a meal; impeding Plaintiff's ability to communicate privately with other residents of Riverview; failing to arrange a substitute driver to take Plaintiff to the hospital for surgery; failing to provide Plaintiff with medications in connection with his discharge from Riverview; and allowing staff to open Plaintiff's private mail. Plaintiff does not assert that he had a legally protected property interest which was violated by Defendants in connection with any of these claims. Consequently, the Court grants Defendants' Motion for Summary Judgment as to Counts II, V and VII of the Amended Complaint with respect to these claims.

situation." Zinermon v. Burch, 494 U.S. 113, 127 (1990). The Supreme Court has instructed that the following factors are to be weighed in determining what procedure is required in a particular case: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" Id. (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). Individuals must be provided with adequate notice detailing the reasons for a proposed termination of a constitutionally protected property interest . . . prior to the deprivation." Taylor v. Slick, 178 F.3d 698, 703 (3d Cir. 1999) (citations omitted). In order to "satisfy due process requirements, the notice provided must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Id. (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

The parties agree that the procedures provided by state regulation for the discharge or transfer of a personal care home resident in Pennsylvania are constitutionally adequate and do not contend that any other procedure should have been followed in this

case. However, the parties differ with respect to whether those procedures were followed in this case. Defendants contend that they are entitled to the entry of summary judgment in their favor because they complied with the procedures for discharge without 30 days prior written notice provided by 55 Pa. Code § 2620.27(2). Plaintiff, however, asserts that there is evidence that Defendants failed to comply with those regulations and, consequently, evicted him without procedural due process.

The relevant state regulations permit an administrator to discharge a personal care home resident without prior written notice when the resident is "a danger to himself or other residents" and he must be removed from the home in order to "protect the health and safety of the resident, other residents of the home and the staff." 55 Pa. Code § 2620.27(2). Defendants contend that they are entitled to the entry of summary judgment on Plaintiff's claim that he was evicted without procedural due process because Plaintiff was discharged in accordance with this regulation. Plaintiff asserts that there is evidence that the January 26, 2002 incident did not warrant an emergency discharge and that Defendants were aware that emergency discharge was not warranted.

Plaintiff contends that, since his altercation with Mr. Jordan had concluded before the decision was made to evict him, there was no emergency. Plaintiff also points out that the individuals

involved in the decision to evict him, McClary and Fisher, performed no investigation of the facts prior to deciding that he should be discharged. The evidence submitted by the parties shows that McClary heard yelling or screaming and entered the room where the altercation took place, where she saw Plaintiff jumping up and down and pointing to his head. (Pl.'s Ex. 36.) She also learned, before calling the police, that Jordan had initiated the altercation by throwing the first punch. (Pl.'s Ex. 6 at 67-68, Pl.'s Ex. 43 at 39.) McClary called Fisher and told her that Plaintiff should not be allowed to return to Riverview because there were "threats both between Mr. Constantini and Mr. Jordan about getting each other. They were going to get each other, that the situation wasn't over" (Pl.'s Ex. 43 at 30.) Despite her knowledge that Jordan started the fight, and was threatening Plaintiff, McClary recommended Plaintiff's eviction but did not recommend that Jordan be asked to leave Riverview. (Id.)

Gerrity, the DPW investigator, found that, at the time of Plaintiff's eviction, Riverview did not have a policy for emergency terminations. (Pl.'s Ex. 42 at 5.) She stated in her report that:

In terminating a resident without a thirty days notice in a case such as this, a licensee must use judicious judgment and rely on and adhere to Regulations §2620.27(2). In the aftermath, it is difficult to conclude whether the conditions existed for an emergency termination. However, it is clear that PC had the right to request and receive assistance in relocation.

(Id. at 6.) Gerrity elaborated on this statement during her deposition: "I thought that it was really questionable as to whether this is an emergency termination or not, but it was difficult to second guess a provider who is dealing with a situation of an altercation in a facility." (Pl.'s Ex. 10 at 41.) She also thought that there may have been an element of retaliation involved in the decision to evict Plaintiff. (Id. at 41-42.)

