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

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| VINCENT ANTHONY CORTLESSA, SR. | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | NO. 04-1039 |
| COUNTY OF CHESTER, et al. | : | |

**Baylson, J.** **October 24, 2005**

**MEMORANDUM**

## I. Introduction

Plaintiff is Vincent Anthony Cortlessa, Sr. On April 1, 2005, Plaintiff filed an Amended Complaint (Doc. No. 36) (hereinafter referred to as the "Complaint"), under the First, Eighth, and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983, against the County of Chester, Chester County Prison, Chester County Prison Board, and Warden John H. Masters (collectively, the "County Supervisor Defendants"); various individual Chester County Prison employees (collectively, the "Individual Officer Defendants");[1] and Primecare Medical, Inc. and various employees

[1] The Individual Officer Defendants include:
Golden English, Corporal;
Mr. DiPetro, Correctional Officer;
Richard Axe, Correctional Officer;
Mr. Greene, Correctional Officer;
Mr. Dawson, Correctional Officer;
Mr. Gomez, Correctional Officer;

thereof (collectively, the "PrimeCare Defendants").[2] The Complaint alleges provision of inhumane living conditions at the Chester County Prison; use of excessive force against Plaintiff; failure to provide adequate medical treatment to Plaintiff (in the form of both deliberate indifference to a serious medical need and retaliation for the exercise of First Amendment rights); negligence; and disciplinary board retaliation for the exercise of First Amendment rights.

Presently before the Court are Motions to Dismiss (1) filed by the County Supervisor Defendants and the Individual Officer Defendants on April 12, 2005 (Doc. No. 37) and (2) filed by the PrimeCare Defendants on April 20, 2005 (Doc. No. 39). For

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Mr. Denney, Correctional Officer;
"John Doe" 1-10, Correctional Officers;
"John Doe" 11, Sergeant;
"John Doe" 12, Correctional Officer;
Mr. McMillen, Sergeant;
"John Doe" 13, Sergeant;
Mr. Yancey, Correctional Officer;
Mr. Nelson, Correctional Officer;
"John Doe" 14-23, Correctional Officers;
Mr. Boan, Lieutenant and disciplinary hearing board member;
Mr. Zambrana, Corporal and disciplinary hearing board member;
Mr. Flecha, Counselor and disciplinary hearing board member;
Mr. Sergi, Lieutenant and disciplinary hearing board member;
Joseph Zepp, Jr., Sergeant and disciplinary hearing board member; and
Mr. Duane, Counselor and disciplinary hearing board member.

[2] The Defendant PrimeCare employees include:
Terri Kerns, Nurse;
Bill "Doe", Nurse; and
"John Doe" 24-29 (Nurses, Nurse Practitioners, and/or other medical personnel).

the reasons set forth below, the motions will be granted in part and denied in part, and Plaintiff will be given leave to amend the Complaint.

## II. Jurisdiction and Legal Standard

### A. Jurisdiction

This Court has federal question jurisdiction under 28 U.S.C. § 1331, as this action is brought pursuant to 42 U.S.C. § 1983 and Plaintiff alleges violations of his federal constitutional rights. This Court also has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, to consider Plaintiff's state law claims.

Venue is appropriate in this district, pursuant to 28 U.S.C. § 1391, because the claims arose in this judicial district.

### B. Legal Standard

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 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 may grant the motion only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to the Plaintiff, the Plaintiff is not entitled to relief. Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183 (3d Cir. 2000). Accordingly, a federal court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Doe v. Delie, 257 F.3d 309, 313 (3d Cir.

2001).

**III. Facts**

Plaintiff's Complaint sets forth the following facts, which have been abbreviated for the purpose of deciding the present motions. (See Compl. ¶¶ 33-81). On or about April 25, 2002, Plaintiff was brought to Chester County Prison. He spent approximately one year at Chester County Prison before being transferred to SCI-Camp Hill. During that year, Plaintiff spent approximately seven months on several Subject Block units; each of these measured eighteen feet by eighteen feet, housed eighteen prisoners, had only one toilet, and had no ventilation. Plaintiff had to bypass meals to have the opportunity to relieve himself.

