

cover up the epidemic by refusing to inform inmates of its presence, failing to provide MRSA diagnoses and treatment to inmates and failing to provide clean and sanitary conditions of confinement at BCCF. Plaintiffs further aver that recurring MRSA infections were first exhibited in the women's section of BCCF, Module A, due to lack of equality in facilities and access to care based on gender.

Defendants filed their Motion for Summary Judgment on January 1, 2006 and this court dismissed Defendants' Motion without prejudice in its Order of July 14, 2006 to reinstatement after Plaintiffs' filing of an additional response in this case.² Defendants filed their Motion to Reinstate their Motion for Summary Judgment on August 2, 2006. This court will consider the new pleadings filed by the parties together with memoranda heretofore filed on behalf of the parties in regard to Defendants' Motion for Summary Judgment.

II. LEGAL STANDARD

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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). A genuine issue as to any material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

A party seeking summary judgment bears the initial responsibility of identifying the basis for its motion, along with evidence clearly demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Rule 56(e) of the Federal Rules of Civil Procedure requires the nonmoving party to supply sufficient evidence, not mere allegations, for a reasonable jury to find in the nonmovant's favor.

²This court heard oral argument on Defendants' Motion for Summary Judgment on February 16, 2006.

See Oldson v. General Elec. Astrospace, 101 F.3d 947, 951 (3d Cir. 1996). This evidence must be viewed in the light most favorable to the nonmoving party. See Anderson, 477 U.S. at 256. Disagreements over what inferences may be drawn from the facts, even undisputed ones, preclude summary judgment. Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 744 (3d Cir. 1996). Credibility determinations, the drawing of legitimate inferences from facts, and the weighing of evidence are matters left to the jury. Anderson, 477 U.S. at 255 (1986).

III. DISCUSSION

In this case, it is important to note that Plaintiffs Loch and Heimbach have been improperly joined. However, at this late point in time in the litigation, I will decide Defendants' pending Motion and examine the allegations of each Plaintiff separately. Looking to the record in this case, both Plaintiffs Loch and Heimbach were confined as inmates at BCCF pursuant to court orders. Plaintiff Loch was incarcerated at BCCF from May 17, 2001 to May 25, 2001, from December 12, 2001 to September 15, 2002, the period of time at issue in this case, and from May 7, 2004 to October 19, 2004. Plaintiff Heimbach was incarcerated at BCCF on July 22, 2000 for two (2) days, on November 30, 2001 for one (1) day, on May 30, 2001 for four (4) months, on December 8, 2001 for four (4) months, from October 4, 2002 to December 15, 2002 and for other subsequent periods of time; however, only her December 8, 2001 to April 8, 2002 and October 4, 2002 and December 15, 2002 incarcerations are at issue in this case.

In Estelle v. Gamble, 429 U.S. 97 (1976), the United States Supreme Court stated that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." Id. at 104. "The standard enunciated in Estelle is two-pronged: '[i]t requires deliberate indifference on the part of the

prison officials and it requires the prisoner's medical needs to be serious.”³ Monmouth County Correctional Institutional Inmates, 834 F.2d 326, 346 (3d Cir. 1987). Mere allegations of malpractice and mere disagreement regarding proper medical care do not rise to the level of a constitutional violation. Id. In Farmer v. Brennan, 511 U.S. 825 (1994), the United States Supreme Court further defined the deliberate indifference standard to require that a prison official is not liable under the Eighth Amendment “unless the official knows of and disregards an excessive risk to inmate health or safety.” Id. at 837. Furthermore, “absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official ... will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference.” Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004).

In their Complaint, Plaintiffs claim that “all Defendants were deliberately indifferent to all of Plaintiffs’ serious medical needs as inmates at BCCF” and Defendants specifically failed to treat Plaintiffs for their MRSA infections. Pls’ Compl. at P. 8, ¶ 39; P. 9, ¶ 43. Defendants argue that Plaintiffs cannot prove that Defendants were deliberately indifferent to Plaintiffs’ medical needs. The medical records, as provided by Defendants in their pleadings and exhibits submitted to this court, are undisputed in this case. A review of the medical records as to both Plaintiffs demonstrate that each Plaintiff suffered and was provided treatment in the form of medications and medical screening by nurses and doctors to treat Plaintiffs’ various illnesses. Neither at oral argument nor in their pleadings have Plaintiffs set forth evidence to prove that any of the non-medical Defendants had a reason to believe that the medical Defendants were

³Among other examples, deliberate indifference can be demonstrated when: 1) “prison authorities deny reasonable requests for medical treatment ... and such denial exposes the inmate ‘to undue suffering ...’”, 2) “knowledge of the need for medical care [is accompanied by the] ... intentional refusal to provide that care” and 3) “if necessary medical treatment [i]s ... delayed for non-medical reasons.” Id. at 346.

being deliberately indifferent to Plaintiffs' medical needs. Therefore, Plaintiffs' medical treatment claims against non-medical Defendants must fail as a matter of law.