Plaintiff also contends that the procedure for emergency termination provided by state regulation was not followed by Defendants in his eviction. Section 2620.27 specifically requires that, in the event an emergency discharge is warranted, "[t]he administrator shall notify both the resident and the designated person, if any, of the need to transfer the resident" 55 Pa. Code § 2620.27. When Plaintiff was removed from Riverview during the evening of January 26, 2002, ostensibly to obtain medical help, he was not informed that he was being discharged from Riverview and that he would not be permitted to return. (Pl.'s Ex. 43 at 29-30.) Section 2620.27 further provides that the personal care home should take appropriate interim action in the event that the resident is a danger to himself or other residents and must be removed from the home, including one or more of the following: preventing the resident from harming himself or others, calling the police, notifying local emergency mental health officials, notifying the resident's physician, notifying the resident's

designated person, and arranging to have the resident transferred. 55 Pa. Code § 2620.27(2)(i). The only one of those steps taken by Defendants was calling the police. There is no evidence on the record of this Motion that Defendants made any attempt to notify local emergency mental health officials, notify Plaintiff's physician or attempt to have Plaintiff transferred. The regulations governing personal care homes also require personal care home administrators to ensure that their residents are aware of their rights, including their right to "request and receive assistance in relocating." 55 Pa. Code § 2620.61(7). Indeed, Garrity's report specifically noted that Plaintiff was entitled to request and receive assistance in relocating in connection with his eviction from Riverview. (Pl.'s Ex. 10 at 40, Pl.'s Ex. 42 at 6.) There is no evidence that any of the Defendants provided Plaintiff with any assistance in relocating or that any of the Defendants notified Plaintiff of his right to request and receive assistance in relocating in connection with his eviction from Riverview. Garrity also found that Plaintiff was not provided his medications upon his eviction in violation of 55 Pa. Code § 2620.34(11).⁴

Having examined the evidence on the record of this Motion in the light most favorable to Plaintiff, the Court finds that there

⁴55 Pa. Code § 2620.34 provides that "(11) When a resident permanently leaves the home, the resident's medications shall be given to the resident, the designated person, if any, or the person or entity taking responsibility for the new placement."

is a genuine issue of material fact for trial regarding whether Plaintiff received the process required by state law in connection with his eviction from Riverview. Consequently, the Court finds that there is a genuine issue of material fact regarding whether Plaintiff was deprived of his property interest in his residency at Riverview without procedural due process in violation of the Fourteenth Amendment.

Defendants also contend that they are entitled to the entry of summary judgment in their favor with respect to Plaintiff's procedural due process claim because he failed to take advantage of available process prior to filing suit. "In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." Alvin, 227 F.3d at 116. Defendants maintain that Plaintiff's Admission Agreement lists several agencies with which Plaintiff could file a complaint that his constitutional rights had been violated. The Admission Agreement states that "[a]ny resident (and/or their guardian) who believes they have been discriminated against may file a complaint of discrimination with" Riverview, the Bureau of Civil Rights Compliance, DPW, the Office of Civil Rights, U.S. Department of Health and Human Services, and the Pennsylvania Human Relations Commission. (Pl.'s Ex. 3 at 7.) Defendants argue that Plaintiff failed to comply with the requirement that he take

advantage of available process by filing a complaint with these entities. However, there is evidence on the record of this Motion that Plaintiff contacted DPW and the Pennsylvania Human Relations Commission with regard to his eviction from Riverview. (Pl.'s Ex. 1 at 114.) The plain language of the Admission Agreement does not require Plaintiff to file a complaint with all of the listed agencies prior to filing suit. The Court finds, therefore, that Plaintiff is not barred from maintaining this action by failure to take advantage of the process available to him.

