

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

JOHN KAUCHER and	:	
DAWN KAUCHER, h/w,	:	CIVIL ACTION
	:	
Plaintiffs,	:	NO. 03-1212
	:	
v.	:	
	:	
COUNTY OF BUCKS, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J.

FEBRUARY 7, 2005

The present action was filed on February 27, 2003. An Amended Complaint was filed as a matter of right on March 14, 2003, which was answered by the Defendants on May 5, 2003. The Kauchers filed their first motion to amend the complaint on July 18, 2003, which was granted on August 7, 2003, and answered on August 19, 2003. The parties then conducted discovery which, after two extensions, ended on June 4, 2004. Defendants then filed their Motion for Summary Judgment on July 19, 2004. The Kauchers filed their Response on August 3, 2004, and then filed another motion to amend the complaint on August 4, 2004, seeking to add new claims of retaliation not previously mentioned in the prior three complaints. Defendants opposed that motion because granting it would have required additional discovery on the retaliation claims. However, as the need for additional discovery was limited, I granted the motion. The parties were instructed to take a supplemental deposition of Mr. Kaucher and then report back to the Court on the need for any additional discovery beyond that deposition.

Supplemental discovery ended on December 31, 2004, and Defendants filed a Supplemental Motion for Summary Judgment on January 14, 2005. I consider both motions which will be granted.

I. BACKGROUND

The Plaintiffs in this action are John and Dawn Kaucher (“Mr. and Mrs. Kaucher”). Mr. Kaucher works as a Corrections Officer for the County of Bucks, and has served in that capacity since 1999. The Kauchers have both suffered from antibiotic resistant staph infections they believe that Mr. Kaucher contracted while on duty and then gave to his wife.

The Defendants include the County of Bucks, a municipal government entity of the Commonwealth of Pennsylvania, and several of its employees responsible for the operation of the Bucks County Correctional Facility (“BCCF”).¹ The BCCF is a medium to maximum security prison located in Doylestown, Pennsylvania, and has a capacity of 696 prisoners. The County employs approximately 170 corrections officers to provide security at the BCCF for its twenty-four-hour operations. The facility is divided into ten cell blocks, called modules, and has additional common space to which inmates are granted regular access, including a gymnasium, library, barber shop, dining area, outdoor recreation area, and dispensary.

The root cause of the present action is the presence of methicillin-resistant *Staphylococcus aureus* among the inmate population of the BCCF. *Staphylococcus aureus*,

¹ The individual Defendants include the following: Michael Fitzpatrick, Charles Martin, and Sandra Miller, elected members of the Bucks County Board of Commissioners; Gordian Ehlacher, public health administrator of the Bucks County Department of Health; Harris Gubernick, director of the Bucks County Department of Corrections; Willis Morton, Warden of the BCCF; Lewis Polk, M.D., medical director of the Bucks County Department of Health; and Joan Crowe, R.N., the supervisor of the dispensary in the BCCF run by the Bucks County Department of Health.

commonly referred to as staph, is a bacteria commonly carried on the skin and in the nose of healthy people. Approximately twenty to thirty percent of the population is colonized with staph in the nose at any given time.² In the past, most serious staph infections were treated with a certain type of antibiotic related to penicillin. However, in the last fifty years, the staph bacteria have become resistant to various antibiotics, including the commonly used penicillin-related antibiotics. These resistant bacteria are called methicillin-resistant *Staphylococcus aureus* (“MRSA”). Centers for Disease Control and Prevention, MRSA - Methicillin Resistant *Staphylococcus aureus* Fact Sheet, at <http://www.cdc.gov/ncidod/hip/aresist/mrsafaq.htm> (March 7, 2003).

Staph bacteria, including MRSA, can cause different kinds of illness, including skin infections, bone infections, pneumonia, and life-threatening bloodstream infections. MRSA occurs more commonly among persons in hospitals and healthcare facilities; however, MRSA has caused illness outside healthcare facilities including incarcerated persons, players of close-contact sports, and other populations. Staph bacteria and MRSA can spread among people having close contact with infected people, most often through direct physical contact or by sharing contaminated objects. Most staph bacteria, including MRSA, are susceptible to several types of antibiotics, and most staph skin infections can be treated without antibiotics by draining the sore.

