

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

<b>MELVIN LASSITER,</b>	:	<b>CIVIL ACTION</b>
<b><u>PRO SE,</u></b>	:	
	:	
<b>v.</b>	:	
	:	
	:	
<b>TODD BUSKIRK, ET AL.</b>	:	<b>NO. 03-5511</b>

**MEMORANDUM AND ORDER**

Gene E.K. Pratter, J.

April 28, 2005

Melvin Lassiter, who was at all relevant times a pretrial detainee in a county prison, is the pro se plaintiff in this case. Mr. Lassiter alleges that the defendants, Todd Buskirk, James Smith, Todd Haskins, Jose Garcia, and Correctional Officers Chewning and Werley violated his constitutional rights under the Eighth Amendment of the United States Constitution. Mr. Lassiter seeks redress pursuant to 42 U.S.C. § 1983. In two separate motions, all of the defendants have moved to dismiss the complaint.<sup>1</sup> For the reasons discussed below, the motions to dismiss the complaint will be granted in part and denied in part.

**FACTUAL BACKGROUND**

Melvin Lassiter became a pretrial detainee in Northampton County Prison on July 5, 2003, and was placed in a cell with another detainee, Andre Ford, who allegedly is “infected

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<sup>1</sup> In one motion, Messrs. Buskirk, Smith, Garcia, Chewning and Werley move to dismiss the complaint. Mr. Haskins has moved separately to dismiss the complaint.

with the AIDS virus.”<sup>2</sup> On or about July 29, 2003, an altercation between Mr. Lassiter and Mr. Ford occurred when Mr. Lassiter expressed his belief that Mr. Ford had stolen some of Mr. Lassiter’s belongings. During the altercation and while Mr. Ford’s mouth was apparently bleeding, Mr. Ford bit Mr. Lassiter, allegedly causing Mr. Lassiter’s hand to bleed from a deep gash. Mr. Lassiter claims that he immediately sought medical treatment for the gash, and was advised by Mr. Chewing, a correctional officer and defendant in this case, that he (Mr. Lassiter) should complete a medical request slip in order to be treated by the medical staff the next day. Mr. Lassiter also alleges that later the same day, he approached Mr. Werley, also a correctional officer and defendant in this case, and was again advised to complete a medical request slip so that he could be treated by the prison medical staff the next day. Mr. Lassiter did so and was treated for the cut on the morning of July 30, 2003.

Mr. Lassiter filed his initial complaint in this action on October 2, 2003, followed by an amended complaint on December 29, 2003, after he was granted leave to file the claim in forma pauperis. Messrs. Buskirk, Garcia, and Smith moved to dismiss the amended complaint on February 10, 2004, and Mr. Haskins moved to dismiss the amended complaint on February 19, 2004. Before that motion was decided and after several failed attempts to procure pro bono

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<sup>2</sup> Mr. Lassiter’s allegations are not entirely clear and consistent as to whether Mr. Ford is infected with the virus causing AIDS, also referred to as being HIV-positive, or suffers from AIDS. For example, Mr. Lassiter states that Mr. Ford is “infected with the AIDS virus,” see Complaint at ¶¶ 12, 16, 24, 34, 35, but later states that the gash on his hand came into contact “with the blood of someone who had AIDS”, see Complaint at ¶ 25. There is a distinction between being infected with the virus causing AIDS and actually suffering from AIDS. Because most of the allegations refer to Mr. Ford as “infected with the AIDS virus,” the Court assumes at this point in the proceedings that Mr. Lassiter alleges that Mr. Ford is HIV-positive. The Court further notes that this distinction would not directly cause a potential modification of the decision herein because HIV is a serious condition that can cause AIDS and could potentially be transmitted during a physical altercation such is the one alleged by Mr. Lassiter.

counsel, Mr. Lassiter filed another amended complaint on July 9, 2004 (the “Second Amended Complaint”), in which Messrs. Chewning and Werley (who had previously been known only as “John Does” in the Complaint) were identified by name.