3. Personal involvement of the individual Defendants

Defendants also argue that Hess, Fisher, McClary and Kimerey are entitled to summary judgment on Count II of the Amended Complaint because there is no evidence that any of these individual Defendants were personally involved in the alleged constitutional deprivation. In order to succeed on a claim brought pursuant to 42 U.S.C. § 1983, Plaintiff must establish that "the defendant personally participated, directed, or knowingly acquiesced in the alleged constitutional deprivation." Burke v. Dark, No. Civ. A. 00-CV-5773, 2001 WL 238518, at *2 (E.D. Pa. Mar. 8, 2001) (citing Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3rd Cir. 1988)). Plaintiff has submitted evidence that McClary and Fisher were personally involved in the decision to evict him from Riverview. The Court finds, accordingly, that there is a genuine issue of material fact for trial regarding whether McClary and Fisher were

personally involved in a deprivation of Plaintiff's Fourteenth Amendment right to procedural due process with respect to his eviction from Riverview. However, there is no evidence on the record of this Motion that Defendants Hess and Kimerey had any personal involvement in Plaintiff's eviction from Riverview or in the decision to evict him from Riverview. Consequently, Defendants Hess and Kimerey are entitled to the entry of summary judgment in their favor, and against Plaintiff, with respect to Count II of the Amended Complaint.

4. Qualified immunity

Defendants also argue that the individual Defendants are entitled to the entry of summary judgment in their favor with respect to Count II of the Amended Complaint pursuant to the doctrine of qualified immunity. Qualified immunity shields "government officials performing discretionary functions . . . 'from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Kopec v. Tate, 361 F.3d 772, 776 (3d Cir. 2004) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The burden is on the individual Defendants to establish that they are entitled to qualified immunity. Id. (citation omitted). In Saucier v. Katz, 533 U.S. 194, 200-01 (2001), the Supreme Court held that a two step inquiry must be used when ruling on a claim of qualified immunity. The Court first

determines whether, "taken in the light most favorable to the [plaintiff]," the "facts alleged show the [government official's] conduct violated a constitutional right." Id. at 201. "If the Plaintiff fails to make out a constitutional violation, the qualified immunity inquiry is at an end; the officer is entitled to immunity." Bennett v. Murphy, 274 F.3d 133, 136 (3d Cir. 2002). If the evidence, taken in the light most favorable to the Plaintiff, shows the violation of a constitutional right, the Court examines whether that "right was clearly established." Saucier, 533 U.S. at 201. The issue for the Court is "'whether it would be clear to a reasonable [government official] that his conduct was unlawful in the situation he confronted.' If it would not have been clear to a reasonable [government official] what the law required under the facts alleged, then he is entitled to qualified immunity." Kopec, 361 F.3d at 776 (citing Saucier, 533 U.S. at 202). If these requirements have been satisfied, the Court then examines "whether the [official] made a reasonable mistake as to what the law requires." Carswell v. Borough of Homestead, 381 F.3d 235, 242 (3d Cir. 2004). The applicability of qualified immunity is "an objective question to be decided by the court as a matter of law." Id.

Defendants argue that they are entitled to qualified immunity because Plaintiff has failed to establish a constitutional violation. The Court has, however, determined that Plaintiff had

a constitutionally protected property interest in his residency at Riverview and has submitted evidence which, viewed in the light most favorable to Plaintiff, raises a genuine issue of material fact with regard to whether he was deprived of that property interest without due process in violation of the Fourteenth Amendment. Accordingly, the Court finds that Plaintiff has made out a constitutional violation. The Court must next determine whether "it would be clear to a reasonable [government official] that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202. Defendants have made no showing regarding this issue, except to declare, without reference to case law or to the record of this Motion, that their conduct was objectively reasonable. The Court finds that Defendants have failed to meet their burden of establishing that Defendants McClary and Fisher are entitled to qualified immunity.

The Court finds that genuine issues of material fact exist with respect to whether McClary and Fisher deprived Plaintiff of his property interest in his residency at Riverview without procedural due process. Accordingly, Defendants' Motion for Summary Judgment on Count II of the Amended Complaint is denied as to Plaintiff's claim that McClary and Fisher violated his Fourteenth Amendment right to due process in connection with his eviction from Riverview. Defendants' Motion for Summary Judgment on Count II of the Amended Complaint is granted in all other

respects.