Since staph bacteria are one of the most common causes of skin infections in the United States, there have always been a certain number of cases of inmates with staph infections

² Colonization occurs when the staph bacteria are present on or in the body without causing illness.

in the BCCF, including inmates with MRSA infections. However, the unsanitary conditions of the BCCF appear to have exacerbated the problem in recent years. Inmates have experienced serious MRSA infections, several requiring hospitalization. Mr. Kaucher guarded two such inmates in 2001 and 2002 while they were being treated for infections at Doylestown Hospital.

The MRSA problem has generated a spate of prisoner civil rights litigation over the conditions in the BCCF and the County's treatment of inmates infected with MRSA. E.g., *Inmates of the Bucks County Correctional Facility v. County of Bucks*, No. 02-7377. In reaction to that litigation, on August 23, 2002, Magistrate Judge Diane M. Welsh ordered that all inmates and employees of the Department of Corrections be tested for MRSA colonization. Of the approximately 1,126 tested individuals, thirty-two inmates and two corrections officers tested positive for MRSA colonization. Mr. Kaucher was one of those colonized with MRSA. All those who tested positive for MRSA were immediately informed, treated, and in the case of employees, encouraged to follow up with their personal physicians.

On August 21, 2002, before the court ordered testing began, Harris Gubernick, the Director of the Department of Corrections, sent a memorandum to all employees including a publication from the Centers for Disease Control and Prevention on MRSA. The memo informed staff that, "there are NO known cases in the facility. However, proper hygiene is always recommended to prevent and [sic] spread of infection." (Def.'s Mot. Summ. J. at Ex. Y) (emphasis in original).³

The Kauchers' experience with MRSA predates the mandatory testing at the

³ At the time this statement was made it was true. However, an inmate with a suspected staph infection had been cultured and was awaiting test results which were not delivered to the BCCF dispensary until August 22, 2002.

BCCF. Mrs. Kaucher developed a staph infection in February 2002 that was unresponsive to oral antibiotics. She was hospitalized in March 2002 and again in September 2002 for surgical treatment and treatment with intravenous antibiotics. Although it was determined that Mr. Kaucher was colonized with MRSA in August 2002, Mr. Kaucher did not develop an infection until the spring of 2003. In April of 2003, Mr. Kaucher developed several infected boils on his chin and chest. He was treated surgically and received a thirty-day course of antibiotics in an effort to eliminate any MRSA. Since their surgical treatments and followup, neither of the Kauchers has experienced another MRSA outbreak. However, while the Kauchers were dealing with their infections, Mr. Kaucher missed a large amount of work. During his own infection, Mr. Kaucher missed at least two weeks during the month of April 2003.

The County employs a no-fault attendance policy in its twenty-four/seven operations to enforce its expectation that all employees will be at work each day they are scheduled, will report at the time they are scheduled to arrive, and will complete their entire scheduled workday.⁴ The policy is intended to allow employees and individual departments to monitor attendance records and, if necessary, take action to correct problems with an individual employees attendance records. The attendance policy is separate and distinct from the policies respecting the accrual and use of paid leave.

The policy is enforced through an attendance point system, under which employees accumulate points for incidents of faulty attendance. An employee will receive three

⁴ The policy is considered no-fault because it does not distinguish between an excused absence and an unexcused absence. Rather, the policy tracks all absences and tolerates a certain amount of fault.

points for total absence from a scheduled work day,⁵ two points for partial absence from a scheduled work day, one point for failing to report on time, and one point for failing to clock in or clock out. If an employee is approved for Family and Medical Leave Act (“FMLA”) leave, the employee will accrue no points for those absences. If during a rolling three month period, an employee accumulates more than ten points, he is subject to a progressive discipline scheme.