After being moved to several other prisons, Plaintiff was returned to Chester County Prison on January 19, 2004 for purposes of a court proceeding. On January 25, 2004, there was a verbal confrontation between Plaintiff and Corporal English at I-Block. Approximately ten minutes later, Officer DiPetro sent Plaintiff from I-Block to central control to accept a misconduct citation. Immediately upon arriving at central control, Plaintiff was locked into 9-Gate and exposed to winter temperatures for fifteen minutes. After 15 minutes, Corporal English kicked Plaintiff and stated "it's my turn now." English escorted Plaintiff into Counselor Alexander's office, which is a small room without security cameras. English presented Plaintiff with misconduct citation number 009065 for interfering with an officer's duties and insubordination, and told Plaintiff to

sign the citation without reading it. Plaintiff refused. English noted "refused to sign" on the citation and told Plaintiff to leave the office. When Plaintiff proceeded to do so, English kneed Plaintiff in the stomach and wrestled Plaintiff to the ground. At approximately 7:10 a.m., Officers Axe, Greene and Dawson entered the office to restrain Plaintiff and/or join in the assault on Plaintiff.

After being restrained in handcuffs, Plaintiff was escorted by Officers English, Axe, Greene, Dawson, Gomes, Denney, and/or John Doe 1-10 to cellblock K-19 in a forward "chicken wing." Plaintiff was later moved to cellblock C-12 (the "hole") in a more painful backwards "chicken wing." Once in C-12, Plaintiff began to suffer severe abdominal and back pain as a result of these events. Plaintiff made a request to John Doe 11 for medical assistance. John Doe 11 did not respond. English thereafter gave Plaintiff misconduct citation number 009067 (signed and approved by Lieutenant Boan) for assault on an officer.

Approximately four hours later, Nurse Terri Kerns and Officer John Doe 12 approached Plaintiff. Plaintiff stated that he was assaulted by a guard. John Doe 12 then prevented Plaintiff from obtaining medical assistance from Nurse Kerns and Nurse Kerns refused to provide Plaintiff with medical assistance. Plaintiff thereafter made two additional requests for medical assistance to Sergeant McMillen and Sergeant John Doe 13. McMillen and John Doe 13 failed to respond. On January 26, at approximately 5:30 p.m., Plaintiff requested medical assistance from Nurse Bill Doe. Doe, escorted by

Officer Yancey, told Plaintiff he wanted "no involvement with an inmate assaulted by a guard," and refused to provide Plaintiff with medical assistance. Plaintiff then filed inmate requests for two grievance forms and a § 1983 form. Chester County Prison officials refused to provide Plaintiff with any of these forms.

Plaintiff received medical assistance for severe abdominal and back pain at approximately 12:15 p.m. on January 27, 2004, when Plaintiff was seen by a Nurse Practitioner. The Nurse Practitioner diagnosed Plaintiff with severe abdominal damage and prescribed muscle relaxers.[3] During the evening of January 17, 2004, Plaintiff made a request to Officer Nelson for medical assistance because Plaintiff noticed blood in his urine. Nelson did not respond. Almost every day thereafter, Plaintiff made requests to Officers John Doe 14-23 for medical assistance because Plaintiff noticed blood in his urine. John Doe 14-23 did not respond. Plaintiff received medical assistance for the blood in his urine at approximately 9:00 a.m. on February 3, 2004. Nurses, Nurse Practitioners or other medical personnel John Doe 24-29 took approximately five urine tests, but they never communicated any results to Plaintiff.

On or about February 2, 2004, a disciplinary hearing was held on Plaintiff's citation number 009065. The disciplinary board – consisting of Lieutenant Boan, Corporal Zambrana and Counselor Flecha – found Plaintiff guilty of the charges and

[3] Plaintiff took the muscle relaxers for four days; at that time, Plaintiff was taken off the muscle relaxers because they were ineffective at relieving Plaintiff's symptoms.

sentenced Plaintiff to seven days of restricted confinement. On or about February 3, 2004, a disciplinary hearing was held on Plaintiff's citation number 009067. The disciplinary board – consisting of Lieutenant Sergi, Sergeant Zepp and Counselor Duane – found Plaintiff guilty of the charges and sentenced Plaintiff to fifteen days of restricted confinement.

Plaintiff was subsequently transferred to several different facilities, and he now resides at SCI-Fayette.