5. Municipal liability

Counts V and VII of the Amended Complaint assert claims against the City of Philadelphia for violation of Plaintiff's Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983. Defendants argue that the City of Philadelphia is entitled to the entry of summary judgment in its favor on Counts V and VII because Plaintiff cannot establish that his Fourteenth Amendment right to procedural due process was violated as a result of a policy, custom or practice of the City of Philadelphia. The City of Philadelphia cannot be held liable under Section 1983 "solely because it employs a tortfeasor - or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 691 (1978) (emphasis in original). The Supreme Court concluded in Monell that:

a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694. "To establish municipal liability under Monell, a plaintiff must 'identify the challenged policy, [practice or custom], attribute it to the city itself, and show a causal link between the execution of the policy, [practice or custom] and the

injury suffered.'" Martin v. City of Philadelphia, No. Civ. A. 99-543, 2000 WL 1052150, at *10 (E.D. Pa. July 24, 2000) (quoting Fullman v. Phila. Int'l Airport, 49 F. Supp. 2d 434, 445 (E.D. Pa. 1999)) (additional citations omitted). A government's policy is established when "a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986)). A course of conduct becomes a custom when "though not authorized by law, 'such practices of state officials [are] so permanent and well settled' as to virtually constitute law." Id. (quoting Monell, 436 U.S. at 690). It is the plaintiff's burden to show that "a policymaker is responsible either for the policy or, through acquiescence, for the custom." Id. A policymaker is an official with "final, unreviewable discretion to make a decision or take an action." Id. at 1481 (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 142 (1988)). Even high ranking officials are not policymakers for purposes of Section 1983 if their decisions are constrained by policies put into place by others, or if their decisions are reviewable:

When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly when a subordinate's decision is subject to review by

the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies.

Praprotnik, 485 U.S. at 127 (emphasis in original); see also Vassallo v. Timmoney, No. Civ. A. 00-84, 2001 WL 1243517, at *8 (E.D. Pa. Oct. 1, 2001) (noting that even a high ranking official "is not a final policymaker if his decisions are subject to review and revision.") (citing Morro v. City of Birmingham, 117 F.3d 508, 510 (11th Cir. 1997)).

Plaintiff argues that the City of Philadelphia should be held liable for the violation of his civil rights because Riverview did not have in place, at the time of his eviction, any policy regarding emergency termination of residents, thereby creating a custom or practice of allowing the emergency termination of personal care residents in violation of their procedural due process rights. Plaintiff has, however, submitted no evidence linking this custom or practice to the City of Philadelphia itself. There is no evidence on the record of this Motion that McClary or Fisher are decisionmakers with "final authority to establish municipal policy" with respect to the discharge of personal care home residents. See Andrews, 895 F.2d at 1480. Although Fisher may have had the authority to order the emergency discharge of a Riverview resident, Plaintiff has submitted no evidence that McClary's or Fisher's authority was not subject to review or that their authority was unconstrained by municipal policy. There is

also no evidence on the record of this Motion that the City of Philadelphia has a policy, custom or practice of discharging personal care home residents in violation of their Fourteenth Amendment rights to due process. The Court finds that Plaintiff has failed to identify a policy, custom or practice attributable to the City of Philadelphia which caused Plaintiff to be evicted from Riverview without procedural due process.

Plaintiff also contends that the City of Philadelphia is liable to him for the violation of his civil rights because it failed to train its employees. The United States Court of Appeals for the Third Circuit ("Third Circuit") has explained that:

[I]n the absence of an unconstitutional policy, a municipality's failure to properly train its employees and officers can create an actionable violation of a party's constitutional rights under § 1983. However, this failure to train can serve as the basis for § 1983 liability only "where the failure to train amounts to deliberate indifference to the rights of persons with whom the [municipal employees] come into contact."

Reitz v. County of Bucks, 125 F. 3d 139, 145 (3d Cir. 1997) (quoting City of Canton v. Harris, 489 U.S. 378, 388 (1989)). Plaintiff must, therefore, "identify a failure to provide specific training that has a causal nexus with [his injuries]" and show that the absence of that specific training reflects "a deliberate indifference to whether the alleged constitutional deprivations occurred." Id. (citing Colburn v. Upper Darby Township, 946 F.2d 1017, 1030 (3d Cir. 1991)). Plaintiff must "also demonstrate that,

through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." Bd. of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 404 (1997) (emphasis in original). In addition, a municipality may only be held liable in a Section 1983 action for a failure to train "if the plaintiff can show both contemporaneous knowledge of the offending incident or a prior pattern of similar incidents and circumstances under which the supervisor's actions or inaction could be found to have communicated a message of approval to the offending subordinate." Montgomery v. DeSimone, 159 F.3d 120, 127 (3d Cir. 1998).

