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

GERALD MILLAS	:	**CIVIL ACTION**
	:	
v.	:	**NO. 04-5258**
	:	
CITY OF PHILADELPHIA and ARAMARK CORRECTIONAL SERVICES, INC.	:	

MEMORANDUM AND ORDER

Kauffman, J. **November 30, 2005**

Plaintiff Gerald Millas ("Plaintiff") brings this action for violations of 42 U.S.C. § 1983 ("§ 1983") against Defendant City of Philadelphia (the "City") (Count One) and common law negligence against Defendant Aramark Correctional Services, Inc. ("Aramark") (Count Two). Now before the Court are the City's Motion for Summary Judgment on Count One and Aramark's Motion for Summary Judgment on Count Two. For the reasons that follow, the City's Motion will be granted and Aramark's Motion will be denied.

I. BACKGROUND

At all times relevant to this action, Plaintiff was an inmate at the Philadelphia House of Corrections ("PHC"). Plaintiff's Answer to the City's Motion for Summary Judgment at 1. This action arises from a fight between Plaintiff and Mitchell Matthews ("Matthews"), a fellow inmate, on February 20, 2003. Early that day, Plaintiff and Matthews were working in the kitchen area of the PHC serving meals to other inmates. The City's Motion for Summary Judgment ("the City's Motion") at 2. Defendant Aramark was responsible for supplying food services to the PHC. Plaintiff's Answer to the City's Motion at 1. Plaintiff became frustrated

with the manner in which Matthews was performing his duties, and "asked [Matthews] what his problem was." The City's Motion; Millas Dep. 28:2-18. The two inmates then became involved in a "heated verbal altercation" that lasted for several minutes, until they were separated by correctional staff. Plaintiff's Answer to the City's Motion at 1.

Later that day, at approximately 4:00 p.m., Plaintiff entered Matthews' cell. Millas Dep. 31:17-21. There was only one guard in the vicinity, though the usual practice was to have two guards on duty. Millas Dep. 36-37. Soon after Plaintiff entered the cell, a struggle ensued, during which Matthews stabbed Plaintiff in the naval area with a long pointed object, which Plaintiff describes as a meat thermometer.[1] The City's Motion; Millas Dep. 31:20-32:16. Plaintiff was taken to the prison infirmary, where a physician's assistant treated him and then sent him back to his cell. Plaintiff's Answer to the City's Motion at 1; Millas Dep. 38-40. Because the pain in Plaintiff's stab wound persisted, he was transported later that night to Frankford Hospital, where he remained for four days. His injuries included "perforation of his large intestine, perforation of the right colon, and a chin laceration." Plaintiff's Answer to the City's Motion at 1.

At the time of the incident, the City had adopted Philadelphia Prison Policy No. 3.A.15 ("Policy No. 3.A.15"), the express purpose of which is to "maintain strict security over all tools and equipment necessary for vocational training and shop production, facility operations and other types of equipment that require control within a correctional environment." Policy No.

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[1] Plaintiff claims that Matthews acquired the meat thermometer while working in the kitchen and that the City "afford[ed] the offending inmate the opportunity to conceal and secure a sharp instrument." Complaint ¶ 13(e).

3.A.15, attached as Exhibit B to The City's Motion, at 1. Policy No. 3.A.15 includes a provision that applies specifically to the control of food service tools, which mandates that all food service vendors conduct an inventory of all utensils at the beginning and end of each shift in order to determine whether a tool is missing.

II. LEGAL STANDARD

In deciding a motion for summary judgment, "the test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (citing Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Court must examine the evidence in the light most favorable to the non-moving party and resolve all reasonable inferences in that party's favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, "there can be 'no genuine issue as to any material fact' . . . [where the non-moving party's] complete failure of proof concerning an essential element of [its] case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (emphasis added).

III. THE CITY'S MOTION FOR SUMMARY JUDGMENT

To establish a violation of § 1983, Plaintiff must demonstrate "a violation of a right protected by the Constitution or the laws of the United States committed by a person acting under the color of state law." Natale v. Camden County Correctional Facility, 318 F.3d 575,

580-81 (3d Cir. 2003). Liability under § 1983 can extend to a municipality only under limited circumstances.

A municipality may not be held liable for constitutional violations committed by its employees under the doctrine of respondeat superior. Bd. of County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 403 (1997) ("We have consistently refused to hold municipalities liable under a theory of respondeat superior."). Rather, "'it is only when the execution of the government's policy or custom ... inflicts the injury that the municipality may be held liable under § 1983." City of Canton, Ohio v. Harris, 489 U.S. 378, 385 (1989) (quoting Springfield v. Kibbe, 480 U.S. 257, 267 (1987)) (emphasis added). Thus, the "first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." City of Canton, 489 U.S. at 385.

