

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

JOHN FLAMER,	:	
	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
	:	No. 95-7634
CAPTAIN LEVANDOWSKI, WARDEN,	:	
GEORGE HILL, SPIBERILLI,	:	
BARBARA WALRATH, FRANK GREEN,	:	
EMSA HOSPITAL, NURSE CYNTHIA,	:	
KIM CHRISTIE	:	
Defendants.	:	

MEMORANDUM-ORDER

GREEN, S.J.

November , 1997

Presently before the court is Defendants EMSA Hospital, Nurse Cynthia and Kim Christie's Motion For Summary Judgment and Plaintiff's Answer thereto. For the reasons set forth below, Defendants' Motion is granted.

I. FACTS AND PROCEDURE

Plaintiff was granted leave to proceed in forma pauperis in this matter by Order of this Court dated December 7, 1995. Plaintiff's complaint was filed December 12, 1995. Thereafter, Plaintiff executed a voluntary dismissal with respect to his claims against Defendants Levandowski, Hill, Spiberilli, Walrath and Green which was granted by Order of this Court dated December 10, 1996.

Plaintiff brings this action against the moving Defendants under 42 U.S.C. § 1983 alleging violations of his constitutional rights. Defendant Nurse Cynthia was a nurse at EMSA during the time period in question, and Kim Christie was the Health Services Administrator for EMSA. With respect to these defendants, Plaintiff claims that he was denied medical care while he was in

restricted housing during the month of November 1995.

Plaintiff's depositions of January 10, 1997 and February 27, 1997 contain allegations that the Defendants denied the Plaintiff medical treatment for his vomiting of meals and blood.

Plaintiff's medical records from the Health Services Department at Delaware County Prison show that the Plaintiff was either evaluated or attempted to be evaluated because Plaintiff refused the evaluation approximately 50 times for various complaints from November until December 11, 1995 which is the time period in question. (Defs.' Mem., Exh. F.) Plaintiff first complained of a vomiting condition on November 11, 1995 at which time a sample of his sputum was evaluated. (Defs.' Mem., Exh. F at 11/11/95.) On November 12, Plaintiff was again evaluated for his vomiting condition, and his sputum was again tested. (Defs.' Mem., Exh. F at 11/12/95.) On November 13, Plaintiff was referred to the doctor regarding his vomiting condition, but Plaintiff refused to see the doctor twice that day. (Defs.' Mem., Exh. F at 11/13/95.) Plaintiff also refused to be treated for his vomiting condition on several occasions on November 14, 15 and 16. (Defs.' Mem., Exh. F at 11/14/95, 11/15/95 and 11/16/95.) On November 21, 22 and December 9, the medical records reveal that Plaintiff was evaluated for his vomiting condition. (Defs.' Mem., Exh. F at 11/21/95, 11/22/95 and 12/9/95.)

Subsequent to the filing of Plaintiff's Complaint on December 12, 1995, Plaintiff's vomiting condition was evaluated

or attempted to be evaluated another eight times throughout December of 1995. (See Defs.' Mem., Exh. F.) Plaintiff also received several diagnostic tests to evaluate his condition including an iron test, CBC, and upper GI, all of which were negative. (See Defs.' Mem., Exh. F.) The affidavit of Kim Christie confirms the account of events recorded in the medical records. (See Defs.' Mem., Exh. G.) Plaintiff testified in his deposition that since 1991, when he initially started spitting up, he has been treated at various medical facilities, including, SCI-Haverford, Chester County Prison, Philadelphia Detention Center and Sacred Heart Crisis Center, and none of these entities has been able to diagnose his condition. (Flamer Dep., 2/27/97 at 33-34.)

II. DISCUSSION

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). Once the moving party has carried the initial burden of showing that no genuine issue of material fact exists, the nonmoving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact. Pastore v. Bell Telephone Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994). The nonmoving party, instead, must establish the existence of every element essential to his case,

based on the affidavits or by the depositions and admissions on file. Id. (citing Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992)); see also Fed. R. Civ. P. 56(e).

A. DEFENDANTS NURSE CYNTHIA AND KIM CHRISTIE

The Eighth Amendment prohibits punishments which involve the unnecessary and wanton infliction of pain such that the punishment does not comport with the basic concept of human dignity. Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. 2909, 2925 (1976). Where a plaintiff claims a denial of medical treatment, the plaintiff must demonstrate a deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976). Deliberate indifference has been defined as subjective recklessness, or the actor's conscious disregard of substantial harm that may result from his or her action. Farmer v. Brennan, 511 U.S. 825, 839, 114 S. Ct. 1970, 1980 (1994).

In the present case, Plaintiff has failed to produce any evidence in his Answer to substantiate the allegations he set forth in his Complaint or to refute the facts presented in Defendants' Memorandum. Plaintiff's Answer merely recites the allegations in the Complaint and relies on bare assertions of fact. Plaintiff's Answer does not include any affidavits, depositions, admissions on file or any other evidence to support the assertions he makes regarding his Eighth Amendment claim. Even considering the Plaintiff's depositions of 1/10/97, 2/27/97 and 5/22/97, the deposition testimony, along with the Plaintiff's

Complaint and Answer, still do not produce sufficient evidence of an unnecessary and wanton infliction of pain by Defendants Nurse Cynthia and Kim Christie concerning the Plaintiff's medical treatment during the time period in question.

B. DEFENDANT EMSA

A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on respondeat superior. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). "To make out a case under Section 1983, the plaintiff must show actual participation in the unlawful conduct, or actual knowledge of and acquiescence in that conduct." Payton v. Vaughn, 798 F. Supp. 258, 260 (E.D. Pa. 1992). Private entities who act under state law may also be held liable for a policy or custom demonstrating deliberate indifference to constitutional rights. Sanders v. Sears, Roebuck & Co., 984 F.2d 972, 975 (8th Cir. 1993).

Because Plaintiff has failed to produce any evidence of any unlawful conduct on the part of Defendants Nurse Cynthia and Kim Christie, Plaintiff cannot support any allegations against EMSA based on vicarious liability. Plaintiff has also failed to produce any evidence of a policy or custom demonstrating a deliberate indifference to plaintiff's constitutional rights on the part of EMSA. Therefore, as Plaintiff has failed to produce sufficient evidence of a genuine issue of material fact, Defendant EMSA is entitled to summary judgment.

An appropriate Order follows.

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EMSA HOSPITAL, NURSE CYNTHIA,	:	
KIM CHRISTIE	:	
Defendants.	:	

ORDER

AND NOW, this day of November, 1997 IT IS HEREBY ORDERED
that Defendants EMSA Hospital, Nurse Cynthia and Kim Christie's
Motion For Summary Judgment is GRANTED.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.