Plaintiff has failed to identify any specific training which the City of Philadelphia failed to provide which has a causal nexus with his eviction from Riverview. In addition, there is no evidence on the record of this Motion that a City official with relevant decisionmaking authority had contemporaneous knowledge of Plaintiff's eviction from Riverview or of a prior pattern of similar incidents and circumstances. Accordingly, the Court finds that Plaintiff has failed to make a factual showing sufficient to establish the existence of municipal liability for the alleged deprivation of Plaintiff's Fourteenth Amendment right to procedural due process in connection with his eviction from Riverview. See Celotex, 477 U.S. at 322. The Court, therefore, grants Defendants' Motion for Summary Judgment with respect to Counts V and VII of the Amended Complaint.

B. Count III

Count III asserts a claim against the City of Philadelphia for breach of contract. The elements of a claim for breach of contract under Pennsylvania law are: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." Reformed Church of the Ascension v. Theodore Hooven & Sons, Inc., 764 A.2d 1106, 1109 (Pa. Super. Ct. 2000). Plaintiff claims that the City of Philadelphia breached his Admission Agreement by discharging him without 30 days prior written notice. Defendants do not challenge the existence of a contract between Plaintiff and the City of Philadelphia, but argue that the City of Philadelphia is entitled to the entry of summary judgment in its favor with respect to this claim because there is no evidence that the City of Philadelphia breached this provision of the Admission Agreement. Defendants maintain that Plaintiff was properly discharged from Riverview in accordance with paragraph 10 of the Admission Agreement because he was a danger to himself or other residents.

As discussed in Section III.A.2., above, Plaintiff has submitted evidence raising a genuine issue of material fact regarding whether he was a danger to himself or other residents at the time of his eviction from Riverview. (See Pl.'s Ex. 6 at 67-68, Pl.'s Ex. 10 at 41-42, Pl.'s Ex. 36, Pl.'s Ex. 43 at 30, 39.) Plaintiff has also submitted evidence that he was not notified of

his eviction, or of the need to transfer him because he was a danger to himself or other residents, prior to his eviction, as required by paragraph 10 of the Admission Agreement. (Pl.'s Ex. 43 at 29-30.) Accordingly, the Court finds that there is a genuine issue of material fact regarding whether the City of Philadelphia breached the Admission Agreement by evicting Plaintiff from Riverview without 30 days prior written notice. The Court, therefore, denies Defendants' Motion for Summary Judgment with respect to this aspect of Count III.

Plaintiff also claims that the City of Philadelphia breached the Admission Agreement by preventing him from visiting other residents and denying him meals in violation of paragraph 13 of the Admission Agreement.⁵ Paragraph 13 of the Admission Agreement provides, in relevant part, as follows:

13. HOME RULES. The resident agrees to abide by the following rules. These rules must not be in violation of resident's rights given in paragraph [14] of this agreement.

4. VISITING HOURS are daily from 10:00 a.m. to 8:00 p.m.

⁵The Court need not address Defendants' argument that the City of Philadelphia is immune from liability, pursuant to the Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. Ann. § 8541, *et seq.*, for any breach of paragraph 14 of the Admission Agreement, which provides a list of Resident's Rights. Plaintiff has limited his claims for breach of contract to claims that the City breached paragraphs 9 and 10 of the Admission Agreement by evicting him without 30 days prior written notice and claims that the City breached paragraph 13 of the Admission Agreement by preventing him from visiting other residents and by denying him meals. (See Pl.'s Mem. at 42.)

5. MEALS:

Breakfast 7:15 a.m. to 8:00 a.m.
Lunch 11:30 a.m. to 12:15 p.m.
Dinner 5:15 p.m. to 6:00 p.m.