Turning to the claims of the medical Defendants, a review of the medical treatment received by Plaintiffs at BCCF follows. As to Plaintiff Loch, the record reveals that she received medical treatment for her gynecological issues, carpal tunnel syndrome, intravenous heroin abuse, depression, dried nasal passages and MRSA diagnosed pimples by the medical staff at BCCF and at Abington Hospital.

Regarding MRSA, Plaintiff Loch was given a nose culture on August 28, 2002 and a nurse was sent to Module A for five days thereafter to ensure that Plaintiff Loch applied Bactroban ointment. Plaintiff Loch was informed of her positive nasal swab result for MRSA on September 5, 2002 and two small pimples were noted on her body. One day later, September 6, 2002, Nurse Crowe took a culture of Plaintiff Loch's pimples and she was given Bactroban. Plaintiff Loch's pimples were checked again a day later and on September 11, 2002, she was seen by Dr. Davis. It was determined that cultures of the pimples on Plaintiff Loch's body were positive for MRSA. Plaintiff Loch was subsequently put in medical isolation and prescribed Clindamycin for fourteen (14) days. The pimples were recultured for MRSA on September 12, 2001 and returned negative. Plaintiff Loch was then released from BCCF on September 15, 2001.

The record regarding Plaintiff Loch's medical treatment clearly shows that she was treated numerous times for her medical conditions including MRSA and any of her claims premised on mere disagreement with the adequacy of her medical treatment do not rise to the level of a constitutional violation under the law as to any of Defendants. Furthermore, Plaintiff Loch has failed to demonstrate that any of the individual Defendants, except the medical Defendants, knew about her alleged conditions to support a finding of deliberate indifference.

Therefore, Plaintiff Loch's medical treatment claims as to Defendants must fail as a matter of law.

Regarding Plaintiff Heimbach's medical care, the record reveals that she was not diagnosed with MRSA until months after her release from BCCF. However, a culture of a pimple on her right ear lobe was tested for MRSA on November 4, 2002 during her BCCF confinement and Plaintiff Heimbach was placed on medical isolation for two days until the test came back as negative on November 6, 2002. Nevertheless, the nursing staff cleaned Plaintiff Heimbach's right ear and applied Bactroban and a band-aid on November 6 and 7, 2002. While at BCCF, Plaintiff Heimbach received medical treatment for her Impetigo and was provided medication to treat her related facial sores. Plaintiff Heimbach also received medical treatment for her drug abuse problems and gynecological issues.

Because Plaintiff Heimbach was never diagnosed with MRSA during her incarceration at BCCF, this court concludes that she is precluded from bringing a failure to treat medical condition claim against any of Defendants. Even assuming, arguendo, that Plaintiff Heimbach's MRSA was a latent condition, Plaintiff Heimbach's counsel has not provided any evidence to demonstrate that any of Defendants knew anything about her alleged MRSA infection to satisfy deliberate indifference as required by the governing law.

The United States Constitution "does not mandate comfortable prisons[;]" only those deprivations denying "the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." Wilson v. Sieter, 501 U.S. 294, 298 (2001). "A prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v Brennan, 511 U.S. 825, 846 (1994). This standard is deliberate indifference and the knowledge element of this is subjective, "meaning that the official must actually be aware of the existence of the

excessive risk; it is not sufficient that the official should have been aware.” Beers-Capitol v. Whetzel, 256 F.3d 120, 133 (3d Cir. 2001).

Here, Plaintiffs argue that Defendants provided filthy conditions of confinement to inmates at BCCF which caused the spread of MRSA among Plaintiffs and other inmates. Defendants have submitted the MRSA Fact Sheet from the Center for Disease Control which states that MRSA frequently occurs outside of correctional facility populations in significant numbers. Defs. Mot. For Summ. J., Exhibit X. The Fact Sheet also notes that staph bacteria, the bacteria associated with MRSA, are one of the most common causes of skin infection in the United States. Therefore, to the extent that Plaintiffs ask this court to conclude that Defendants are at fault because of the occurrence of MRSA among inmates at BCCF, this assertion is not justified on the evidence of record in this case.

Plaintiffs’ remaining conditions of confinement claims allege that BCCF cells had peeling paint, leaky ceilings, poor ventilation, moldy and discolored walls and ceilings, rusted shower vents and dirty and stained mattresses among other complaints. Regarding these claims, this court concludes that Defendants Ehlacher, Polk and Crowe, as the medical Defendants sued in this case, do not possess the requisite authority and/or involvement regarding the conditions of confinement at BCCF to be held liable. Furthermore, this court concludes that Defendants Gubernick and Morton cannot be held liable because, assuming arguendo that these Defendants were actually personally aware of the environmental conditions at BCCF, these Defendants took measures, not herein disputed, to abate any serious risk of harm posed to Plaintiffs by their conditions of confinement at BCCF.