In the Second Amended Complaint, Mr. Lassiter alleges that the defendants, who are all employees working at the prison, deliberately placed Mr. Lassiter in a cell with an HIV-infected detainee without informing Mr. Lassiter of Mr. Ford’s illness, thereby disregarding the risk posed to Mr. Lassiter. Complaint at ¶ 35. Mr. Lassiter also alleges that Mr. Ford had “violent tendencies.” Complaint at ¶ 35. Mr. Lassiter alleges that the defendant prison guards acted with deliberate indifference to his basic needs, that he was unreasonably exposed to HIV, and that these actions violated Mr. Lassiter’s Eighth Amendment right to be free from cruel and unusual punishment.

After Mr. Lassiter filed a Second Amended Complaint, the original motions to dismiss were denied without prejudice. Mr. Haskins, who is the Correctional Healthcare Solutions Director of the Northampton County Department of Corrections, filed his Motion to Dismiss the Second Amended Complaint on July 19, 2004, and Messrs. Buskirk, Garcia, Smith, Chewning and Werley filed their Motion to Dismiss the Second Amended Complaint on July 28, 2004.

In his motion to dismiss the Second Amended Complaint, Mr. Haskins argues that the allegations against him must be dismissed because there are no allegations that Mr. Haskins exhibited deliberate indifference to a serious medical condition suffered by Mr. Lassiter. In their motion to dismiss the Second Amended Complaint, Messrs. Buskirk, Smith, Garcia, Chewning and Werley argue that the Second Amended Complaint should be dismissed because (1) Mr. Lassiter failed to exhaust his administrative remedies, as required by the Prison

Litigation Reform Act of 1996; (2) the allegations, even if true, do not amount to deliberate indifference on the part of prison officials; and (3) they are shielded by the doctrine of qualified immunity.

Throughout the history of this case, Mr. Lassiter has attempted to have counsel appointed on his behalf. Unfortunately, these attempts have not been successful, and Mr. Lassiter remains a pro se plaintiff. Despite several lengthy extensions of time to respond afforded by the Court to allow for Mr. Lassiter to secure counsel or otherwise respond to the motions, see Docket Entries Nos. 32, 33, which have now been pending for almost nine months, no response has been filed, either pro se or otherwise.

## **DISCUSSION**

### **A. Standard of Review**

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O’Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

To establish a valid claim, the Federal Rules of Civil Procedure require that a plaintiff must provide “a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Weston v. Pennsylvania, 251

F.3d 420, 429 (3d Cir. 2001). In considering a motion to dismiss, a court should construe a plaintiff's claim "so as to do substantial justice," and pro se complaints in particular, such as Mr. Lassiter's, are to be liberally construed. Alston v. Parker, 363 F.3d 229, 234 (3d Cir. 2004).

**B. Exhaustion of Administrative Remedies**

Messrs. Buskirk, Smith, Garcia, Chewing and Werley argue that Mr. Lassiter's claim must be dismissed because Mr. Lassiter failed to exhaust his administrative remedies pursuant to the Prison Litigation Reform Act of 1996 (the "PLRA") prior to filing the Second Amended Complaint. The PLRA provides that a claim brought by a prisoner<sup>3</sup> pursuant to 42 U.S.C. § 1983 may not be brought in federal court "until such administrative remedies as are available have been exhausted." 42 U.S.C. § 1997e(a). Although the failure to exhaust available administrative remedies is an affirmative defense that must be pleaded by the defendant, the failure may be considered as the basis for a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6). Ray v. C.O. Kertes, 285 F.3d 287, 295 n.8 (3d Cir. 2002).

In the present case, the Defendants argue that because the Second Amended Complaint does not expressly set forth that Mr. Lassiter exhausted his administrative remedies, dismissal is required. In support of this assertion, the Remaining Defendants rely on Nyhuis v. Reno, 203 F.3d 65, 67 (3d Cir. 2000), in which the district court's dismissal of a federal inmate's Section 1983 action was affirmed. The Court notes, however, a distinction between the present case and Nyhuis, in that in Nyhuis, the petitioning prisoner answered the motion to dismiss and actually

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<sup>3</sup> Federal statute governing the judiciary and judicial procedure defines a "prisoner" as "any person incarcerated or detained in any facility who is accused of . . . violations of criminal law . . ." 28 U.S.C. § 1915(h). For purposes of the PLRA analysis, Mr. Lassiter's status as a pretrial detainee is encompassed by this definition.