**IV. Discussion**

At the outset, it is important to note that F.R. Civ. P. 8(a)(2) articulates the liberal notice pleading requirements in the federal courts. Rule 8 simply requires that a pleading include "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." F.R. Civ. P. 8(a). "Generally, in federal civil cases, a claimant does not have to set out in detail the facts upon which a claim is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim." Conley v. Gibson, 355 U.S. 41, 47-48 (1957); Weston v. Pennsylvania, 251 F.3d 420, 428 (3d Cir. 2001). The same liberal notice pleading requirements apply to § 1983 civil rights cases as to all other cases filed in federal court. Leatherman v. Tarrant County, 507 U.S. 163, 167-68 (1993) (holding that a federal court may not apply a "heightened pleading standard" in § 1983 civil rights cases filed against municipalities); Abbott v. Latshaw, 164 F.3d 141, 148 (3d Cir. 1998) (applying the Leatherman standard to a § 1983 claim against a

non-municipal defendant). Specifically, the Third Circuit has held that a civil rights complaint is adequate if it states the conduct, time, place, and persons responsible for the alleged violation. Evancho v. Fisher, 423 F.3d 347, 353 (3d Cir. 2005) (holding plaintiff's § 1983 retaliation claim against state attorney general "utterly fail[ed] to meet the liberal notice pleading standard" where there were no facts alleged connecting the defendant to the alleged wrongdoing).

For organizational purposes, the Court will discuss the numerous causes of action in the Complaint in several groups based on the parties against whom the claims are asserted. First, the Court will discuss the § 1983 claims against Individual Officer Defendants. Second, the Court will discuss § 1983 claims against County Supervisor Defendants. Finally, the Court will discuss claims against the PrimeCare Defendants.

**A. Section 1983 Claims against Individual Officer Defendants**

Individual state and local officials acting in their official capacities are not "persons" subject to suit for damages under § 1983. See, e.g., Douris v. Schweiker, 2004 WL 1396209 (3d Cir. 2004); Carter v. State Corr. Inst. at Graterford Med. Health Dep't, 2004 U.S. Dist. LEXIS 26058, *14-15 (E.D. Pa. 2004) (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 70-71 (1989); Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 698 (3d Cir. 1996)). Therefore, the claims contained in Counts II, III, V, VII, and XI against the Individual Officer Defendants in their official capacities must be dismissed. See, e.g., Foxworth v. Pa. State Police, 2005 WL 840374 (E.D. Pa. 2005) (reaching same

result with regard to individual Pennsylvania State Police Officers sued in their official capacities under § 1983).

The Individual Officer Defendants can, however, be held liable under § 1983 in their personal capacities if Plaintiff demonstrates that they 1) acted under color of state law and 2) deprived him of a federal right. Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). The Third Circuit requires that Plaintiff aver facts demonstrating that each individual defendant personally "participated in violating [Plaintiffs'] rights, or . . . directed others to violate them or . . . had knowledge of and acquiesced in his subordinates' violations." Carter, 2004 U.S. Dist. LEXIS 26058 at *15 (citing Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir. 1995)). "[A]llegations of participation or actual knowledge and acquiescence . . . must be made with appropriate particularity," Id. at *16 (citing Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988)), and should include the conduct (including time and place) of the persons allegedly responsible. See Evancho, supra (citing Boykins v. Ambridge Area Sch. Dist., 621 F.2d 75, 80 (3d Cir. 1980)).

In this case, all Defendants were acting under color of state law because they were either county government officials or working on behalf of the county at the time of the alleged violations. Therefore, the issue remaining is whether Plaintiff has sufficiently alleged that each Individual Officer Defendant subjected Plaintiff to "the deprivation of any right, privilege, or immunit[y] secured by the Constitution and laws." 42 U.S.C. §

1983.

1. Excessive Force

To evaluate a constitutional claim for violation of Plaintiff's Eighth Amendment rights by use of excessive force, the Court must inquire "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Smith v. Mensinger, 293 F.3d 641, 649 (3d Cir. 2002). The Court must consider "(1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of injury inflicted; (4) the extent of threat to safety of staff and inmates, as reasonable perceived by responsible officials on the basis of the facts known to them; and (5) any effort made to temper the severity of the response." Id. (citing Brooks v. Kyler, 204 F.3d 102, 106 (3d Cir. 2002)).

