

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

<b>MARK GREEN,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>v.</b>	:	<b>NO. 00-5330</b>
	:	
<b>PHILA. COUNTY PRISONS, et al.,</b>	:	
<b>Defendants.</b>	:	

**MEMORANDUM**

**STENGEL, J.**

**October 4, 2006**

Mark Green brought this *pro se* action *in forma pauperis* against the staff (“Staff Defendants”<sup>1</sup>) of the Philadelphia Industrial Correction Center (“PICC”) in connection with pain and suffering that he allegedly incurred at the Philadelphia prison. Mr. Green contends that the Staff Defendants did not properly respond to his grievances and his claims of injury in October 1998. As a result, they violated his constitutional rights. Mr. Green seeks redress under 42 U.S.C. § 1983 for their actions.<sup>2</sup> On April 10, 2006, Staff Defendants filed a motion for summary judgment.<sup>3</sup> For the reasons set forth below, the motion for summary judgment will be granted.

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<sup>1</sup> The Staff Defendants that filed the motion for summary judgment are: (1) Harry E. More; (2) Charles B. Shovlin; (3) Walter P. Dunleavy; (4) Levern Sowers; (5) Theresa Avella; (6) Lisa Goods; (7) Gloria Diamond; (8) Karen Pugh; (9) Rosa Jackson; (10) Donna Duncan; and (11) Deborah Jenkins.

<sup>2</sup> The *pro se* plaintiff did not use 42 U.S.C. § 1983 in his complaint. Instead, he used the words “in violation of 8<sup>th</sup> Amend. deliberate indifference.” *Pro se* filings with the court are construed liberally. See *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Royce v. Hahn*, 151 F.3d 116, 118 (3d Cir. 1998). Therefore, for the purposes of this memorandum, it shall be assumed that plaintiff is seeking redress under 42 U.S.C. § 1983.

<sup>3</sup>The City of Philadelphia, Scott Libby, and Cyril Varlack are also named defendants in this action; however, they were not party to the motion for summary judgment.

## I. BACKGROUND<sup>4</sup>

In October 1998, Mark Green was an inmate at PICC.<sup>5</sup> On or about October 2, 1998, Mr. Green began suffering from symptoms of food poisoning. The alleged food poisoning caused him to be bedridden for four non-consecutive days. Mr. Green described his condition as flu-like and he experienced headaches, nausea, vomiting, and diarrhea. At the same time, Mr. Green had clavicle pain from an injury he suffered prior to arriving at PICC. Mr. Green sought medical assistance from members of the prison staff but his requests were ignored. In addition, he filed several sick call slips with the medical staff. Mr. Green went to the medical unit at PICC three times during the month of October 1998, but the reasons for his visits are unclear.

Mr. Green lodged two complaints with Warden Harry More in October 1998. The grievances he filed detailed his symptoms, complained about the lack of medical care, and expressed concern about food sanitation. See Docket No. 88. The prison has no record of any grievances filed by Mr. Green concerning either food sanitation or a lack of medical care. The only grievance on file with the PICC from Mr. Green concerns a non-working light fixture in his cell.

Mr. Green attempted to file a complaint in federal court on October 20, 2000.

Judge John P. Fullam closed the case on October 30, 2000 because Mr. Green did not pay

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<sup>4</sup> The facts have been taken from the complaint, the parties' briefs filed in connection with this motion, and the deposition of the plaintiff, Mark Green. The facts are viewed in the light most favorable to the non-moving party, the plaintiff.

<sup>5</sup> Mr. Green was transferred to another institution on October 21, 1998.

the required filing fee. Mr. Green filed a motion to proceed *in forma pauperis* on December 19, 2001, which was denied by Judge Fulham on January 7, 2002. After Mr. Green filed a copy of his inmate trust fund account statement, Judge Fullam granted Mr. Green's motion to proceed *in forma pauperis* on February 15, 2002. On April 28, 2003, the court permitted Mr. Green to file his complaint and issue summons. The complaint alleges that the Staff Defendants violated his Eighth Amendment rights. On April 10, 2006, the Staff Defendants filed a motion for summary judgment on all the plaintiff's claims against them.

## **II. SUMMARY JUDGMENT STANDARD**

Summary judgment should be granted “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©. An issue of fact is “genuine” only if the evidence is such that a reasonable jury could return a verdict for the non-moving party in light of the burdens of proof required. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 252. (1986). A factual dispute is “material” if it could affect the outcome of the case under the governing law. Id.