Specifically, Defendants Gubernick and Morton allege that their abatement measures include but are not limited to: implementing policies in place to handle the cleaning of cells and modules, providing inmates with all the cleaning supplies that they needed and allowing them to shower as many times a day as necessary, contracting with Aramark to ensure repair of any

maintenance problems, having several environmental investigations performed at BCCF regarding the air quality and mold complaints, replacing all mattresses at BCCF and completing extensive roof repairs and shower replacements. Defs. Mot. For Summ. J., Ex.'s R, U, A, JJJ, H. Additionally, BCCF was accredited by the National Commission on Correctional Health Care ("NCCHC") in 2000 for its compliance with NCCHC Standards for Health Services in Jails.⁴ Defs. Mot. For Summ. J., Ex. H. The effectiveness of these compliance steps is challenged by Plaintiffs; however, the fact that the measures were taken is essentially not contradicted by any evidence of record. Therefore, Plaintiffs' conditions of confinement claims do not pass constitutional muster and they must be dismissed as a matter of law.

The Third Circuit Court of Appeals in Beers-Capitol v. Whetzel, 256 F.3d 120 (3d Cir. 2001) stated that "[f]or the plaintiffs' claims seeking to hold supervisors liable for their deficient policies; Sample's four-part test provides the analytical structure for determining whether the policymakers exhibited deliberate indifference to the plaintiffs' risk of injury, it being simply the deliberate indifference test applied to the specific situation of a policy-maker." Id. at 135.⁵ "To hold a municipality liable pursuant to 42 U.S.C. § 1983, a plaintiff must prove that the municipality had in place a policy, practice or custom that caused the deprivation of a constitutional right." See Monell v. New York City Department of Social Services, 436 U.S. 658, 691 (1978). Liability premised on 42 U.S.C. § 1983 cannot be based on a theory of respondeat superior. See Id. at 691-5. A plaintiff must establish that the government policy or custom

⁴The next scheduled on-site survey of BCCF was not scheduled to occur until sometime prior to February 2003. Defs. Mot. For Summ. J., Ex. H.

⁵"[T]o hold a supervisor liable because his policies or practices led to an Eighth Amendment violation, the plaintiff must identify a specific policy or practice that the supervisor failed to employ and show that: (1) the existing policy or practice created an unreasonable risk of the Eighth Amendment injury; (2) the supervisor was aware that the unreasonable risk was created; (3) the supervisor was indifferent to that risk; and (4) the injury resulted from the policy or practice." Beers-Capitol, 256 F.3d at 134; Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989).

was the proximate cause of the injuries allegedly sustained by the plaintiff. Kneipp v. Tedder, 95 F.3d 1199, 1213 (3d Cir. 1996).

Plaintiffs argue that Defendants have implemented policies at BCCF, such as the Pre-Existing Conditions Policy, and cost containment policy, that violate Plaintiffs' constitutional rights by denying them basic needs guaranteed under the United States Constitution. In response, Defendants argue that Plaintiffs have failed to provide any evidence to support these policy claims or to demonstrate deliberate indifference on the part of any alleged policymaker defendant. Upon review of the pleadings and the evidence produced on summary judgment in this case, this court must conclude that there exists no evidence to sustain a finding of any policy or practice in place at BCCF that resulted in a violation of Plaintiffs' constitutional rights. Furthermore, Defendants have provided undisputed evidence to this court that Defendant County of Bucks and other non-medical Defendants took remedial steps to address the conditions of confinement issues raised in Plaintiffs' Complaint and in the 2002 State Inspection Report such as replacing the roof of the building and painting the facility. Defs. Mot. For Summ. J., Ex. HHH. Plaintiffs simply challenge the sufficiency and effectiveness of the actions taken. Therefore, any claims of Plaintiffs that Defendants instituted policies designed to be deliberately indifferent to Plaintiffs' serious needs must fail as a matter of law.

In their Complaint, Plaintiffs allege that Defendants violated their First Amendment "right to know" by failing to warn them about the presence and risks involved regarding the MRSA outbreak at BCCF. Defendants move for summary judgment on Plaintiffs' First Amendment claims as a matter of law because they assert there is no cognizable First Amendment right to know under the instant circumstances. In their pleadings, briefs and oral argument to this court, Plaintiffs failed to provide any legal basis or evidence to support their First Amendment claims. At this stage in the litigation, Plaintiffs may not rest on mere allegations or conclusions to maintain their claims and survive summary judgment. Furthermore, there exists no established

law requiring that a prison official identify persons who may have been diagnosed with MRSA or a similar communicable disease to other inmates. Therefore, because Plaintiffs have failed to provide legal authority to substantiate their First Amendment allegations, this court must grant summary judgment to Defendants on Plaintiffs' First Amendment claims as a matter of law.