As a general rule, "there is no constitutional violation for '*de minimis* use of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.'" Brooks, 204 F.3d at 107. This Court has therefore refrained from finding a constitutional violation in cases where the force used was *de minimus* and objectively reasonable under the circumstances. Smith v. Horn, 2004 U.S. Dist. LEXIS 11306 (E.D. Pa. 2004). At the motion to dismiss stage, however, "to state a claim, the plaintiff need only allege that force was maliciously applied to cause harm." Harmon v. Divirgilis, 2005 U.S. Dist. LEXIS 2284, *5 (E.D. Pa. 2005) (citing Wesley v. Dombrowski, 2004 U.S. Dist. LEXIS 11938 (E.D. Pa. 2004)).

a. Defendants English, Axe, Greene, Dawson, Gomes, Denny, and John Doe 1-10

Plaintiff's Complaint states that Corporal English used brutal force against Plaintiff in retaliation for a verbal confrontation, see Compl. at §§ 41, 48-52, and that Officers Axe, Greene, Dawson, Gomez, Denny, and John Doe 1-10 restrained Plaintiff in a manner that caused independent physical injury and/or joined in English's physical assault. Id. at ¶¶ 53-63. Taking these allegations as true, this use of force was both unreasonable under the circumstances and maliciously applied to cause harm. Moreover, the severity of the misconduct indicates that the force applied by these particular Defendants was not necessarily *de minimis*. See Brooks, 204 F.3d at 108 ("[A]lthough the extent of an injury provides a means of assessing the legitimacy and scope of the force, the focus always remains on the force used (the blows)."). Plaintiff alleges that the physical confrontation resulted in "severe abdominal and back pain," see Compl. at ¶¶ 64, 72, for which he was medicated. Therefore, if the use of force was not objectively reasonable under the circumstances and was not *de minimus*, such use of force may constitute a violation of the Eighth Amendment. The Court will therefore deny the Motion to Dismiss the claims against Defendants English, Axe, Greene, Dawson, Gomez, Denny, and John Doe 1-10 in their personal capacities contained in Counts II and III of the Complaint.

b. Defendant DiPetro

Plaintiff's sole factual allegation concerning Officer DiPetro is limited to the

following statement: "Approximately ten minutes after the verbal confrontation between Plaintiff and Corporal English, Officer DiPetro sent Plaintiff from I-Block to central control to accept a misconduct citation." Compl. at § 43. Plaintiff fails to allege DiPetro's involvement in any of the events described in the paragraphs of the Complaint related to the use of excessive force. Plaintiff has therefore failed to allege any action by Defendant DiPetro that could constitute a violation of the Eighth Amendment. Accordingly, the Court will grant the Motion to Dismiss the claims against Officer DiPetro in his personal capacity contained in Count II of the Complaint without prejudice. Plaintiff is given leave to amend the Complaint with twenty (20) days by alleging particular facts demonstrating Officer DiPetro's personal involvement in violations of Plaintiff's Eighth Amendment rights.

2. Inadequate Medical Treatment

Plaintiff's right to receive adequate health care derives from a prisoner's constitutional rights embodied in the Eighth Amendment's prohibition against cruel and unusual punishment. See Farmer v. Brennan, 511 U.S. 825, 832 (1994); Estelle v. Gamble, 429 U.S. 97 (1976). This prohibition has been interpreted by the Supreme Court as prohibiting "the unnecessary and wanton infliction of pain." Hudson v. McMillian, 503 U.S. 1 (1992). Under this standard, an inmate who claims a violation of § 1983 on the basis of a failure to provide the necessary medical treatment must show both that 1) his medical needs were serious, and 2) the Defendants' failure to attend to his medical

needs rose to the level of deliberate indifference. Spruill v. Gillis, 372 F.3d 218, 235-36 (3d Cir. 2004); Colburn v. Upper Darby Township, 946 F.2d 1017, 1023 (3d Cir. 1991).

A serious medical need is "one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987). "Inadvertent failure to provide adequate medical care . . . or . . . negligent diagnosis" is insufficient to establish an Eighth Amendment violation. Wilson v. Seiter, 501 U.S. 294, 310 (1991) (quoting Estelle, 429 U.S. at 105-06).[4] In defining the deliberate indifference standard, the Supreme Court has stated that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate human conditions of confinement unless the official knows of and disregard an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837, 844.