When a party seeks summary judgment, it bears the initial responsibility of informing the 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). While a plaintiff has the ultimate burden of proof at trial, the moving party's initial burden under Celotex can be met simply by pointing out to the court that there is an absence of evidence in support of the non-moving party's case. Id. at 325.

After a moving party has met its initial burden under Celotex, the non-moving 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). Therefore, summary judgment is appropriate if the non-moving party fails to rebut the moving party's assertions 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.

The court must view the evidence presented in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255. The court must not weigh the evidence as for one party against the other, but must ask only whether a fair-minded jury could return a verdict for the non-moving party on the evidence presented. Id. at 252. If the non-moving party has exceeded the "mere scintilla of evidence" threshold and can offer a genuine issue of material fact, then the court may not credit the moving party's version of events against the non-moving party, even if the quality of the moving party's evidence

far outweighs that of the non-moving party. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

### III. DISCUSSION

Under 42 U.S.C. § 1983, a private party may recover in an action against any person acting under the color of state law who deprives the party of his or her constitutional rights.<sup>6</sup> Therefore, in order to succeed on a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate: (1) the violation of a right secured by the Constitution, and (2) that the deprivation was committed by a person acting under the color of state law.

West v. Atkins, 487 U.S. 42, 48 (1988). Section 1983 does not by itself confer substantive rights, but instead provides a remedy for redress when a constitutionally protected right has been violated. Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985). To determine if a person was acting under the color of state law, the court must ask whether the plaintiff's deprivation was "caused by the exercise of some right or privilege created by the State" and whether the defendant "may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

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<sup>6</sup>Section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

Here, the plaintiff has alleged a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.<sup>7</sup> Mr. Green’s claims are centered on the defendants’ failure to provide him adequate medical attention and services. The Eighth Amendment “requires prison officials to provide basic medical treatment to those . . . incarcerated.” Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999) (discussing Estelle v. Gamble, 429 U.S. 97 (1976)). In order to assert an Eighth Amendment medical claim under § 1983, a prisoner must establish “deliberate indifference” by prison officials to a “serious” medical need. See Meyers v. Majkic, No. 04-3883, 2006 U.S. App. LEXIS 18502, at \*3-4 (3d Cir. July 24, 2006) (citing Estelle v. Gamble, 429 U.S. 97, 103-04 (1976)). Neither party disputes that the Staff Defendants were state actors when they acted as correctional officers or wardens at PICC.

I will first address when state actors can be held accountable under a § 1983 cause of action. I will then turn my attention to the affirmative defenses that the Staff Defendants raised in their motion for summary judgment — statute of limitations and exhaustion of available administrative remedies. Finally, I will discuss Mr. Green’s claim against the City of Philadelphia.

#### **A. Personal Involvement in Alleged Wrong**

The Staff Defendants argue that Mr. Green’s claims against them should be dismissed because they were not responsible for the medical care of prisoners within

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<sup>7</sup>The Eighth Amendment to the U.S. Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. Const. amend. VIII.

PICC. The medical services of PICC were provided by an outside contractor, Prison Health Services (“PHS”). The Staff Defendants also contend that several of them had no personal involvement with the plaintiff and are improperly named in the suit. Mr. Green counters that defendants Avella, Sowers, More, Shovlin, and Dunleavy “were responsible, under the circumstances for contacting medical once they seen [sic] plaintiff needed care.” Pl.’s Resp. Def.’s Mot. Summ. J. (“Pl. Resp.”) at 4. Furthermore, Mr. Green contends that Warden Harry More and his deputy wardens, Charles Shovlin and Walter Dunleavy, had actual knowledge of the alleged constitutional wrongs based on his submission of grievances. According to the plaintiff, the wardens’ positions required them to respond to the grievances he filed. See Pl. Dep. at 94-103 (“[T]he reason why any of them could have responded or was supposed to respond to my grievance was because they head the correctional office.”).

“[A] defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior. Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity.” Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988) (citations omitted). In order to hold prison officials with supervisory positions liable, it must be shown that they had "direct responsibility for the actions of the employees who engage[d] in misconduct." Rizzo v.

Goode, 423 U.S. 362, 375-76 (1976). See Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990); Crymes v. Atl. County Gov't, No. 04-4450, 2005 U.S. Dist. LEXIS 16602, at \*15-16 (D.N.J. Aug. 4, 2005).