affirmed that he had not attempted to exhaust the administrative remedies available to him because he could not obtain the monetary or declaratory relief he requested. Here, Mr. Lassiter is a pro se plaintiff who has not responded to either of the motions to dismiss and has not admitted in any fashion any failure to exhaust administrative remedies. Given the present circumstances, the Court is not prepared to dismiss the Second Amended Complaint in this case based solely on arguments in the Remaining Defendants' motions, particularly inasmuch as the issue is raised as a result of this pro se Plaintiff's failure to affirmatively allege in his complaint that he has exhausted his administrative remedies. In other words, neither the pleadings nor other record documents the alleged non-exhaustion. Thus, the Court cannot know at this juncture whether the issue is one in actuality or only the result of unknowledgeable pro se pleading. The purported failure to exhaust administrative remedies does not warrant dismissal of the Second Amended Complaint at this time.

**C. Section 1983 Claim**

The "essential element" of an action pursued under Section 1983 is abuse of a constitutional right of a plaintiff by a state official through the exercise of his or her official position. Davidson v. O'Lone, 752 F.2d 817, 827 (3d Cir. 1984). To establish such a claim, a plaintiff must demonstrate that: (1) the injurious conduct was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of rights conferred by the Constitution or federal law. Samerica Corp. of Delaware v. City of Phila., 142 F.3d 582, 590 (3d Cir. 1998). Thus, the Court must consider whether the allegations in the Second Amended Complaint, when considered in a light most favorable to Mr. Lassiter, sufficiently assert that the Defendants abused their authority to violate his constitutional rights.

## 1. Interpretation of Constitutional Claim Asserted

All of the Defendants argue that the allegations in the Second Amended Complaint, even if they are true, do not rise to the level of “deliberate indifference” to Mr. Lassiter’s medical needs and, therefore, fail to state a claim for a violation of Mr. Lassiter’s rights under the Eighth Amendment to the United States Constitution. Although not raised by the Defendants, the Court notes that Mr. Lassiter was at all relevant times a pretrial detainee, and not a prisoner serving a sentence and, thus, his rights under the Fourteenth, and not the Eighth, Amendment are implicated in this case. See Bell v. Wolfish, 441 U.S. 520, 537 n.16 (1979); Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977). Because Mr. Lassiter is a pro se litigant responsible on his own for drafting the Second Amended Complaint, the Court will presume that had Mr. Lassiter known that his status as a pretrial detainee warranted this distinction he would have asserted that the constitutional violation underlying his Section 1983 claim was a violation of his Fourteenth Amendment rights, and the Court will proceed by analyzing the Second Amended Complaint as though such a claim was asserted, instead of one arising under the Eighth Amendment.

The Court looks to Bell v. Wolfish, 441 U.S. 520 (1979), and the case law interpreting that case for guidance with respect to determining whether the conditions of Mr. Lassiter’s confinement violated his constitutional rights. In Bell, the Supreme Court concluded that a pretrial detainee has “at least those constitutional rights . . . enjoyed by convicted prisoners.” Bell v. Wolfish, 441 U.S. 520, 545 (1979) (emphasis added). Mr. Lassiter specifically asserts that the Defendants’ actions in placing him in a cell with Mr. Ford constituted deliberate indifference to Mr. Lassiter’s basic needs because the Defendants allegedly were aware (1) that

Mr. Ford was infected with HIV, and (2) that Mr. Ford previously had exhibited violent tendencies. Complaint at ¶¶ 33-38. The Court therefore interprets Mr. Lassiter's Second Amended Complaint to allege that the conditions of Mr. Lassiter's confinement violated his constitutional rights because (1) he was housed in a cell with an inmate who tended toward physical violence and was infected with HIV, thereby exposing Mr. Lassiter to unreasonable risk of serious harm, and (2) the Defendants failed to properly address Mr. Lassiter's subsequent medical needs. Each of these allegations will be analyzed below.