Here, Plaintiff necessarily alleges that particular Individual Officer Defendants acted with deliberate indifference by failing to provide Plaintiff with timely and adequate

[4] Plaintiff concedes that he received medical care at the prison, but alleges that the treatment was untimely, inadequate, and ineffective. Complaint at ¶¶ 64-76. Plaintiff claims that this caused him to endure uncorrected "severe abdominal and back pain." Id. at ¶¶ 64, 72. Plaintiff states that he has sustained "irreparable physical harm," id. at ¶¶ 119, 125, and alleges that he "will continue to suffer mental anguish, loss of sleep, distress, fear, anxiety, humiliation, embarrassment, loss of respect, shame, and loss of enjoyment of life." Id.

medical treatment. After reviewing the pleadings, the Court concludes that Plaintiff's claims against Defendants John Doe 11, John Doe 12, Sergeant McMillen, John Doe 13, Mr. Yancey, Mr. Nelson, and John Doe 14-23 in their personal capacities cannot be dismissed for failing to allege deliberate indifference to a serious medical condition. Plaintiff makes factual allegations that 1) Plaintiff had a serious medical need (see, e.g., Spruill, 372 F.2d at 236 (finding serious back pain requiring medication satisfies this requirement)); and 2) these particular Defendants either personally ignored Plaintiff's requests for assistance for that serious medical need or prevented others from providing such assistance. See Compl. at ¶¶ 64, 67, 68, 70, 74, 75. Accordingly, the Court will deny the Motion to Dismiss Count V of the Complaint.

3. First Amendment Retaliation

"Retaliation for the exercise of constitutionally protected rights is itself a violation of rights secured by the Constitution. . . ." White v. Napoleon, 897 F.2d 103, 111-12 (3d Cir. 1990). The First Amendment protects both the right to freely speak and the right not to be retaliated against for exercising First Amendment rights. A prisoner alleging retaliation must show (1) constitutionally protected conduct, (2) an adverse action by prison officials "sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights," and (3) "a causal link between the exercise of his constitutional rights and the adverse action taken against him." Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2005) (citing Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001)). Plaintiff's

Complaint alleges two forms of retaliation – denial of adequate medical treatment and punitive actions by internal prison disciplinary boards.

a. Inadequate Medical Treatment Retaliation

Plaintiff's Complaint states that he attempted to file administrative grievances – an act protected by the First Amendment – and, in retaliation, he suffered adverse action in the form of denial of adequate medical assistance by John Doe 11, John Doe 12, Mr. McMillen, John Doe 13, Mr. Yancey, Mr. Nelson, and John Doe 14-23. Compl. at ¶¶ 65-75, 128-29. These allegations, taken as true, state a cause of action upon which § 1983 relief may be granted. Accordingly, the Court will deny the Motion to Dismiss Count VII of the Complaint. See, e.g., Hughes v. Smith, 2005 U.S. Dist. LEXIS 2783, *13-14 (E.D. Pa. 2005).

b. Disciplinary Board Retaliation

Plaintiff's Complaint states that disciplinary board members Boan, Zambrana, Flecha, Sergi, Zepp, Jr., and Duane voted for two separate adverse disciplinary board actions in retaliation for Plaintiff's attempts to file administrative grievances. Compl. at ¶¶ 78-79, 155-56. If this allegation is taken as true, these defendants used false disciplinary charges as a means to prevent or intimidate Plaintiff from pursuing his claims. Such use of disciplinary actions to suppress Plaintiff's right to complain suggests impermissible retaliatory action in violation of Plaintiff's First Amendment rights. The Court is satisfied that, in this context, "the word 'retaliation' in Plaintiff's Complaint

sufficiently implies a causal link between his complaints and the adverse disciplinary actions taken against him." Mitchell, 318 F.3d at 530 (citing Mensinger, 293 F.3d at 653 ("We have . . . held that falsifying misconduct reports in retaliation for an inmate's resort to legal process is a violation of the First Amendment's guarantee of free access to the courts."); Babcock v. White, 102 F.3d 267, 275-76 (7th Cir. 1996) (prisoner could survive summary judgment on his claim that prison officials retaliated against him for "use of the 'inmate grievance system' and previous lawsuits")). Plaintiff has stated a cause of action under § 1983, and the Court will therefore deny the Motion to Dismiss Count XI of the Complaint.

**B. Section 1983 Claims against County Supervisor Defendants**

1. County Supervisor Defendants In Their Official Capacities

a. County of Chester, Chester County Prison Board, and Chester County Prison

Municipalities and other local government units are among those persons to whom § 1983 applies. Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). When a suit against a municipality is based on § 1983, the municipality can only be liable when the alleged constitutional transgression implements or executes a policy, regulation or decision officially adopted by the governing body or informally adopted by custom. Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782, 791 (3d Cir. 2000); Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996).