Here, Mr. Green has alleged no facts or offered no proof of personal involvement in his alleged constitutional injury by Staff Defendants Lisa Good, Gloria Diamond, Karen Pugh, Rosa Jackson, Donna Duncan, and Deborah Jenkins. In fact, in Mr. Green's deposition, counsel for the Staff Defendants inquired into why Mr. Green named the above defendants in the present action. He did not respond to the questions. Instead, Mr. Green affirmed that he was "knowingly, willfully, and voluntarily discontinuing this lawsuit" against Good, Diamond, Pugh, Jackson, Duncan, and Jenkins. Pl. Dep. at 114-17.

In addition, Mr. Green seeks to hold Warden More and his two deputies liable due to their positions at PICC. He believes the wardens should be ultimately responsible for any wrong that occurs within the walls of the prison. However, "the mere fact . . . [they] may hold a supervisory position is insufficient to find liability." Pearson v. Vaughn, 102 F. Supp. 2d 282, 289 (E.D. Pa. 2000). The plaintiff must demonstrate that the wardens set a policy, gave an order, or knowingly acquiesced in a correctional officer's denial of medical service or attention. See Gay v. Petsock, 917 F.2d. 768, 771 (3d Cir. 1990); Waples v. Kearney, No. 00-210, 2001 U.S. Dist. LEXIS 9050, at \*7-8 (D. Del. Mar. 13, 2001) (dismissing a *pro se* prisoner's § 1983 claim against a warden that were premised

on the doctrine of respondeat superior). Mr. Green has not made any factual showing that these supervisors had personal knowledge of or participated in his alleged deprivation of rights. See Pl. Dep. at 77-102 (explaining that the only reason he filed suit against the wardens was because of their positions at PICC and stating that he has no knowledge that the grievances he filed were reviewed by the wardens). He has also adduced no evidence that the wardens issued an order or implemented a policy of denying medical services to prisoners. Furthermore, the sending of a grievance to the “Warden” is insufficient to impose knowledge of any wrongdoing on More, Shovlin, or Dunleavy. See Rode, 845 F.2d at 1208 (holding the filing of a grievance with an office is not enough to impose actual knowledge of the grievance on the head of the office). Finally, Mr. Green’s attempt to hold the wardens liable for the acts of PHS is another effort to apply a respondeat superior theory of liability.<sup>8</sup> Civil rights claims cannot be premised on a theory of respondeat superior. Id. at 1207.

As for the remaining Staff Defendants, Correctional Officers Theresa Avella (“Avella”) and Levern Sowers (“Sowers”), Mr. Green wants to hold them liable for exhibiting deliberate indifference to his clavicle pain and food poisoning. Mr. Green stated in his deposition that he broke his clavicle in a bike accident in 1996 and he experienced regular pain in that area prior to and during his incarceration. See Pl. Dep. at 18. Mr. Green has been in “some sort of mild pain” ever since the bike accident. As a

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<sup>8</sup>It should be noted that the claims of Mr. Green against three PHS employees were dismissed on October 22, 2004. See Docket No. 55.

result of this pain, Mr. Green claims he repeatedly sought medical assistance from the medical staff in October 1998 and each request was denied. See Pl. Compl. at 4; Pl. Dep. at 35. These denials form part of the basis of his § 1983 claims against Avella and Sowers. Avella and Sowers contend they cannot be held accountable for the actions of the PHS medical staff.

As noted above, a § 1983 claim cannot be founded on a theory of respondeat superior. See Rode, 845 F.2d at 1207. Mr. Green cannot hold Avella and Sowers liable for the actions or lack of action of the PHS staff. Without bringing the clavicle pain to Avella and Sowers' attention or showing they had knowledge of his pain and did nothing about it, a § 1983 Eighth Amendment action for deliberate indifference to his clavicle pain cannot succeed. Mr. Green has not demonstrated personal involvement by Avella and Sowers in the neglect of his clavicle pain.

Mr. Green did, however, make the necessary showing of Avella and Sowers' personal involvement with respect to the alleged deliberate indifference to his food poisoning. He claims he complained of his illness to Avella and Sowers when they were on duty and they failed to respond to his medical needs.