The policy provides for four levels of discipline. At the first level the employee receives a written warning. The County will review the employee’s attendance record again ninety days after the first warning. If the employee accumulates an additional ten points in a rolling three month period within one year of the first warning, he will be advanced to the second level of discipline. At the second level, the employee receives a three day suspension and second warning. The County will again review the employee’s attendance ninety days after the second warning. If the employee accumulates an additional ten points in a rolling three month period within one year of the second warning, he will be advanced to the third level of discipline, a five day suspension and final warning. If the employee accumulates an additional ten points in a rolling three month period within one year of the final warning, the employee may be terminated.

Mr. Kaucher has been disciplined several times for attendance problems. As a probationary employee Mr. Kaucher was repeatedly cited for poor attendance at each stage of his evaluation. He was retained as a permanent employee despite these attendance issues, but has continued to be cited for poor attendance. In March 2001, Mr. Kaucher received a first warning after accruing more than 10 points in a three month period. After the first step discipline closed,

⁵ The point system covers incidents of absence. An incident is defined as an individual absence. Two or more days of consecutive absence are treated as a single incident under the policy.

Mr. Kaucher again received a first warning in July 2002. In August 2002, Mr. Kaucher received a three day in-house suspension and second warning for attendance violations. Mr. Kaucher received a five day in-house suspension and final warning in March 2003 for continued attendance problems. In May 2003, Mr. Kaucher was eligible for termination due to excessive absences; however, the County withdrew the incident after reclassifying a portion of the violations within the audit period as FMLA leave and withdrawing the associated points.

II STANDARD

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248. To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION

The Kauchers' four count complaint alleges constitutional violations pursuant to 42 U.S.C. § 1983 (Count I), state law fraudulent misrepresentation (Count II), Pennsylvania constitutional violations (Count III), and violations of the Family and Medical Leave Act of 1993 (Count IV). Defendants argue largely that the Kauchers fail to state a claim upon which relief can be granted, or that there is no evidence of a violation. As a result, the complaint is considered by count.

A. CONSTITUTIONAL VIOLATIONS

The individual defendants in this case have raised the defense of qualified immunity. Government officials performing discretionary functions are generally shielded 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). Because the qualified immunity doctrine provides the official with immunity from suit, not immunity from trial, any questions regarding immunity should be resolved at the earliest possible stage of the litigation. Saucier v. Katz, 533 U.S. 194, 200-01 (2001).

A court required to rule upon qualified immunity must first consider the following threshold question: "Taken in the light most favorable to the [plaintiff], do the facts alleged show the officer's conduct violated a constitutional right?" Id. at 201 (citing Siegert v. Gilley, 500 U.S. 226, 232 (1991)). Then, if necessary, the court will determine whether the constitutional right was clearly established. In that event, "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he

confronted.” Id. at 202.

Count I of the Complaint alleges violations of the First, Fourth and Fourteenth Amendments. The Kauchers allege violations of the right to know, freedom of speech, freedom of association, first amendment retaliation, the right to bodily integrity of the Fourth Amendment, substantive due process, equal protection, and municipal liability. Each is evaluated in turn.

1. The First Amendment

a. The Right to Know

Although “the stretch of the First Amendment’s protection is theoretically endless,” the right to know “must be invoked with discrimination and temperance.” Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 588 (1980) (Brennan, J. concurring). The right to know is a limited right of the public to access public records and observe public proceedings. See, e.g., In re Memphis Pub. Co., 887 F.2d 646, 647 (6th Cir. 1989) (recognizing the right of access to public judicial proceedings guaranteed by the First Amendment); United States v. Suarez, 880 F.2d 626, 630 (2d Cir. 1989) (finding a right to know how the amount of money spent from public funds). As the right is a public right, it is generally expressed by the press, and is subject to limitation by the needs of individual privacy. See Virgil v. Time, Inc., 527 F.2d 122, 1128 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976).