In their Motion for Summary Judgment, Defendants assert that this court should grant summary judgment on Plaintiffs' PERA⁶ claims because there exists no private cause of action for violations of the Pennsylvania State Constitution and, alternatively, Defendants are immune from suit under the Political Subdivision Tort Claims Act ("the Act"), 42 Pa. Const.Stat. Ann. §§ 8541-8564. In response, Plaintiffs argue that certain courts in this district have found that a private cause of action exists for cases of gender discrimination against a local government entity under PERA and that the Act does not immunize a municipality from a state constitutional claim.

The Pennsylvania Supreme Court has not yet ruled on the issue of whether a plaintiff may bring a cause of action for damages for violations of PERA and there is a split in the district as to whether such a cause of action exists. Compare Ryan v. Gen. Mach. Prod., 277 F.Supp.2d 585 (E.D. Pa. 2005) (refusing to recognize a private cause of action for gender wage discrimination under PERA), with Barrett v. Greater Hatboro Chamber of Commerce Inc. et. al., No. 02-cv-4421, 2003 U.S. Dist. LEXIS 15498, at *7 (E.D. Pa. Aug. 19, 2003) (finding a private right of action for gender discrimination available to litigants under PERA). The task of this court is to predict whether the Pennsylvania Supreme Court would recognize a private cause of action under PERA in the present circumstances. I find the Third Circuit Court of Appeals decision in Sameric Corp. v. City of Phila., 142 F.3d 582 (3d Cir. 1998) instructive in my

⁶ Article I, §28 of the Equal Rights Amendment of the Pennsylvania Constitution prohibits discrimination on the basis of sex and states that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

prediction. In Sameric, the Third Circuit determined that the defendant municipality was immune under the Act from claims for monetary damages except with respect to the eight exceptions to immunity which were not applicable in that case. Id. at 600; See 42 Pa. Const.Stat. Ann. § 8542(b). The court also found that the individual defendants were individually immune under the Act because Plaintiff's state constitutional claims revolved around the defendants' acts "within the scope of their employment to the same extent as their employing agency." Sameric, 142 F.3d at 600; See 42 Pa. Const.Stat. Ann. § 8545.

Looking to the present case, this court predicts that the Pennsylvania Supreme Court would find that the Act, under the evidence and legal theories advanced by Plaintiffs, provides immunity to Defendants from PERA liability. There exists no evidence in the record to demonstrate and substantiate that Defendants provided separate modules at BCCF for women and men out of malice or ill will. See Id. at 600-01. Furthermore, Plaintiffs' argument that the exception to immunity under the Act for claims involving the "care, custody and control of Plaintiff's physical body in the county jail" should apply is not justified on this summary judgment record. Pls. Mem. of Law Opposing Defs. Mot. For Summ. J. at P. 26. Therefore, this court follows the instruction of Sameric and concludes that all Defendants are immune from liability under the Act regarding Plaintiffs' state constitutional claims. An appropriate Order follows.

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

ANGELA LOCH and	:	
TRICIA HEIMBACH,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	No. 03-cv-4833
	:	
COUNTY OF BUCKS ET AL.,	:	
	:	
Defendants.	:	
	:	

ORDER

AND NOW, this 1st day of September 2006, upon careful consideration of the Motion of Defendants County of Bucks, Gordian Ehrlicher, Lewis Polk, M.D., Joan Crowe, R.N., Harris Gubernick, and Willis Morton to Reinstate their Motion for Summary Judgment (Dkt, # 51), the responses thereto and the issues raised by counsel for the parties at oral argument, **IT IS HEREBY ORDERED** that said Motion to Reinstate Defendants' Motion for Summary Judgment (Dkt. #51) is **GRANTED**. **IT IS FURTHER ORDERED**, upon consideration of Defendants' Motion for Summary Judgment and the responses thereto, that said Motion for Summary Judgment is **GRANTED** in its entirety.

BY THE COURT:

S/ Clifford Scott Green _____

CLIFFORD SCOTT GREEN, S.J.

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

ANGELA LOCH and	:	
TRICIA HEIMBACH,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	No. 03-cv-4833
	:	
COUNTY OF BUCKS et. al.,	:	
	:	
Defendants.	:	
	:	

JUDGMENT

AND NOW, this 1st day of September 2006, **IT IS HEREBY ORDERED** that judgment in this matter is entered in favor of Defendants County of Bucks, Gordian Ehrlacher, Lewis Polk, M.D., Joan Crowe, R.N., Harris Gubernick, and Willis Morton and against Plaintiffs Angela Loch and Tricia Heimbach.

BY THE COURT:

S/ Clifford Scott Green

CLIFFORD SCOTT GREEN, S.J.