Accordingly, I will grant defendants Harry E. More, Charles B. Shovlin, Walter P. Dunleavy, Lisa Goods, Gloria Diamond, Karen Pugh, Rosa Jackson, Donna Duncan, and Deborah Jenkins summary judgment on Mr. Green's claims against them. I will also grant defendants Avella and Sowers summary judgment on any claims against them that

relate to Mr. Green's clavicle pain. Since the only claims of Mr. Green that remain relate to Avella and Sowers' deliberate indifference to his food poisoning, I will take up the remaining arguments in the Staff Defendants' motion for summary judgment only as they apply to those claims.

## **B. Statute of Limitations**

### **1. In General**

The Staff Defendants claim that Mr. Green's causes of action accrued on October 20, 1998 at the latest. Mr. Green does not address the accrual date of his claims in his response to the defendants' summary judgment motion. In addition, a dispute exists as to when Mr. Green's complaint was effectively filed for statute of limitations purposes. Mr. Green argues that October 20, 2000 should be the date the court considers the complaint filed. On that date, Mr. Green filed a complaint, but it was dismissed for failure to pay the requisite filing fee. The Staff Defendants contend that April 28, 2003 is the more appropriate date. It was on April 28, 2003 that Judge Fullam approved the filing of the complaint *in forma pauperis*.

Congress did not provide for a statute of limitations for claims based on § 1983, and therefore, "the United States Supreme Court has held that state statutes of limitations applicable to personal injury actions govern all § 1983 cases." Long v. Bd. of Educ., 812 F. Supp. 525, 530 (E.D. Pa. 1993) (citing Wilson v. Garcia, 471 U.S. 261, 276-80 (1985)), overruled on other grounds by Burgh v. Borough Council of Montrose, 251 F.3d

465 (3d Cir. 2001). Therefore, § 1983 cases in Pennsylvania borrow Pennsylvania's two-year personal injury statute of limitations. See Rose v. Bartle, 871 F.2d 331, 347 n.13 (3d Cir. 1989); 42 Pa. Cons. Stat. § 5524(2) (2005). However, federal law dictates when the statute of limitations begins to run for a § 1983 cause of action. Morley v. Phila. Police Dep't, No. 03-880, 2004 U.S. Dist. LEXIS 12771, at \*31 (E. D. Pa. July 7, 2004).

Under federal law, a case arising under § 1983 accrues when the “plaintiff knows or has reason to know of the injury which is the basis of the section 1983 action.” Montgomery v. DeSimone, 159 F.3d 120, 126 (3d Cir. 1998) (internal quotations omitted). From the date of accrual, the cause of action must be instituted with the court, i.e., a complaint must be filed, within the applicable statute of limitations period. In a court's determination of whether the statute of limitations has been violated, “[t]he Third Circuit has explicitly stated that ‘although a complaint is not formally filed until the filing fee is paid, we deem a complaint to be constructively filed as of the date that the clerk received the complaint - as long as the plaintiff ultimately pays the filing fee . . . .’” Molina v. City of Lancaster, 159 F. Supp. 2d 813, 819 (E.D. Pa. 2001) (quoting McDowell v. Del. State Police, 88 F.3d 188, 191 (3d Cir. 1996)).

This court will consider the original complaint constructively filed on October 20, 2000. It was on that date that Mr. Green filed his complaint with the clerk and Mr. Green was ultimately permitted to proceed *in forma pauperis* on those claims. In addition, no

evidence has been put forth that the plaintiff's delay in prosecuting this action between October 20, 2000 and April 28, 2003 was in bad faith.

The remaining unanswered question is when the cause of action accrued. Working backwards from the October 20, 2000 date, Mr. Green's alleged constitutional injuries must have accrued on or after October 20, 1998 for this suit to be sustainable — within the two years prior to the filing of the complaint. With the plaintiff's § 1983 Eighth Amendment cause of action, the injuries accrued on the date(s) that Avella and Sowers displayed the deliberate indifference to Mr. Green's medical needs. It was on those days that Mr. Green should have known he was injured under the Eighth Amendment.