In the present case, the Kauchers claim they are entitled to a “right to know there was a communicable disease in [Mr. Kaucher’s] workplace.” (3d Am. Compl. ¶ 46). This is not a right cognizable under the First Amendment. The “right to know” does not encompass a right to automatic public disclosure of information available to a government actor. Rather, the right ensures the public’s ability to investigate matters of public concern, and even then is subject to

limitation. As a result, the Kauchers have not presented a valid claim for a violation of the “right to know.”

b. Freedom of Speech

The First Amendment protects an employee who speaks out on a matter of public concern, so long as the employee’s interests outweigh the government’s interest in efficient operations. Curinga v. City of Clairton, 357 F.3d 305, 309 (3d Cir. 2004). Public employees have a First Amendment right to speak freely on matters of public concern. See, e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972); Pickering v. Bd. of Ed., 391 U.S. 563, 571-72 (1968); Watters v. City of Phila., 55 F.3d 886, 891 (3d Cir. 1995). However, protections extend only to matters of public concern, Connick v. Meyers, 461 U.S. 138, 146 (1983), and speech that does not interfere with the efficient operation of the government workplace. Pickering, 391 U.S. at 568.

Mr. Kaucher argues that the County policy prohibiting the disclosure of personal information to the media is overbroad and chills his freedom of speech. I do not agree. The government has an interest in regulating the speech of its employees to promote “efficiency and integrity in the discharge of official duties, and [in maintaining] proper discipline in the public service.” Connick, 461 U.S. at 150-51. Government “must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.” Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J. concurring in part). The policy will stand.

c. First Amendment Retaliation

There are three requirements in a public employee’s retaliation claim for engaging

in a protected activity. First, the employee must demonstrate that the speech involves a matter of public concern and the employee's interest in the speech outweighs the government employer's countervailing interest in providing efficient and effective services to the public. Curinga, 357 F.3d at 310 (citing Pro v. Donatucci, 81 F.3d 1283, 1288 (3d Cir. 1996)). Second, the speech must have been a substantial or motivating factor in the alleged retaliatory action. Id. (citing Baldassare v. New Jersey, 250 F.3d 198, 194-95 (3d Cir. 2001); Green v. Phila. Hous. Auth., 105 F.3d 882, 885 (3d Cir. 1997)). Finally, the employer can show that it would have taken the adverse action even if the employee had not engaged in the protected conduct. Id. The first requirement is a question of law, and the second and third requirements are questions of fact. Id.

Mr. Kaucher asserts that he has been denied possible promotion in retaliation for speaking with a reporter and for filing the present lawsuit. On July 24, 2004, Deputy Warden Clifton S. Mitchell directed an internal posting to fill an open sergeant's position in the BCCF. The selection criteria and qualifications for the position included (1) experience and knowledge determined through examination; (2) minimum of two years as a corrections officer; (3) attendance and punctuality, no second level disciplinary action within two years; and (4) work performance, no formal disciplinary action within two years.

Thirty-three officers, including Mr. Kaucher, submitted applications for the promotion. After a review of attendance and disciplinary records of the applications, five of the applicants, including Mr. Kaucher, were rejected for attendance violations, one applicant was rejected because he had been disciplined within the last two years for work performance issues, and two applicants were rejected because they had not been employed for the required two years. The rejected applicants were notified that they were ineligible to continue forward in the

selection process, and the remaining twenty-five applicants continued onward through the process.

Mr. Kaucher contends that despite the established criteria, three BCCF employees have been promoted to sergeant with unsatisfactory discipline and attendance records. Mr. Kaucher named these employees at deposition. However, a review of their discipline and attendance records demonstrates that all three met the eligibility requirements for promotion. As a result, Defendants have established that Mr. Kaucher would have been denied promotion even if he had not filed the present lawsuit. Mr. Kaucher was not eligible for promotion because of his attendance problems.