a. **Segregation of Violent Prisoners Infected with HIV**

Many courts have held that the failure to automatically segregate an HIV-infected prisoner from the general population of pretrial detainees, based on HIV status alone, does not rise to the level of a constitutional violation. See e.g., Hoover v. Watson, 886 F. Supp. 410, 417 (D. Del. 1995) ("the failure to segregate an AIDS-infected prisoner from the general population fails to rise to the level of a constitutional violation"); Feigley v. Fulcomer, 720 F. Supp. 475, 482 (E.D. Pa. 1989) (finding that failure to automatically segregate inmates who have tested positively for the virus causing AIDS not cruel and unusual punishment); Maddox v. Goode, Nos. 88-7880-83, 88-8211, 1989 WL 17544, at \*2 (E.D. Pa. Feb. 27, 1989)(noting that there is no evidence of risk associated with being housed in a prison cell with inmate who is HIV-positive or is suffering from any stage of AIDS); Oladipupo v. Austin, 104 F. Supp. 2d 626, 635 (W.D. La 2000) (finding no affirmative duty under the Constitution to segregate HIV-infected from non-infected detainees); Goss v. Sullivan, 839 F. Supp. 1532, 1536 (D. Wyo. 1993) (noting that the "weight of authorities" holds that failure to segregate HIV-infected prisoners does not rise to the level of a constitutional violation). Thus, the case law advises that merely

being placed in a position of general contact with an HIV-infected prisoner would not have created a prolonged hardship that violated Mr. Lassiter's constitutional rights.

However, the Court notes that Mr. Lassiter's Second Amended Complaint alleges that liability in this case is predicated on the alleged combination of facts that the Defendants placed him in the cell with Mr. Ford knowing that Mr. Ford had "violent tendencies." This allegation necessarily gives the Court pause, in that certain of the Defendants<sup>4</sup> who were responsible for deciding to house Mr. Ford in the general pretrial detainee population are alleged to have known that Mr. Ford was both violent and infected with HIV, thereby notably increasing the risk of serious injury to other detainees, in this instance, Mr. Lassiter.

The Court of Appeals for the Third Circuit has concluded that the very nature of detention necessitates state responsibility for the safety of detainees and inmates. Davidson v. O'Lone, 752 F.2d 817, 821 (3d Cir. 1984); see also Farmer v. Brennan, 511 U.S. 825, 832 (1994) (holding that prison officials "must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates'"). Liability of prison officials may arise for an assault committed by one prisoner on another if there was "intentional conduct, deliberate or reckless indifference to the prisoner's safety, or callous disregard on the part of prison officials." Davidson, 752 F.2d at 828. An act

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<sup>4</sup> Mr. Buskirk, who is the Associate Warden of the Northampton County Department of Corrections, and Mr. Smith, who is the Director of the Northampton County Department of Corrections, are the only two Defendants who are implicated in these allegations. Although Mr. Haskins and Mr. Garcia are each identified as parties to the action, no allegations are asserted against them at all. Thus, the Court will dismiss the Second Amended Complaint as to Messrs. Haskins and Garcia. Messrs. Chewning and Werley, who were the Correctional Officers involved in the subsequent medical treatment of Mr. Lassiter's injury, are not alleged to have taken any action with respect to Mr. Ford's housing arrangement, and are therefore only considered with respect to the treatment of Mr. Lassiter's medical needs, discussed infra.

that is deliberately indifferent “entails something more than mere negligence” but “less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” Farmer, 511 U.S. at 835. Where a prisoner claims that the conditions of his or her confinement failed to prevent physical harm, the conditions in question must pose “a substantial risk of serious harm” to be actionable. Id. at 834.

In determining whether an HIV-infected inmate with violent tendencies should be segregated, prison administrators consider such factors as security considerations, the inmate’s psychiatric diagnosis and treatment, the inability to follow blood and body fluid precautions due to an inability to comprehend the need, the inability to follow good infection control measures, and possible victimization by other inmates. See Feigley v. Fulcomer, 720 F. Supp. 475, 482 (M.D. Pa. 1989) (noting that these, and other, considerations are made when considering whether an inmate infected with the virus causing AIDS should be segregated for their own safety or the safety of other inmates). Thus, the Court must consider whether the Second Amended Complaint alleges that the Defendants’ knowledge of Mr. Ford’s tendencies was such that they could have foreseen an altercation in which Mr. Ford’s HIV-positive condition could be implicated to cause Mr. Lassiter’s injury (a bite by an HIV-positive inmate who is himself bleeding from his mouth), thereby suggesting that the Defendants acted with deliberate or reckless indifference to Mr. Lassiter’s safety.