A policy is made when a "decisionmaker possessing final authority to establish

municipal policy with respect to the action" issues an official proclamation, policy, or edict. A course of conduct is considered to be a custom when, though not authorized by law, "such practices of state officials [are] so permanent and well-settled" as to virtually constitute law. Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (citations omitted). Custom may also be established by evidence of knowledge and acquiescence. Beck, 89 F.3d at 971; Fletcher v. O'Donnell, 867 F.2d 791, 793 (3d Cir. 1989). The Third Circuit held in Fletcher that, while a single incident by a lower level employee acting under color of law does not suffice to establish a custom, if a custom can be established by other means, such as proof of knowledge and acquiescence, a single application of the custom can suffice to establish a governmental entity's liability. Id. at 793-94 (citing Oklahoma City v. Tuttle, 471 U.S. 808 (1985); Pembaur v. Cincinnati, 475 U.S. 469, 482 n.10 (1986)); see also, e.g., Simmons v. City of Philadelphia, 947 F.2d 1042, 1075 (3d Cir. 1991). Furthermore, a Plaintiff must demonstrate causation, as "a municipality can be liable under § 1983 only where its policies are the moving force behind the constitutional violation." City of Canton v. Harris, 489 U.S. 378, 388-89 (1989) (internal quotations omitted). Finally, as discussed supra, the Plaintiff's allegations must include the conduct (including time and place) – i.e., the "who," "what," and "when" – of the persons or entities allegedly responsible. Evancho 2005 U.S. App. LEXIS at *15 (3d Cir. 2005).

In demonstrating a policy or custom, Plaintiff may rely on a "failure to train"

theory; if so, Plaintiff must assert that Defendants' failure to adequately train employees "reflect[s] a 'deliberate' or 'conscious' choice by [the] municipality such that one could call it a policy or custom." Canton, 489 U.S. at 388-89; Grazier v. City of Philadelphia, 328 F.3d 120, 124 (3d Cir. 2003). This standard will not be satisfied by a mere allegation that a training program represents a policy for which the city is responsible, but, rather, the focus must be on whether the program is adequate to the tasks the particular employees must perform. Harris, 489 U.S. at 389-90. Moreover, such liability arises "only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants." Id.

The Court is not convinced that Plaintiff has satisfied his burden of alleging facts sufficient to support any claim of municipal liability against the County of Chester, Chester County Prison Board, and Chester County Prison. The Complaint lacks any factual allegations 1) referencing the conduct, time, place, and persons responsible for any official municipal policy or custom endorsing conduct of the Individual Officer Defendants in providing inhumane living conditions, using excessive force, offering inadequate medical treatment, or using any retaliatory actions in response to the exercise of First Amendment rights; or 2) identifying a direct causal link between any policy or custom and a violation of Plaintiff's rights. Instead, the Complaint summarily asserts that the County of Chester, Chester County Prison Board, and Chester County Prison have "had knowledge" (see Compl. ¶ 87) or exhibited "deliberate indifference" (see Compl. ¶¶

88, 110, 123, 135, 162) without referencing any specific facts supporting the "who," "what," and "how" of those allegations. Moreover, to the extent that Plaintiff seeks to proceed on a "failure to train" theory,[5] although he suggests the existence of a "deliberate indifference" to his rights, Plaintiff avers absolutely nothing regarding how any current training program is inadequate to the tasks of the Individual Officer Defendants.

The Court is sensitive to Plaintiff's "informational disadvantage," see Alston v. Parker, 363 F.3d 229, 233 (3d Cir. 2004), especially with regard to municipal entities. However, lacking detailed information about the actions of the County of Chester, Chester County Prison Board, and Chester County Prison does not give Plaintiff license to make bold assertions without any factual backing at all. See, e.g., Walker v. North Wales Borough, et al., No. 05-0425 (E.D. Pa. filed October 19, 2005) (reaching the same conclusion where Plaintiff summarily asserted that the Township had "encouraged, tolerated, ratified and been deliberately indifferent to [certain] patterns, practices and customs without referencing any facts supporting the "who," what," and how" of that allegation).[6]

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[5] Plaintiff never uses this language in the Complaint, but references to "deliberate indifference" and the duty of "supervisors" suggests that, reading the Complaint at its most possible breadth, Plaintiff may have contemplated this theory of liability.