## 2. Summary Judgment based on an Affirmative Defense

When a defendant moves for summary judgment on the grounds of statute of limitations, on which it bears the burden of proof, it has the obligation to affirmatively point out the absence of a genuine issue of material fact. See Manno v. Am. Gen. Fin. Co., No. 05-CV-1222, 2006 U.S. Dist. LEXIS 46902, at \*37-38 (E.D. Pa. July 12, 2006) (citing In re Bressman, 327 F.3d 229, 237-38 (3d Cir. 2003)); Chaplin v. Nationscredit Corp., 307 F.3d 368, 372 (5th Cir. 2002) ("To obtain summary judgment, if the movant bears the burden of proof on an issue . . . because . . . as a defendant he is asserting an affirmative defense, he must establish beyond peradventure all of the essential elements of the . . . defense to warrant judgment in his favor."). See also Nat'l State Bank v. Fed. Reserve Bank, 979 F.2d 1579, 1582 (3d Cir. 1992); 11 Moore, Federal Practice §

56.13[1] p. 56-138. “Once a moving party with the burden of proof makes such an affirmative showing, it is entitled to summary judgment unless the non-moving party comes forward with probative evidence that would demonstrate the existence of a triable issue of fact.” In re Bressman, 327 F.3d at 238 (citing Fed. R. Civ. P. 56(e)).

### 3. Food Poisoning Claim

Mr. Green claims that he became ill from food poisoning on four non-consecutive days between October 2, 1998 and October 20, 1998. In his deposition, he states that he complained to Avella and Sowers on those four days, plus additional days, about his sickness. Avella and Sowers failed to answer his call for medical care or summon the medical staff. As to the exact days of Avella and Sowers’ alleged indifference, Mr. Green is inconsistent. In his response to the Staff Defendants’ motion for summary judgment, Mr. Green points to October 18 and 19, 1998, dates prior to October 20, 1998. See Pl. Resp. at 4. In his deposition, however, he claims he is certain that October 20, 1998 was the last day he became ill and Avella and Sowers failed to respond. See Pl. Dep. at 59-60.

Avella and Sowers do not address when Mr. Green’s cause of action accrued. Instead, they focus their argument on when Mr. Green’s complaint was filed for statute of limitations purposes. They only state that “he was required to file any § 1983 claims no later than October 20, 2000,” Defs.’ Mem. of Law Supp. Mot. for Summ. J. (“Defs.’

Mem.”) at 7, which appears to concede that Mr. Green’s cause of action accrued on October 20, 1998.

Based on the determination that the complaint was effectively filed on October 20, 2000, Avella and Sowers needed to affirmatively demonstrate that they never denied Mr. Green’s request for medical assistance on or after October 20, 1998. They fail to present any evidence on this matter, do not attempt to contradict Mr. Green’s claims, and suggest their disputed actions may have occurred on October 20, 1998. As a result, viewing the facts in the light most favorable to the plaintiff, a genuine issue exists as to when the alleged constitutional injury accrued.

Avella and Sowers have failed to meet their burden on the statute of limitations defense. Therefore, I will reject their summary judgment argument that the claims of Mr. Green are time barred.

### **C. Exhaustion of Administrative Remedies**

Staff Defendants point to the absence of evidence in the record that Mr. Green filed any type of complaint in their grievance system. In particular, PICC monitors all filed grievances and maintains records of such complaints, and it has no record of the grievances that Mr. Green claims he filed. The defendants contend that all prisoners must exhaust this administrative remedy prior to filing a state or federal lawsuit. Mr. Green counters Staff Defendants’ argument by stating that he exhausted the administrative remedies of PICC by filing “grievances that were ignored” on October 14, 1998 and

October 19, 1998. See Pl. Resp. at 3; Docket No. 88 (a copy of a grievance filed by Mr. Green dated “10-18-98”). Alternatively, he contends that he and other prisoners at PICC were “never informed of any grievance scheme,” and he therefore should not be responsible for failing to exhaust the administrative remedies.

The Prison Litigation Reform Act (“PLRA”) states that “[n]o action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983) or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available have been exhausted.” 42 U.S.C. § 1997e(a). The PLRA applies to any claim that arises in the prison setting. See Porter v. Nussle, 534 U.S. 516, 532 (2002) (“[T]he PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”). Furthermore, Congress “has provided in § 1997e(a) that an inmate must exhaust [administrative remedies] irrespective of the forms of relief sought and offered through administrative avenues.” Booth v. Churner, 532 U.S. 731, 741 n.6 (2001). The Third Circuit has continually held that the exhaustion requirement is absolute, absent circumstances where no administrative remedy is available. See Spurill v. Gillis, 372 F.3d 218, 227-28 (3d. Cir. 2004); Nyhuis v. Reno, 204 F.3d 65, 67 (3d. Cir. 2000); but see Freeman v. Snyder, No. 98-636-GMS, 2001 U.S. Dist. LEXIS 16634, at

\*15-16 (D. Del. Apr. 10, 2001) (finding that if no administrative remedy is available, the exhaustion requirement need not be met).