The "constitutional deprivation" Plaintiff is claiming stems from the City's alleged failure to (1) protect Plaintiff from his fellow inmate and (2) provide adequate medical care once Plaintiff was injured, which, Plaintiff argues, constitute a violation of his rights under the Eighth Amendment. Accordingly, the Court must determine whether these alleged violations were directly caused by some policy or custom of the City.

Plaintiff has failed to identify any policy or custom of the City that might have contributed to the poor health care he allegedly received. That claim, accordingly, must fail. Marran v. Marran, 376 F.3d 143, 156 (3d Cir. 2004) ("Without an allegation of a policy or custom, [the plaintiff] has not stated a prima facie case, and the District Court properly

dismissed the claim[.]").

Plaintiff does, however, identify municipal policies that are causally linked to the stabbing: the City's alleged failure to (1) "search inmates for sharp, potentially deadly utensils that could be used as weapons" and (2) "maintain sufficient staff to protect inmates from attacks by other inmates[.]" Plaintiff's Answer to the City's Motion at 6.

As noted above, the City has adopted Policy No. 3.A.15 to prevent precisely the sort of incident that gave rise to Plaintiff's injuries. Plaintiff's argument is thus based on the failure of that policy: he is contending that the City's failure to enforce Policy No. 3.A.15 itself is the policy which caused his injuries. "[A] policy or custom may also exist where the policymaker has failed to act affirmatively at all[,]" Natale, 318 F.3d at 584 (quoting Bryan County, 520 U.S. at 417-18), but only in limited circumstances. The Supreme Court has made it clear that a municipality's inaction in the face of some harm constitutes a policy that could subject the municipality to liability under § 1983 only where "'the inadequacy [of existing practice] is so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the [violation].'" Bryan County, 520 U.S. at 417-18 (quoting City of Canton, 489 U.S. at 390).

The party moving for summary judgment bears "the initial burden of 'informing the district court of the basis for its motion.'" Lexington Ins. Co. v. Western Pennsylvania Hosp., 423 F.3d 318, 322 n.2 (3d Cir. 2005) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "Once the moving party has met this burden, however, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial." Id.

The City easily satisfies its initial burden with the evidence it presented about Policy No. 3.A.15. To the extent that Policy No. 3.A.15 is meant to address inmates' access to tools that could be used as weapons, it is compelling evidence that the City was not was not deliberately indifferent to the constitutional deprivation Plaintiff has alleged. The burden accordingly shifts to Plaintiff.

To meet its burden, Plaintiff directs the Court to the following evidence: the stabbing incident itself and the City's statement during discovery that "for the time period 1/1/2003 to 3/4/2005, there were 309 incident [sic] in which one or more inmate(s) became involved in a physical struggle." Plaintiff's Answer to the City's Motion at 7.

While Matthews' possession of a sharp object does suggest a mistake of some kind, it does not necessarily follow that the error should be attributed to Policy No. 3.A.15. The blame could also lie with a prison employee – a guard or a kitchen worker, for example – who was negligent in performing his duty, in which case the City would not be subject to § 1983 liability. Pembaur v. City of Cincinati, 475 U.S. 469, 479 (1986) ("[T]he 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible."). The fact of the stabbing would not in itself be a sufficient basis for a reasonable jury to conclude that the City's policy was deficient. Bryan County, 520 U.S. at 406 ("That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation; the plaintiff will simply have shown that the *employee* acted culpably.") (emphasis in original); City

of Canton, 489 U.S. at 391 ("And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.").

But, as noted above, even if Plaintiff had identified a specific deficiency in the City's policy, he still must show that the deficiency was so obvious that the City was deliberately indifferent to the inmates' safety in not correcting it. City of Canton, 489 U.S. at 390. Matthews' ability to secure the meat thermometer does not alone support that inference. Significantly, nothing in the record suggests that Policy No. 3.A.15 is so problematic on its face that the need for a remedy is obvious; nor is there any evidence that inmates have been able repeatedly to circumvent the policy and obtain weapons. Absent such evidence, no reasonable fact-finder could conclude, solely on the fact of Plaintiff's stabbing, that the City had been deliberately indifferent to the ability of inmates to obtain weapons. Bryan County, 520 U.S. at 409-11 (holding that a municipality is subject to § 1983 liability for failing to amend its policy only where (1) the policy-makers continue to adhere "to an approach that they know or should know has failed to prevent tortious conduct" *or* (2) the deficiency is "obvious in the abstract").