[6] In fact, under Rule 11 of the Rules of Civil Procedure, Plaintiff has an obligation only to assert claims for which "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." F.R. Civ. P. 11(b)(3). Plaintiff must either aver some — even if not yet detailed — specific facts to support his claim. See Walker, supra.

The Court will therefore grant the Motion to Dismiss the claims against the County of Chester, Chester County Prison Board, and Chester County Prison in their official capacities contained in Counts I, IV, VI, VIII, and XII of the Complaint without prejudice. Plaintiff is given leave to amend his Complaint within twenty (20) days to plead specific facts supporting (1) a specific policy or custom, (2) a direct causal link between the policy and Plaintiff's harm, and (3) deliberate indifference with regard to a failure to train.

b. Warden Masters

As discussed supra, individual state and local officials acting in their official capacities are not "persons" subject to suit for damages under § 1983. However, as an exception to this general rule, a state or municipal official may be held liable in his or her official capacity under a theory based upon failure of a supervisor to properly train employees. See Foster v. David, 2005 U.S. Dist. LEXIS 18446, *6-8 (E.D. Pa. 2005) (citing Sample v. Dieks, 885 F.2d 1099, 1118 (3d Cir. 1989) (reversing summary judgment in favor of a senior prison official where the official through improper supervision established a state process that deprived inmates of constitutional rights); Duvall v. Borough of Oxford, 1992 U.S. Dist. LEXIS 3630 (E.D. Pa. 1992) (denying the motion to dismiss of a municipal police chief where the complaint alleged that "a policy maker knew about the need for different training, ignored this need, and thereby caused the injury at issue")).

However, the Court is not convinced that Plaintiff has satisfied his burden of alleging facts sufficient to support a claim of liability against Warden Masters in his official capacity based on a "failure to train" theory. As recited supra, although Plaintiff suggests the existence of a "deliberate indifference" to his rights, he avers absolutely nothing regarding any current training program or how one is inadequate to the tasks of the Individual Officer Defendants whom Masters ostensibly supervised.

Accordingly, the Court will grant the Motion to Dismiss the claims brought against Warden Masters in his official capacity contained in Counts I, IV, VI, VIII, and XII of the Complaint without prejudice. Plaintiff, however, is given leave to amend his Complaint within twenty (20) days to plead specific facts supporting deliberate indifference with regard to a failure to train.

2. Masters in his Personal Capacity

To the extent that Plaintiff is also suing Masters in his personal capacity (see Compl. at ¶ 5), Masters can only be held personally liable under § 1983 if he participated in violating Plaintiff's rights, directed others to violate them, or had knowledge of and acquiesced in his subordinates' violations. As discussed supra, allegations of participation or actual knowledge and acquiescence must be made with "appropriate particularity," Carter, 2004 U.S. Dist. LEXIS at *16, and need include the conduct (including time and place) of the persons allegedly responsible. Evancho, 2005 U.S. App. LEXIS 19585 at *15.

Here, although Plaintiff's Complaint states that Masters, by virtue of being prison Warden, had some nebulous general knowledge of inhumane living conditions, use of excessive force, inadequate medical treatment and retaliatory disciplinary actions, Plaintiff has not made any allegations of Masters' actual participation in the specific violations of Plaintiff's rights (or knowledge and acquiescence thereof) with any acceptable degree of "appropriate particularity." Without any such detail, Plaintiff's claims against Masters in his personal capacity implicitly rest on the doctrine of *respondeat superior*, contrary to Rode, supra. See Evancho, 2005 U.S. App. LEXIS 19585 at *17 (reaching the same conclusion); see also, e.g., Carter, 2004 U.S. Dist. LEXIS 26058 at *16 (reaching a similar result where Plaintiff failed to allege any personal involvement in a Plaintiff's treatment by a Warden sued in his personal capacity).

Accordingly, the Court will grant the Motion to Dismiss the claims brought against Defendant Masters in his personal capacity contained in Counts I, IV, VI, VIII, and XII of the Complaint without prejudice. Plaintiff is given leave to amend his Complaint within twenty (20) days to plead specific facts supporting Masters' (1) participation or (2) knowledge and acquiescence in specific violations of Plaintiff's rights.