Failure to exhaust administrative remedies is an affirmative defense. Like the statute of limitations defense above, in order for a defendant to succeed when it asserts failure to exhaust remedies in support of summary judgment, the defendant must establish the absence of a genuine issue of material fact as to each element of the defense. See Brown v. Croak, 312 F.3d 109, 111 (3d Cir. 2002) (“Failure to exhaust administrative remedies is an affirmative defense that must be pled and proven by the defendant.”); Wilson v. Budgeon, Civ. A. No. 3:05-2101, 2006 U.S. Dist. LEXIS 31451, at \*8 (M.D. Pa. May 19, 2006) (citing Anderson v. Deluxe Homes of PA, Inc., 131 F. Supp.2d 637, 649 (M.D. Pa. 2001)). Once a defendant meets this threshold, the burden shifts to the plaintiff to set forth a genuine dispute of material fact as to any element essential to the affirmative defense. Id. If the plaintiff is able to establish a genuine dispute, summary judgment must be denied. Id.

Here, Avella and Sowers have failed to satisfy their initial burden. The defendants do not detail the requirements of the PICC grievance system. They only attached an affidavit to their motion for summary judgment that states no relevant grievance from Mr. Green appeared in PICC’s internal database. In order for a court to determine the absence of a genuine issue as to each element of an exhaustion defense, the court must know what administrative remedies are available to prisoners and whether the plaintiff exhausted

them. In addition, Mr. Green created a genuine dispute as to whether he exhausted the available administrative remedies. Viewing the record in the light most favorable to Mr. Green, the copy of the grievance he produced protests the alleged constitutional injuries that form the basis of this case. The grievance complains about inadequate medical attention by the prison staff.<sup>9</sup> Therefore, the court must assume Mr. Green filed the grievance with PICC and exhausted his administrative avenues.

Avella and Sowers have failed to satisfy their burden in proving failure to exhaust administrative remedies. Accordingly, I will deny them summary judgment based on that affirmative defense.

**D. § 1983 Eighth Amendment Claim<sup>10</sup>**

Avella and Sowers make a general denial of the Eighth Amendment allegations against them. Mr. Green argues in his response how his claims satisfy the Eighth Amendment “deliberate indifference” standard. Therefore, I will discuss the merits of the Eighth Amendment claim.<sup>11</sup>

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<sup>9</sup>Mr. Green’s claim that he was not aware of the grievance system is not compelling, especially given the fact that he had previously filed a grievance concerning a light fixture in his cell.

<sup>10</sup>I do not take up Avella and Sowers’ qualified immunity because it was not raised in their motion for summary judgment. But where “the plaintiff fails to make out a constitutional violation, the qualified immunity inquiry is at an end; the [state actor] is entitled to immunity.” Bennett v. Murphy, 274 F.3d 133, 136 (3d Cir. 2002). Mr. Green has failed to make out a constitutional claim under the Eighth Amendment. See infra.

<sup>11</sup>Since the moving party did not base their motion for summary judgment on the substance of the Eighth Amendment claim, the court’s discussion of this issue could be deemed *sua sponte*. To the extent that it is, “[i]t has long been established that, under the right circumstances, district courts are entitled to enter summary judgment *sua sponte*.” Couden v. Duffy, 446 F.3d 483, 500 (3d Cir. 2006) (quoting Gibson v. Mayor and Council of Wilmington, 355 F.3d 215, 222 (3d Cir. 2004)). The right circumstances include: (1) the presence of a fully developed record, (2) the lack of prejudice to the plaintiff, and (3) a decision based on a purely legal issue. Gibson, 355 F.3d at 224. The plaintiff must have proper notice, i.e., “reason to believe the court might reach the issue and received a fair opportunity to put its best foot forward.” Id. at 223-24. Mr. Green had every opportunity to put his best foot forward on this issue — he was deposed, he raised the issue and argued the law in his response, and he was given

Mr. Green claims Avella and Sowers violated his Eighth Amendment rights when they failed to “alert medical for services after direct observation” that he needed medical care. Mr. Green also stated in his deposition that he complained to Avella and Sowers about his illness and they did not respond. According to Mr. Green, he suffered from food poisoning and he was “bedridden, vomiting, and had headaches.”