Nor can Plaintiff meet his evidentiary burden with the City's admission that there were 309 physical struggles in the PHC over a two year period. That statement fails to reveal whether any of the 309 physical struggles involved weapons. The City's admission thus proves nothing about the effectiveness of Policy No. 3.A.15, and does not create a genuine issue of material fact as to whether the City was deliberately indifferent to the ability of inmates to obtain weapons.

Plaintiff also contends that the City was deliberately indifferent to inadequate staffing at the PHC. To meet his burden of showing a genuine issue of material fact, Plaintiff once again relies on the stabbing incident itself and the evidence about the 309 physical struggles.

That Matthews and Plaintiff had the opportunity to engage in violence clearly evidences a problem – such incidents must not be tolerated. However, without more, a reasonable fact-finder could not infer that blame for the incident could be traced to a flaw in the City's policies. Indeed, Plaintiff admits that one of the guards on duty had wandered off immediately prior to the incident, strongly suggesting that the guard's negligence rather than the City's policies was responsible for his injuries.

The City's admission that 309 physical struggles took place in the PHC also fails to establish deliberate indifference. As noted above, a municipality is liable under § 1983 only when its policies lead to a constitutional deprivation. "The Constitution 'does not mandate comfortable prisons.'" Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Rhodes v. Chapman, 452 U.S. 337, 349 (1981). Thus, "[i]t is not every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety." Id. At 834. Rather, "[f]or a[n Eighth Amendment] claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." Id. (emphasis added).

Plaintiff's burden is to present evidence that there were insufficient prison guards to protect the inmates from suffering serious harm at one another's hands and that the City was deliberately indifferent to this situation. Bryan County, 520 U.S. at 411 ("A plaintiff must

demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.") (emphasis added). The City's statement fails to indicate how many of the struggles resulted in serious injuries and how many were just minor scuffles. A much higher degree of specificity would be necessary for a reasonable fact-finder to conclude that more prison guards were necessary to protect inmates from inflicting "serious injuries" on one another. Accordingly, the Court finds that the City's admission fails to create a genuine issue of fact as to whether "'the inadequacy [of the policy in effect at the time of Plaintiff's injury] [was] so likely to result in the violation of constitutional rights," that the City can "be said to have been deliberately indifferent[.]'" Bryan County, 520 U.S. at 417-18.

D. Conclusion

Plaintiff has thus failed to create a genuine issue of fact as to whether a policy of the City's was responsible for his alleged constitutional deprivation. Accordingly, the City's Motion for Summary Judgment will be granted.

IV. ARAMARK'S MOTION FOR SUMMARY JUDGMENT

Aramark moves for summary judgment on Plaintiff's common law negligence claim on the grounds that he has failed to adduce sufficient evidence that Aramark or its employees were negligent.[2] However, the record in this case reveals no Answer by Aramark to Plaintiff's Complaint. Fed. R. Civ. P. 8(d) provides in pertinent part that "[a]verments in a pleading to

[2] Aramark's argument that it is not liable under § 1983 is moot; Plaintiff never asserted a § 1983 claim against Aramark

which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Thus, under the Rule, a defendant is considered to have conceded all allegations in a plaintiff's complaint that he fails to deny in a responsive pleading.

Here, the Complaint alleges that Aramark (a) failed to "account for all of its equipment and utensils, especially the sharp instrument with which plaintiff was stabbed"; (b) allowed "an inmate to obtain, conceal and remove from the kitchen area a sharp instrument"; and (c) failed to "adequately supervise, monitor and account for its equipment[.]" Complaint ¶ 18. Not only has Aramark not denied these allegations in a responsive pleading, it has failed to file a responsive pleading at all. Indeed, its only submission in the case is the motion for summary judgment now before the court, which is not a responsive pleading. See Centifanti v. Nix, 865 F.2d 1422, 1431 n.9 (3d Cir. 1989) ("[N]either a motion to dismiss, nor a motion for summary judgment, constitutes a responsive pleading[.]").

Under Fed. R. Civ. P. 8(d), this failure by Aramark to deny the allegations in the Complaint in a responsive pleading is, in effect, an admission that the allegations are true. Accordingly, Aramark's motion for summary judgment will be denied.

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ORDER

AND NOW, this 30th day of November, 2005, upon consideration of Defendants' Motions for Summary Judgment and the responses thereto and for the reasons stated in the accompanying memorandum, it is **ORDERED** that the City's Motion (docket no. 9) is **GRANTED** and that Aramark's Motion (docket no. 10) is **DENIED**. Accordingly, Judgment is **ENTERED** for the City against Plaintiff on all counts.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.