(Pl.'s Ex. 3 ¶ 13.) Defendants argue that the City of Philadelphia is entitled to the entry of summary judgment in its favor on Plaintiff's claim that the City breached paragraph 13 of the Admission Agreement because there is no evidence that Plaintiff was prevented from visiting other residents during the visiting hours provided by the Admission Agreement and because there is no evidence that he was denied meals.

Plaintiff has submitted evidence that, on one occasion, a Riverview Employee asked a Riverview resident who lived in the Fernwood West cottage, and who was visiting Plaintiff in the day room of the Fernwood East cottage, to leave the Fernwood East day room because he was not a resident of Fernwood East. (Pl.'s Ex. 38.) Plaintiff was subsequently informed, by another Riverview employee, that Riverview residents were permitted to visit the day rooms of other cottages. (Id.) Plaintiff does not contend that this visit occurred during the visiting hours provided by paragraph 13(4) of the Admission Agreement or that he suffered any damages arising from this incident.

Plaintiff has also submitted evidence that, on September 9, 2001, he returned to Riverview from giving blood at 5:45, after dinner had been served to residents, but prior to 6:00 p.m., and he

was initially denied dinner. (Pl.'s Ex. 1 at 34.) However, the evidence on the record of this Motion shows that Plaintiff was given a meal that night. (Id. at 35.) The record of this Motion also contains evidence of other occasions in which Plaintiff encountered difficulty obtaining appropriate meals from Riverview food service staff (see Pl.'s Exs. 20, 25, Defs.' Ex. 3 at 606), but there is no evidence on the record of this Motion that Plaintiff was actually denied a meal during the meal hours set forth in paragraph 13 of the Admission Agreement. Plaintiff has also failed to assert any damages arising from the incidents in which he had difficulty obtaining appropriate meals.

The Court finds that the evidence on the record of this Motion is insufficient to establish the existence of a genuine issue of material fact regarding whether the City of Philadelphia breached its obligation to allow Plaintiff visitors during visiting hours or its obligation to provide Plaintiff with meals during its scheduled mealtimes. The Court further finds that there is no evidence on the record of this Motion that Plaintiff suffered any damages as a result of the alleged breaches of paragraph 13 of the Admission Agreement. Consequently, the Court grants Defendants' Motion for Summary Judgment on Count IV of the Amended Complaint with respect to Plaintiff's claim that the City of Philadelphia breached paragraph 13 of the Admission Agreement by preventing him from receiving visitors and denying him meals.

C. Count IV

Count IV of the Amended Complaint alleges a claim against Defendants Hess, Fisher, Moore, McClary, and Kimerey, pursuant to 42 U.S.C. § 1983, for violation of Plaintiff's First Amendment right to free speech. Plaintiff alleges that the individual Defendants retaliated against him, in violation of the First Amendment, for complaints which he made about his treatment, and the treatment of other residents, at Riverview. "The Supreme Court has explicitly held that an individual has a viable claim against the government when he is able to prove that the government took action against him in retaliation for his exercise of First Amendment rights." Anderson v. Davila, 125 F.3d 148, 160 (3d Cir. 1997) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)). In order to prevail on his claim that the individual Defendants violated his First Amendment rights by retaliating against him for making complaints, Plaintiff must show: "(1) that [he] engaged in protected activity; (2) that the government responded with retaliation; and (3) that the protected activity was the cause of the retaliation." Estate of Smith v. Marasco, 318 F.3d 497, 512 (3d Cir. 2003) (citing Anderson, 125 F.3d at 161).

Defendants argue that summary judgment should be granted in favor of Defendants Hess, Fisher, Moore, McClary, and Kimerey with respect to Count IV because Plaintiff's complaints regarding his