In order for a prisoner to successfully assert a § 1983 cause of action for a violation of the Eighth Amendment based upon a failure to provide adequate medical care, the plaintiff must establish (1) that the state actor was “deliberately indifferent” to his medical needs and (2) the medical needs of the prisoner were “serious.” See Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999); Monmouth Cty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1997) (articulating the standard in Estelle v. Gamble, 429 U.S. 97 (1976), as a two-pronged test). Under the first element, a prisoner can establish “deliberate indifference when the record would allow the fact finder to conclude that a prison official is subjectively aware of the risk of substantial harm to an inmate, but failed to respond.” Meyers v. Majkic, No. 04-3883, 2006 U.S. App. LEXIS 18502, at \*4 (3d Cir. July 24, 2006) (citing Farmer v. Brennan, 511 U.S. 825, 828 (1970)). Negligent conduct by a prison official, “without some more culpable state of mind,” is not enough to constitute deliberate indifference. See Rouse, 182 F.3d at 197. As for the second element, a prisoner’s medical needs are serious when they have been ““diagnosed by a

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several chances to supplement the record.

physician as requiring treatment’ or [are] so obvious that a layperson would recognize the need for professional medical care.” Meyers, 2006 U.S. App. LEXIS 18502, at \*3 (quoting Monmouth Cty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1997)).

Here, Mr. Green claims he made requests to Avella and Sowers for medical assistance when he was bedridden, vomiting, and suffering other flu-like symptoms. Mr. Green did not exhibit these symptoms over a long period of time. Rather, he suffered these symptoms on four non-consecutive days. The record does not indicate either the content of his communication with Avella and Sowers or the words and conduct of the defendants when Mr. Green informed them of his medical problems. Mr. Green also admits that he did receive some medical attention from the PHS staff during the month of October 1998, although Mr. Green does not remember the reasons for his visits to the medical unit. Pl. Dep. at 117-20. Taken together, and drawing all reasonable inferences in favor of Mr. Green, Mr. Green has failed to show the existence of a genuine issue regarding deliberate indifference by Avella and Sowers or the seriousness of his condition.

Under the first prong, the Third Circuit has found deliberate indifference in at least five situations. See Lanzaro, 834 F.2d at 346-47; Bennett v. Div. of Immigration Health Servs., No. 05-4251, 2006 U.S. Dist. LEXIS 13784, at \*16 n.6 (E.D. Pa. Mar. 28, 2006). The one that is relevant in this case is “where prison authorities deny reasonable requests

for medical treatment . . . and such denial exposes the inmate to undue suffering or the threat of tangible residual injury.” Id. at 346 (internal quotations and citation omitted). Even assuming Avella and Sowers ignored Mr. Green’s pleas for medical attention, flu-like symptoms that last for a day do not require medical treatment. Typically, such a condition must be allowed to run its course and medicine can provide little relief. The fact that Mr. Green recovered within one day with each incident supports the defendants’ failure to respond to Mr. Green’s requests. In addition, Avella and Sowers did not subject Mr. Green to undue suffering. Mr. Green’s four bouts with food poisoning were unfortunate, but any pain he suffered was unavoidable.<sup>12</sup> Finally, Mr. Green visited the medical unit several times during the relevant time frame. While it may not have been on the days he had food poisoning, it was on days that were close enough in time to the illness to allow the defendants to assume he was receiving any necessary medical attention. See Durmer v. O’Carroll, 991 F.2d 64, 69 (3d Cir. 1993) (holding that a non-physician defendant cannot be considered deliberately indifferent for failing to respond to a prisoner’s medical complaints when the prisoner is already receiving treatment from the prison medical staff). At most, based on this record, a reasonable juror could find the defendants negligent for not making an inquiry into the illness that formed the basis for

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<sup>12</sup>In his response to the defendants’ motion for summary judgment, Mr. Green states for the first time that he “has an immune system disease and his infection was debilitating.” Pl. Resp. at 4. He provides no evidence to support this bald assertion and the court will give it no consideration.

Mr. Green's complaints. Deliberate indifference requires more than a showing of mere negligence.