Mr. Kaucher next contends that he has been denied worker's compensation benefits because of his decision to file the present lawsuit and speak to the press about the MRSA infections in the BCCF. In support of this contention, Mr. Kaucher points only to the temporal proximity of the filing of the present suit on February 27, 2003 and the denial of Mr. Kaucher's worker's compensation claim on May 23, 2003. Although temporal proximity may be used to show causation in a retaliation case, see Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997), the timing of the alleged retaliatory action must be "unusually suggestive of retaliatory motive before a causal link will be inferred." Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 189 n.9 (3d Cir. 2003). Furthermore, the amount of time between the protected activity and the alleged retaliation is a circumstance to be considered by a fact-finder in determining if the plaintiff has established the required causation. Id. It need not be automatically definitive.

Defendants response to this allegation is twofold. First, they argue that the

temporal proximity is insufficient in this case. I agree. Mr. Kaucher did not apply for worker's compensation benefits until April 2003, approximately two months *after* he filed his complaint in this case. Under such a circumstance, the relationship between filing of the complaint, the filing of the claim, and the claim's denial are considered together. There is no evidence of any immediate action taken against Mr. Kaucher at the time of the filing of the complaint. The evidence is quite the opposite. Following the denial of Mr. Kaucher's worker's compensation claim, the County reclassified his absences for that period as on FMLA leave and retracted any associated attendance points related to them. Had the County not taken such action, Mr. Kaucher would have been subject to termination.

Second, Defendants argue that worker's compensation decisions are made by an independent third-party claims administrator over which the County exerts no control. In light of this fact, Mr. Kaucher has made no effort to show that Defendants attempted in any way to affect the outcome of his worker's compensation claim. Furthermore, Mr. Kaucher has appealed the claim denial. There is no evidence of retaliation against Mr. Kaucher for his filing the present lawsuit, and Defendants are entitled to judgment as a matter of law on this issue.

d. Freedom of Association

The Constitution provides protections for the freedom of association in two distinct contexts. Roberts v. United States Jaycees, 468 U.S. 609, 617 (1984). First, the choice "to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State." Id. at 617-18. Second, the right to "associate for the purpose of engaging in those activities protected by the First Amendment" is also protected from undue government restriction. Id. However, "the nature and degree of constitutional protection afforded freedom of

association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case.” Id. at 618.

Mrs. Kaucher argues that her infection with MRSA at the hands of the County has infringed upon her freedom of association by preventing her from seeing her relatives in their homes. The freedom of association does not apply to such a deprivation. This is not a instance in which a plaintiff was forced to choose between a government job and continued association with someone or membership in an organization. See Connor v. Clifton County Prison, 963 F. Supp. 442, 450 (M.D. Pa. 1997). Furthermore, the record demonstrates that Mrs. Kaucher was still able to see her family, though she chose to do so only in public places. She did so several times while she was ill, including attending her grandmother’s funeral. As a result, there is no evidence of a violation of the freedom of association. Summary judgment is appropriate on the issue. Accord id.

2. The Fourth Amendment

In addition to its protections against unreasonable searches and seizures, the Fourth Amendment also insures “freedom from bodily restraint and punishment.” Ingraham v. Wright, 430 U.S. 651, 675 (1977). “It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.” Id. However, it is clear that the Fourth Amendment applies only to searches and seizures undertaken by the government. United States v. Attson, 900 F.2d 1427, 1430 (9th Cir. 1990). There have been no searches, seizures, or investigations of the Kauchers in this case to violate their rights to bodily integrity. The claims will, therefore, be dismissed.

3. The Fourteenth Amendment

a. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment is a limitation on the power of the State to act. It is not an affirmative guarantee of certain minimal levels of safety and security. Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992). Historically, the guarantees of due process have been applied only to deliberate decisions of government officials to deprive a person of life, liberty, or property. Id. at 127 n.10. Neither the text nor the history of the Due Process Clause supports a claim that the government's duty to provide its employees with a safe working environment is a substantive component of the Clause. Id. at 126, 129.