Based on a review of the allegations in the Second Amended Complaint, the Court concludes that Mr. Lassiter’s allegations prevent the dismissal of the claim against some of the Defendants. In the Second Amended Complaint, Mr. Lassiter alleges that “[d]espite this actual knowledge of Ford’s AIDS infection, combined with his violent tendencies, Prison officials

decided to house Lassiter in the same cell as Ford without informing Lassiter of either of these facts.” Complaint at ¶ 35. Mr. Lassiter further alleges that Mr. Smith, the Director of the Northampton County Department of Corrections, “was aware of Ford’s condition and deliberately disregarded the risk to Lassiter posed by housing Lassiter in the same cell as Ford,” which unreasonably exposed Lassiter to infection from AIDS. Complaint, at ¶¶ 36, 37.

The Court acknowledges that this may be considered to be a close question, and that at least one other court has dismissed a claim under similar, although not identical, circumstances. See Cameron v. Metcuz, 705 F. Supp. 454, 460 (N.D. Indiana 1989) (dismissing allegations of deliberate indifference for failure to protect from attack by HIV-infected inmate).<sup>5</sup> However, considering the allegations in a light most favorable to Mr. Lassiter, the Court concludes that the allegations that he was exposed unreasonably to an HIV-positive cellmate even though prison personnel were both aware of Mr. Ford’s condition and of his propensity to physical violence cannot be dismissed as to Messrs. Buskirk and Smith.

**b. Attendance to Medical Needs**

Mr. Lassiter also alleges that he was placed at substantial risk of harm because he was not sent immediately to the medical housing unit upon showing the Correctional Officers the bite injury on his hand. Complaint, at ¶¶ 6-7.<sup>6</sup> Mr. Lassiter also alleges that he twice sought out

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<sup>5</sup> The Court notes that the pro se plaintiff in Cameron was an inmate, and not a pretrial detainee. Therefore, the case was considered pursuant to the Eighth, and not the Fourteenth, Amendment. The fact that pretrial detainees must be given *at least* the same considerations as convicted inmates, the Court concludes the standard in the present case should be applied in a more strict manner than it was in Cameron, at least at this stage in the proceedings.

<sup>6</sup> This portion of the Second Amended Complaint as submitted by Mr. Lassiter is a bracketed note that states “Potential Additional Counts.” In construing the allegations in a light most favorable to Mr. Lassiter, the Court will consider this to be an additional allegation.

prison guards and requested emergency attention after the altercation occurred. Complaint at ¶ 23.

The Court concludes that these allegations in the Second Amended Complaint are not sufficient to support a claim that either the guards or Mr. Haskins, who is the Correctional Healthcare Solutions Director of the Northampton County Department of Corrections, behaved in a manner that was deliberately indifferent to Mr. Lassiter's medical needs. Mr. Lassiter states that each time he requested medical care, he was advised to complete a medical request slip so that he could be treated the next day, and that the cut was, in fact, treated the next day. Second Amended Complaint at ¶¶ 23, 25-28. These allegations confirm that Mr. Lassiter's medical needs were considered. Although Mr. Lassiter disagrees with the guards' assessment of his injury, the actions alleged do not amount to deliberate indifference or callous disregard of Mr. Lassiter's medical needs. Moreover, Mr. Lassiter asserts no additional injury as a result of the delay in treatment. These "post-bite" allegations do not rise to the level of having placed Mr. Lassiter in a position of substantial risk that would amount to inappropriate punishment as a result of the denial of medical care. Because the only allegations against Messrs. Chewing and Werley related to the medical care Mr. Lassiter received, the claims against them will be dismissed.