treatment at Riverview do not constitute protected activity under the First Amendment. Defendants contend that Plaintiff's complaints cannot be treated as protected activity because they do not relate to matters of public concern. The "public concern" requirement does not, however, apply in this case. The Third Circuit has recently explained that the "public concern" requirement applies only when "a claim of First Amendment retaliation is brought by a public employee against his or her government employer." Eichenlaub v. Township of Indiana, 385 F.3d 274, 282 (3d Cir. 2004) (citing Anderson, 125 F.3d at 162). The "public concern" requirement is not applied "when non-employees complain that government has retaliated against them *as citizens* for their speech. To expand this public concern limitation into the broader context of all citizen speech would wrench it from its original rationale and curtail a significant body of free expression that has traditionally been fully protected under the First Amendment." Id. (emphasis in original). The Third Circuit explained that "except for certain narrow categories deemed unworthy of full First Amendment protection -- such as obscenity, 'fighting words' and libel -- all speech is protected by the First Amendment. That protection includes private expression not related to matters of public concern." Id. at 282-83 (citations omitted). Accordingly, the Court finds that Plaintiff's speech, comprising complaints about his treatment, and the treatment of others, by

employees of Riverview, is entitled to full protection under the First Amendment. See id. at 284.

Defendants also argue that Defendants Hess, Fisher, Moore, McClary, and Kimerey are entitled to summary judgment on Count IV because there is no evidence that any of them retaliated against Plaintiff as a result of his complaints. Plaintiff has produced evidence that he submitted written complaints to McCourt, a social work supervisor, regarding verbal harassment of himself and other residents of Riverview by Riverview employees, including Kevin Jefferson (Pl.'s Exs. 11, 20, 21, 22, 23, 25, 26); the failure of a Riverview employee to transport Plaintiff to the hospital for his surgery on October 2, 2001 (Pl.'s Ex. 15); and an incident of physical intimidation of Plaintiff by that employee after Plaintiff had submitted his complaint to McCourt (Pl.'s Ex. 30). The record of this Motion also contains a complaint which Plaintiff wrote to Kimerey regarding his treatment by Riverview employees. (Pl.'s Ex. 16.) Plaintiff has also produced written complaints which he submitted to Fisher regarding his experience of verbal harassment by Riverview employees, including Jefferson and Moore. (Pl.'s Exs. 37, 38, 40, 41.) One of those complaints was given to Fisher less than a week before Jefferson and Moore assaulted Plaintiff on January 26, 2002. (Id. at Pl.'s Ex. 40.) Plaintiff also submitted a written complaint to Fisher stating that his belongings and furniture had been removed from his room by a Riverview employee

without prior warning approximately two weeks after Plaintiff complained about that employee to Fisher. (Pl.'s Ex. 39.) Plaintiff has also produced evidence that Fisher refused to accept a December 21, 2001 memorandum from McCourt concerning an incident in which Plaintiff was physically assaulted by another resident. (Pl.'s Exs. 33-34.) The record before the Court also contains evidence that, during the time period in which Plaintiff submitted written complaints directly to Fisher, Fisher attempted to obtain a psychological evaluation of Plaintiff by the mental health mobile team and that, less than one week after returning McCourt's memo regarding the assault, Fisher asked McCourt to have Plaintiff's evaluated by a therapist. (Pl.'s Ex. 36.) There is also evidence that Plaintiff met with Hess and Fisher to discuss his complaints about Riverview on November 21, 2001. (Pl.'s Ex. 27.)

The Court finds that Plaintiff has submitted evidence that he complained about Moore to Fisher less than a week before Moore assaulted him. Plaintiff has also produced evidence that he submitted many complaints to Fisher and that, during the time period in which he submitted complaints directly to Fisher, she first sought to have him psychologically evaluated and then evicted him from Riverview. Close temporal proximity between protected speech and retaliatory conduct may be sufficient to establish causation. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000). The Court finds that the evidence on the record of

this Motion, viewed in the light most favorable to Plaintiff, establishes the existence of a genuine issue of material fact regarding whether Defendants Moore and Fisher retaliated against Plaintiff for his protected speech. Accordingly, Defendants' Motion for Summary Judgment on Count IV of the Amended Complaint is denied with respect to individual Defendants Moore and Fisher.