**C. Claims Against PrimeCare Defendants**

1. State Law Claims

As it stands, Plaintiff's Complaint does not assert a cause of action against the

PrimeCare Defendants under § 1983. Instead, the Complaint sets forth two counts – negligence and corporate liability – based on traditional state law principles of liability. The Court finds these counts state claims that, if true, are sufficient to confer liability on the Primecare Defendants.[7] See Compl. at ¶¶ 142-145, 149-50. Because Plaintiff's federal claims survive, the Court will exercise its discretion, pursuant to 28 U.S.C. § 1367, and retain jurisdiction over the state law claims brought against the PrimeCare Defendants. The Court will therefore deny the Motion to Dismiss Counts IX and X of the Complaint.

2. Request for Leave to Amend

Plaintiff requests leave to amend the Complaint to add § 1983 claims against the PrimeCare Defendants for violation of Plaintiff's right to adequate medical treatment while incarcerated under the Eighth Amendment. Applying the standards for § 1983 causes of action based on inadequate medical treatment, discussed supra, the Court finds that Plaintiff has set forth allegations that, taken as true, are sufficient to establish the Eighth Amendment claims that Plaintiff seeks to assert against the PrimeCare Defendants. See Cortlessa v. County of Chester et al., No. 04-1039 (E.D. Pa. October 21, 2004)

[7] The Court finds PrimeCare's argument regarding filing of a Certificate of Merit to be unconvincing. Case law indicates that "Certificate of Merit rule" applies only to federal district courts sitting in diversity. See, e.g., Scaramuzza v. Sciolla, 345 F. Supp. 2d 508 (E.D. Pa. 2004). This Court, however, is not sitting in diversity and does not find any similar situation in which a federal court has applied a state rule similar to the "Certificate of Merit rule" to dismiss a claim supplemental to a § 1983 action.

("[P]laintiff's complaint cannot be dismissed for failing to allege deliberate indifference to a serious medical condition, in that plaintiff makes a [sic] serious factual allegations that his injuries were ignored by Primecare."). The Court further finds that an amendment of Plaintiff's Complaint will not prejudice the PrimeCare Defendants, as PrimeCare's Rule 12(b)(6) Motion and Plaintiff's Response in Opposition have addressed the Eighth Amendment claims as if they were already asserted in Plaintiff's Complaint. The Court therefore grants Plaintiff leave to amend the Complaint in accordance with this Memorandum and Order.

An appropriate Order follows.

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

| | | |
|---|---|---|
| VINCENT ANTHONY CORTLESSA, SR. | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | NO. 04-1039 |
| COUNTY OF CHESTER, et al. | : | |

**ORDER**

AND NOW, this 24th day of October, 2005, upon consideration of the pleadings and briefs and based on the foregoing Memorandum, it is hereby ORDERED that Defendants' Rule 12(b)(6) Motions to Dismiss (Doc. No. 37 and Doc. No. 39) are disposed of as follows:

1. Counts II, III, V, VII, and XI against all Individual Officer Defendants in their official capacities are dismissed with prejudice.
2. Count II against Defendant DiPetro in his personal capacity is dismissed without prejudice and with leave to amend within twenty (20) days.
3. Counts I, IV, VI, VIII, and XII against Defendants County of Chester, Chester County Prison Board, and Chester County Prison in their official capacities are dismissed without prejudice and with leave to amend within twenty (20) days.
4. Counts I, IV, VI, VIII, and XII against Defendant Masters in his official capacity are dismissed without prejudice and with leave to amend within twenty (20) days.
5. Counts I, IV, VI, VIII, and XII against Defendant Masters in his personal capacity are dismissed without prejudice and with leave to amend within twenty (20) days.

6. As to all other claims, the Motions to Dismiss are denied.

7. Plaintiff is granted leave to amend the Complaint within twenty (20) days to add a count against PrimeCare Medical, Inc., Terry Kerns, Bill Doe, and John Doe 24-29 for violation of Plaintiff's right to medical treatment while incarcerated under the Eighth Amendment to the United States Constitution as secured by 42 U.S.C. § 1983.

8. Within twenty (20) days of service, Defendants shall respond to any Amended Complaint.

9. Discovery shall be completed by December 30, 2005.

10. Plaintiff's expert reports shall be due November 30, 2005.

11. Defendants' expert reports shall be due December 16, 2005.

12. Dispositive motions shall be due January 16, 2006.

13. This case shall enter the Court's trial pool on March 1, 2006.

BY THE COURT:

s/ MICHAEL M. BAYLSON

Michael M. Baylson, U.S.D.J.

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