**D. Qualified Immunity**

Messrs. Buskirk, Smith, Garcia, Chewing and Werley also assert that the Second Amended Complaint should be dismissed because they are protected by the doctrine of qualified immunity. In general, government officials performing discretionary functions are 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, 817-18 (1982). To determine whether qualified immunity applies in a particular case, a court must apply a two-part test. First, a court must consider whether the facts, considered in a light most favorable to the allegedly injured party, show that the official’s conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001); Carswell v. Borough of Homestead, 381 F.3d 235 (3d Cir. 2004). Once it is shown that a constitutional right was violated, a court must then consider whether the right was clearly established, such that the official had reason to know the consequences of his specific actions. See Saucier, 533 U.S. at 201; Anderson v. Creighton, 483 U.S. 635, 636-37 (1987); see also Berg v. County of Allegheny, 219 F.3d 261, 272 (3d Cir. 2000). Because qualified immunity is an “immunity from suit rather than a mere defense to liability,” a district court should resolve such questions at the earliest possible stage in the litigation. Hubbard v. Taylor, 399 F.3d 150, 167 (3d Cir. 2005) (quoting Saucier, 533 U.S. at 200-01 (2001)).

In this case, as discussed supra, Mr. Lassiter has set forth allegations sufficient to support a claim that his liberty interests as a pretrial detainee were violated by being placed in unreasonable danger. Thus, the first prong of the qualified immunity test has been met. The Court must, therefore, consider whether the right to protection from violent conduct by other prisoners was one that Messrs. Buskirk and Smith would have had reason to know of, with risk of serious harm being among the consequences of their alleged deliberate indifference to that right.

The Court acknowledges that there is much case law advising that HIV-infected prisoners need not be automatically segregated from the general prison population, thereby

supporting the Defendants' argument that the failure to automatically segregate AIDS-infected inmates are clearly established constitutional violations. However, as discussed supra, the Court considers the issue to be whether housing a detainee with someone who is known to have a propensity for physical violence and HIV infection would constitute a clear violation of a pretrial detainee's rights. Based on the standard set forth in Davidson, 752 F.2d 817, 828 (3d Cir. 1984), the Court concludes that Messrs. Buskirk and Smith would have had clear notice that an assault by one prisoner on another could give rise to liability if the prison officials acted in a recklessly indifferent manner. Thus, if this claim proves to be supported by facts, qualified immunity would not apply to these Defendants as to that claim.

### **CONCLUSION**

Because the allegations in the Second Amended Complaint, assuming that they are all true, are sufficient to support a claim that Mr. Lassiter was, as a result of reckless indifference, deprived of the right to safety from attack by a known violent HIV-positive cell-mate. The claims against Mr. Buskirk and Mr. Smith will be allowed to go forward certainly at least as far as taking the deposition of the Plaintiff to find out, inter alia, the possible status of the exhaustion of remedies issue. Because there appear to be no direct allegations against Mr. Haskins or Mr. Garcia, they will be dismissed from this action. Finally, the claims against Messrs. Werley and Chewing will be dismissed because the only allegations in the Second Amended Complaint against them fail to support a claim that these Defendants acted with deliberate indifference toward Mr. Lassiter's medical needs. An appropriate Order follows.

April 28, 2005

/S/ \_\_\_\_\_  
Gene E.K. Pratter  
United States District Judge

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

<b>MELVIN LASSITER</b>	:	<b>CIVIL ACTION</b>
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<b>TODD BUSKIRK, ET AL.</b>	:	<b>NO. 03-5511</b>

**ORDER**

AND NOW, this 28th day of April, 2005, upon consideration of the Motion to Dismiss of Todd Haskins (Docket Nos. 26, 27), the Motion to Dismiss of Todd Buskirk, James Smith, Lieutenant Jose Garcia, Correctional Officer Chewning and Correctional Officer Werley (Docket No. 30), and after having extended Plaintiff several extensions of time within which to file a response to the motions (Docket Nos. 32, 33), it is hereby ORDERED that the Motion to Dismiss of Todd Haskins is GRANTED. The Motion to Dismiss of Todd Buskirk, James Smith, Lieutenant Jose Garcia, Correctional Officer Chewning and Correctional Officer Werley is GRANTED IN PART and DENIED IN PART, in that it is GRANTED with respect to Messrs. Haskins, Garcia, Chewning and Werley, and it is DENIED with respect to Messrs. Buskirk and Smith.

Messrs. Buskirk and Smith are ORDERED to file and serve their answers to the Second Amended Complaint within 20 days of the date of this Order.

BY THE COURT:

/S/ \_\_\_\_\_  
GENE E.K. PRATTER  
United States District Judge