The Court finds that Plaintiff has submitted evidence that he spoke with Hess concerning his complaints about Riverview, but has not submitted any evidence that Hess took any action in retaliation for that speech. The Court further finds that there is no evidence on the record of this Motion that Kimerey had any part in Plaintiff's eviction from Riverview or took any other retaliatory action against him. The Court also finds that there is no evidence on the record of this Motion that Plaintiff made complaints to or about McClary, or that McClary was aware of Plaintiff's complaints, which were made to other Riverview employees, when she recommended to Fisher that he be evicted from Riverview. Accordingly, Defendants' Motion for Summary Judgment on Count IV of the Amended Complaint is granted as to individual Defendants Hess, Kimerey and McClary.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment as to Count II of the Amended Complaint is denied with respect to the claim asserted against Fisher and McClary for

violation of Plaintiff's Fourteenth Amendment right to procedural due process in connection with his eviction from Riverview. Defendants' Motion for Summary Judgment as to Count II is granted in all other respects. Defendants' Motion for Summary Judgment as to Count III of the Amended Complaint is denied with respect to the claim asserted against the City of Philadelphia for breach of contract arising from Plaintiff's eviction from Riverview. Defendants' Motion for Summary Judgment as to Count III is granted in all other respects. Defendants' Motion for Summary Judgment as to Count IV of the Amended Complaint is denied with respect to the claim for retaliation in violation of the First Amendment brought against Defendants Fisher and Moore. Defendants' Motion for Summary Judgment as to Count IV of the Amended Complaint is granted in all other respects. Defendants' Motion for Summary Judgment is also granted with respect to Counts V, VII and VIII and those Counts are dismissed. Individual Defendants Ida Taylor, Ira Dixon, John Taylor, Kathy De Lee, Ramona Turner, and Valerie Howell are dismissed with prejudice as Defendants to this action.⁶

⁶In sum, the following claims survive the Motion for Summary Judgment:

1. The assault and battery claim in Count I against Frederick Moore and Kevin Jefferson (Defendants did not move for summary judgment on this claim).
2. The § 1983 claim in Count II for deprivation of property without due process in violation of the Fourteenth Amendment against Joanne McClary and Kathleen Fisher based on Plaintiff's eviction from Riverview on January 26, 2002.
3. The breach of contract claim in Count III against the

An appropriate order follows.

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- City of Philadelphia based on Plaintiff's eviction from Riverview on January 26, 2002.
4. The § 1983 claim in Count IV for retaliation in violation of the First Amendment against Kathleen Fisher and Frederick Moore.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER CONSTANTINI : CIVIL ACTION
: :
v. : :
: :
ROBERT HESS, ET AL. : NO. 03-5402

ORDER

AND NOW, this 1st day of November, 2004, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 29), Plaintiff's response thereto, and Defendants' Reply Memorandum, **IT IS HEREBY ORDERED** that the Motion is **GRANTED** in part and **DENIED** in part, as follows:

1. Defendants' Motion is **GRANTED** in part and **DENIED** in part with respect to Count II of the Amended Complaint. Defendants' Motion is denied as to Plaintiff's claim, in Count II, that Defendants Kathleen Fisher and Joanne McClary violated his Fourteenth Amendment right to due process in connection with his eviction from Riverview. Defendants' Motion as to Count II is granted in all other respects.
2. Defendant's Motion is **GRANTED** in part and **DENIED** in part as to Count III of the Amended Complaint. Defendants' Motion is denied as to Plaintiff's claim, in Count III, that the City of Philadelphia breached its Admission Agreement with Plaintiff with respect to his eviction from Riverview. Defendants' Motion as to Count III is

granted in all other respects.

3. Defendant's Motion is **GRANTED** in part and **DENIED** in part as to Count IV of the Amended Complaint. Defendants' Motion is denied as to Plaintiff's claim, in Count IV, that Defendants Kathleen Fisher and Rick Moore retaliated against him in violation of the First Amendment. Defendants' Motion as to Count IV is granted in all other respects.
4. Defendants' Motion is **GRANTED** as to Counts V, VII and VIII of the Amended Complaint and those Counts are dismissed with prejudice.
5. Defendants' Riverview Home, Ida Taylor, Ira Dixon, John Taylor, Kathy De Lee, Ramona Turner, and Valerie Howell are dismissed, with prejudice, as Defendants to this action.

IT IS FURTHER ORDERED that Defendants' Motion for Leave to File a Reply Memorandum (Docket No. 38) is **GRANTED**.

BY THE COURT

John R. Padova, J.