Furthermore, there is no evidence that the County's alleged failure to adequately warn Mr. Kaucher about the risks of MRSA infection in the BCCF was an omission characterized as arbitrary, or conscience shocking in a constitutional sense. First, such a claim is analogous to a typical state-law negligence claim that the County failed in its duty to provide its employees with a safe working environment. The Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." Id. at 128. The Clause should not be interpreted to impose federal duties analogous to duties traditionally imposed by state tort law. Id.; accord Searls v. Southeastern Pa. Transp. Auth., 990 F.2d 789 (3d Cir. 1993). There is, therefore, no violation of substantive due process.

b. Equal Protection

In order to state a claim for a violation of the Equal Protection Clause, the plaintiffs must show that they are members of a protected class and have been discriminated

against because of their membership in that class, otherwise, the plaintiffs must show that they were intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. Purcelli v. Houston, No. 99-2982, 2000 WL 760522, at *12-13 (E.D. Pa. June 12, 2000). In this case, the Kauchers have not shown that they are members of a protected class, or that they have been singled out for irrational treatment by the County. As a result, they have not established an equal protection claim.

c. Municipal Liability

The doctrine of *respondeat superior* does not apply in actions brought under section 1983. As a result, a municipality may only be held liable for the injuries directly attributable to its actions. Monell v. Dep't of Social Servs., 436 U.S. 658 (1978). Under Monell, a municipality may be liable under section 1983 if its policy or well-settled custom causes a constitutional injury. Estate of Henderson v. City of Phila., 1999 U.S. Dist. LEXIS 10367, at *56 (E.D. Pa. Jul. 9, 1999) (citing Monell, 436 U.S. at 694). In order to obtain damages from a municipality, a plaintiff must prove that “municipal policy makers established or maintained a policy or custom which caused a municipal employee to violate the plaintiff’s constitutional rights.” Id. The policy must be the moving force behind the constitutional tort. Furthermore, the policy must also exhibit deliberate indifference to the constitutional rights of those the policy affects. Id. A plaintiff must also present scienter like evidence of indifference attributable to a particular policymaker or group of policymakers. Simmons v. City of Phila., 947 F.2d 1042, 1060-61 (1991). In the absence of any unconstitutional policy, it is the plaintiff’s responsibility to articulate a factual basis demonstrating considerably more proof than a single incident to support his claim. House v. New Castle County, 824 F. Supp. 477, 486 (D. Del. 1985) (citing

Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985)).

The Kauchers have failed to articulate a policy or well settled custom of the County that is the motivating factor beyond their own alleged constitutional injuries. Although they proffer an alleged policy of cost containment in treating the medical needs of inmates in the BCCF and other County operated corrections facilities, these policies cannot be the motivating force behind an injury to the Kauchers. The alleged policy clearly applied only to the treatment of inmates and not to County employees who receive comprehensive health and workers' compensation benefits.⁶

Furthermore, after all inmates and employees were tested for MRSA colonization, the two employees colonized with MRSA were immediately informed by the County and encouraged to consult with their personal physicians. Mr. Kaucher did so. The Department of Corrections distributed information to all employees explaining the risks of MRSA and encouraging employees to take extra precautions against the spread of infectious disease. There is simply no evidence that the County acted with any indifference towards its employees in dealing with the MRSA situation in the BCCF. I will, therefore, grant summary judgment in favor of the County.

B. FRAUDULENT MISREPRESENTATION

The Pennsylvania Workmen's Compensation Act enforces the historical *quid pro quo* that employers received in return for being subjected to a statutory, no-fault system of compensation for worker injuries. Poyser v. Newman & Co., 514 Pa. 32, 522 A.2d 548 (1987).

⁶ I express no opinion as to the existence of the alleged policy and whether or not such a policy would be deliberately indifferent to the constitutional rights of inmates.

The Act provides that

[t]he liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.

77 Pa. Stat. Ann. § 481(a). The exclusivity of the workers' compensation remedy extends to causes of action embodying willful and wanton conduct on the part of the employer, including intentional torts. Poyser, 514 Pa. at 36, 522 A.2d at 551-52.