As for the second prong, Mr. Green fails to establish that a reasonable fact finder could find that his food poisoning was so severe that the non-physician defendants should have recognized the need to get him medical attention. As noted above, the evidence only shows that he experienced food poisoning on several different occasions. His sickness never lasted longer than a day. A one day bug is not an obvious ailment that a layperson should recognize as requiring professional medical care. In addition, no evidence has been presented that the food poisoning actually required medical care. Therefore, no reasonable juror could find that Mr. Green's medical condition was serious enough to warrant Eighth Amendment protection.

Accordingly, I will grant Avella and Sowers summary judgment for the § 1983 Eighth Amendment claims Mr. Green brought against them.

**E. Claims Against the City of Philadelphia**

Mr. Green's claims are against the Staff Defendants, the City of Philadelphia ("City"), Scott Libby, and Cyril Varlack. The City is named in the caption of Mr. Green's complaint, but he asserts no basis in his complaint or other filings to hold the City liable for the events at issue. The City was not a party to the Staff Defendants' motion for

summary judgement; however, this court takes up the issue of the City's liability under 28 U.S.C. § 1915, which governs *in forma pauperis* proceedings.<sup>13</sup>

For a municipality to be held liable under § 1983, the plaintiff must demonstrate that the municipality and its officials deprived him of his constitutional rights pursuant to a municipal policy or custom; the municipality itself cannot be held liable under a theory of respondeat superior. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690-91 (1978). A municipal policy is “a statement, ordinance, regulation, or decision officially adopted and promulgated by [a governing] body's officers.” Id. at 690. A municipal custom, on the other hand, is a “persistent and widespread” practice by municipal officials that is “so permanent and well settled as to constitute a custom or usage with the force of law.” Id. at 691.

As a threshold matter then, the plaintiff must demonstrate that one or more of his constitutional rights have been violated. The court, having previously established that Mr. Green's Eighth Amendment rights were not violated, finds that the City is entitled to have the action against it dismissed. See supra Part III.D.; Robinson v. Shop-Rite Supermarkets, 04-CV-3439, 2005 U.S. Dist. LEXIS 33207, at \*18-19 (D.N.J. Dec. 15, 2005). Even if Mr. Green had successfully established an Eighth Amendment violation

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<sup>13</sup>Under 28 U.S.C. § 1915(e)(2), “the court shall dismiss the case at any time if the court determines that . . . the action or appeal (I) is frivolous or malicious;[or] (ii) fails to state a claim on which relief may be granted . . . .” “An action is frivolous if it lacks an arguable basis either in law or in fact, and the claims are of little or no weight, value, or importance, not worthy of serious consideration, or trivial. Additionally, a *pro se* complaint can only be dismissed for failure to state a claim when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Ringgold v. Wilmington Police Dep't, No. 06-17-GMS, 2006 U.S. Dist. LEXIS 30315, at \*2-3 (D. Del. May 16, 2006) (internal citations and quotations omitted).

by Avella or Sowers, he has presented no evidence of any custom or policy of the City or PICC to deliberately deprive prisoners of adequate medical treatment.

Accordingly, I will dismiss any claims against the City with prejudice for failing to state a claim upon which relief can be granted.

#### **IV. CONCLUSION**

For the reasons set forth above, I will grant the Staff Defendants' motion for summary judgment in its entirety and dismiss all claims against them. In addition, I will dismiss any claims against the City with prejudice. An appropriate Order follows.

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

<b>MARK GREEN,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>v.</b>	:	<b>NO. 00-5330</b>
	:	
<b>PHILA. COUNTY PRISONS, et al.,</b>	:	
<b>Defendants.</b>	:	

**ORDER**

**AND NOW**, this 4th day of October, 2006, upon consideration of Staff Defendants'<sup>1</sup> motion for summary judgment (Docket No. 98) and Plaintiff's response thereto, it is hereby **ORDERED** that Staff Defendants' motion is **GRANTED**.

It is further **ORDERED** that all claims against the City of Philadelphia are **DISMISSED** with prejudice.

BY THE COURT:

/s/ Lawrence F. Stengel  
LAWRENCE F. STENGEL, J.

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<sup>1</sup>Staff Defendants that filed the motion for summary judgment are (1) Harry E. More; (2) Charles B. Shovlin; (3) Walter P. Dunleavy; (4) Levern Sowers; (5) Theresa Avella; (6) Lisa Goods; (7) Gloria Diamond; (8) Karen Pugh; (9) Rosa Jackson; (10) Donna Duncan; and (11) Deborah Jenkins.