This case is highly analogous to Wilson v. Asten-Hill Manufacturing Co., 791 F.2d 30 (3d Cir. 1986). In Wilson, the employees alleged that Asten-Hill had long possessed medical and scientific data that clearly indicated that the inhalation of asbestos dust and fibers in the course of the ordinary and foreseeable use of its asbestos products was unreasonably dangerous and carcinogenic. They further alleged that Asten-Hill withheld scientific data, disseminated outdated scientific data, failed to provide warning of known risks, and failed to test products adequately. As a result, the plaintiffs alleged that they had been "fraudulently and deliberately" exposed to asbestos. Id. at 31. The court noted that:

[e]ven if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, willfully failing and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.

Wilson, 791 F.2d at 34 (quoting 2A Larson, The Law of Workmen's Compensation § 68.13 (1975)).

Although Pennsylvania law will allow an employee to bring an action for

fraudulent misrepresentation for incidents in which the intentional conduct of the employer aggravates an already existing work related injury such is not the case here. “There is a difference between employers who tolerate workplace conditions that will result in a certain number of injuries or illnesses and those who actively mislead employees *already suffering* as the victims of workplace hazards, thereby precluding such employees from limiting their contact with the hazard and from receiving prompt medical attention and care.” Martin v. Lancaster Battery Co., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992) (emphasis added). The Kaucher’s argue that any misstatements made by Defendants led to Mr. Kaucher’s exposure to MRSA. There is no evidence that any of the Defendants withheld any information in a manner to aggravate the Kauchers’ injuries. As a result, their fraudulent misrepresentation claim is barred by the workers’ compensation statute.

C. RIGHT OF ACTION UNDER THE PENNSYLVANIA CONSTITUTION

Pennsylvania has no statute similar to 42 U.S.C. § 1983, which provides the cause of action for damages due to a federal constitutional violation, and the question of whether the Pennsylvania Constitution provides such a cause of action directly is not fully settled. Although the Pennsylvania Constitution has been said to provide for an action for injunctive relief to enforce its equal rights provisions, see, e.g., R. v. Commonwealth, 535 Pa. 440, 460-63, 636 A.2d 142, 152-53 (1994); Erdman v. Miller, 207 Pa. 79, 90, 56 A. 327, 331 (1903); Hunter v. Port Auth., 277 Pa. Super. 4, 6-7, 419 A.2d 631, 632 (1980), there has been no such holding as to an action for damages.

There is a significant difference between actions for injunctive relief and actions seeking damages. Mulgrew v. Fuomo, No. 03-5039, 2004 WL 1699368, at *2-4 (E.D. Pa. July

29, 2004). It has been widely held that the Pennsylvania Constitution does not provide a direct right to damages. E.g., Dooley v. City of Phila., 153 F. Supp. 2d 628, 663 (E.D. Pa. 2001); Sabatini v. Reinstein, No. 99-2393, 1999 WL 636667, at *6 (E.D. Pa. Aug. 18, 1999); McMillian v. Phila. Newspapers, Inc., No. 99-2949, 1999 WL 570859, at *3 (E.D. Pa. Aug. 4, 1999); Holder v. City of Allentown, No. 91-240, 1994 WL 236545, at *3 (E.D. Pa. May 19, 1994); Lees v. West Greene Sch. Dist., 632 F. Supp. 1327, 1335 (W.D. Pa. 1986); Pendrell v. Chatham Coll., 386 F. Supp. 341, 344 (W.D. Pa. 1974). As a result, the Kauchers have failed to plead an effective cause of action under the Pennsylvania Constitution.

D. FAMILY AND MEDICAL LEAVE ACT VIOLATIONS

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq*, guarantees eligible employees of covered employers a total of up to twelve work weeks of leave due to the birth or placement for adoption of a child, the need for a spouse, son, or daughter, for care related to a serious health condition, or due to the employees own serious health condition rendering him unable to perform the functions of his position. Id. § 2612(a)(1). Leave may be taken in a block, may be taken intermittently, or may be taken through a reduced schedule. Id. § 2612(b). The Act guarantees only unpaid leave and permits the employer to require that an employee's paid leave run until it is extinguished during FMLA leave. Id. § 2612(d). After leave is completed, the employee is entitled to return to the same or an equivalent position with limited exception. Id. § 2614.

In order to qualify for FMLA leave, an employee is required to give timely notice to his employer. In the event that the need for leave is foreseeable, the requirement is thirty days notice. Id. § 2612(e). If thirty days notice is not practicable, the employee is to provide notice as

soon as is practicable. Id.

In the case of leave request due to a serious health condition, the employer may require medical certification from the employee's (or his family member's) treating physician or medical professional. Id. § 2613. Should the employer have reason to doubt that certification, it is entitled to require the employee or family member be evaluated by a medical professional of its choosing at its expense. Id. In the event of a discrepancy between the first and second professional's recommendation on certification, the employer may require a third evaluation at its expense by a medical professional jointly selected by the parties. The findings of the third professional are binding. Id. After certification, the employer may require recertifications by a medical professional on a reasonable basis. Id.

It is unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the Act. Id. § 2615. Discrimination or discharge on the basis of exercising rights under the Act are also prohibited. Id. An employer in violation of the act may be liable in damages for any lost wages and benefits due to the violation, or, in the event that the violation does not lead to lost wages, the actual damages sustained by the employee to provide necessary care up to a maximum of twelve weeks of the employee's wages, as well as liquidated damages. Id. § 2617. The employee may also sue for equitable relief, including reinstatement and promotion. Id.

Mr. Kaucher has applied for and received FMLA leave six times between May 2001 and November 2004. In May 2001, Mr. Kaucher applied for intermittent FMLA leave to care of Mrs. Kaucher's chronic asthma. The County approved his request four days later, granting him intermittent leave from May 11, 2001, to May 11, 2002. In July 2002, Mr. Kaucher

applied for intermittent FMLA leave to care for Mrs. Kaucher's asthma. His request was approved and leave granted from August 25, 2003 to February 24, 2003. In April 2003, Mr. Kaucher applied for a third period of intermittent leave to care of his wife's asthma and MRSA infection. His request was granted from May 4, 2003 to November 4, 2003. In May 2003, the County retroactively designated Mr. Kaucher's one month absence in April 2003 for his own medical condition as FMLA leave. In November 2003, Mr. Kaucher sought an extension of his FMLA leave to care for his wife's asthma. His request was approved to May 4, 2004. Mr. Kaucher applied for another extension of that leave from May 4, 2004 to November 4, 2004, which was granted. In the course of approving the latest FMLA leave application, the County exercised its right under the Act to a second medical opinion at its expense. The County arranged for Mrs. Kaucher to see a specialist of its choosing on May 5, 2004. While the County was awaiting the second opinion report, Mr. Kaucher's use of FMLA leave was contingently approved.⁷ Mr. Kaucher was sent a final approval on May 20, 2004, approving his FMLA leave request.

The record reflects that Mr. Kaucher has never been denied a request for FMLA leave to which he has been entitled. Furthermore, Mr. Kaucher has not been disciplined for exercising his rights. He continues to exercise them to this day. As a result, there is no evidence of an FMLA violation by the County for which Mr. Kaucher can recover damages.

⁷ Contingent approval allowed Mr. Kaucher to take FMLA leave. However, had the County's specialist not agreed with Mrs. Kaucher's physician, any leave taken could have been treated under the County's regular attendance and leave policies.

IV. CONCLUSION

As I conclude that the Kauchers have failed to state a constitutional violation for which relief may be granted, that their claim for fraudulent misrepresentation is barred by the workers' compensation statute, that the Pennsylvania Constitution does not include a direct right to sue for damages, and that the Kauchers have failed to establish a violation of the Family and Medical Leave Act of 1993, Defendants' Motion for Summary Judgment will be granted.

An appropriate Order follows.

