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.	:	

Baylson, J. **May 24, 2005**

MEMORANDUM

I. Introduction

Vincent Anthony Cortlessa, Sr. seeks damages under the First, Eighth, and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983, against numerous parties affiliated with the County of Chester, including present and former Chester County Prison Board officers and employees (collectively, the "Chester County Defendants"), healthcare contractor Primecare Medical Inc. ("Defendant Primecare"), and Primecare employees Terry Kerns and William Dougherty ("Defendants Kerns and Dougherty"). The Complaint alleged 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.

The Court previously dealt with the Defendants' Motions to Dismiss. In October of 2005, the Court granted the Motions to Dismiss in part and denied them in part, and the Court allowed a number of claims to proceed. Pursuant to the Court's Order, Plaintiff filed a Second

Amended Complaint on November 10, 2005 and the parties proceeded with discovery.

Counsel for the different remaining Defendants (Primecare, Kerns and Dougherty, and the Chester County Defendants, respectively) filed Motions for Summary Judgment in January of 2006. The Court held oral argument in February of 2006 and thereafter issued a detailed Order that (1) dismissed Chester County Prison as a defendant because it was part of defendant County of Chester; (2) dismissed officers Boan, Zambrana, Flecha, Sergi, Zepp Jr. and Duane (i.e., the members of the prison Disciplinary Hearing Boards) as Defendants in their individual capacities; (3) extended discovery deadlines, allowed additional depositions and interrogatories, ordered additional production of documents, and provided for service of expert reports; and (4) gave the parties an opportunity to supplement their summary judgment briefing. Defendant Primecare and Defendants Kerns and Dougherty thereafter supplemented their summary judgment briefs.

The Court held another oral argument on May 15, 2006, concerning the Motions for Summary Judgment brought by Defendant Primecare (Doc. No. 61), Defendants Kerns and Dougherty (Doc. No. 64), and the Chester County Defendants (Doc. No. 67). For the reasons that follow and the reasons stated on the record on May 15, 2006, the Court will (1) grant in part and deny in part the motion of Defendant Primecare, (2) deny the motion of Defendants Kerns and Dougherty, and (3) grant in part and deny in part the motion of the Chester County Defendants.

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

Summary judgment is appropriate "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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing

"sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

III. Facts

Many facts in this case remain in vigorous dispute. The Court has previously set forth the Plaintiff's factual allegations in great detail, and will not do so again here. See Memorandum and Order dated October 24, 2005. Specific, relevant disputes of material fact are referenced as appropriate in the following discussion.

IV. Discussion

The Court will discuss the remaining claims against the moving Defendants seriatim, and will state its rulings. As to the Defendants' motions that are denied, the Court will state the fact issues for trial. For the convenience of the parties, at the conclusion of this discussion the Court will restate, in summary fashion, the claims that will proceed to trial.

As a threshold matter, the Court will dismiss the remaining claims against the "John Doe" Defendants. The use of fictitious parties is an acceptable practice until reasonable discovery permits the naming of the actual parties. See Campbell v. United Parcel Service, 1996 U.S. Dist. LEXIS 6101, *9-*10 (E.D. Pa. 1996) (citing Johnson v. City of Erie, 834 F. Supp. 873, 878 (W.D. Pa. 1993); Scheetz v. Morning Call, Inc., 130 F.R.D. 34, 36-37 (E.D. Pa. 1990); Klingler v. Yamaha Motor Corp., U.S.A., 738 F. Supp. 898, 910 (E.D. Pa. 1990). However, fictitious parties must be dismissed if discovery does not yield their identities. Campbell, 1996 U.S. Dist LEXIS 6101 at *10 (citing Scheetz, 130 F.R.D. at 37; Gillespie v. Civiletti, 629 F.2d 637, 642

(9th Cir. 1980)). Discovery in this case is now closed, and Plaintiff has been provided sufficient opportunity to identify potential defendants. Having failed to do so, the "John Doe" Defendants will be dismissed.

A. Defendant Primecare

1. Count X: Negligence Claim Against Primecare

Count X alleges that, as the health services contractor for the Chester County Prison, (1) Primecare and its employees owed a duty to Plaintiff to exercise the degree of care required and normally exercised by similarly situated professionals, (2) Primecare and its employees failed to exercise that required degree of care in regard to Plaintiff's injury, and (3) Plaintiff suffered harm as a result.

Plaintiff has offered an expert opinion, under oath, from Dr. Sinaiko. The opinion states that Plaintiff was injured, at least in part, by the failure of Primecare's employees to exercise the required degree of care. Primecare asserts that because Dr. Sinaiko also stated that, due to the purportedly negligent conduct, he is unable to determine the exact extent (i.e., degree) of Plaintiff's injury, summary judgment must be granted. To the contrary, the Court finds that at this stage the expert report is sufficient to establish disputes of material fact concerning whether or not Primecare's employees exercised the required degree of care in treating Plaintiff (and, therefore, whether Primecare should be held liable for its employees actions under the well-established common law doctrine of respondeat superior liability for negligence). The existing factual disputes on what happened to Plaintiff at the prison require the Court to submit this claim

to a jury.[1]

The Court will therefore deny Primecare's Motion for Summary Judgment on this claim.

2. Count IX: Eighth Amendment Deliberate Indifference Claim Against Primecare

Count IX alleges that Primecare is liable, pursuant to 42 U.S.C. § 1983, for violations of Plaintiff's Eighth Amendment right to medical treatment while incarcerated. Stated differently, Plaintiff claims that Primecare is responsible, on the basis of respondeat superior liability, for the deliberate indifference of its employees towards Plaintiff's serious medical needs.

Primecare has argued that it cannot be held liable under a theory of respondeat superior liability because it is an independent contractor for a municipality and, as such, should enjoy protection from vicarious liability similar to that granted to municipalities in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). Primecare cites to Natale v. Camden County Correctional Facility, 318 F.3d 575 (3d Cir. 2003) and a variety of decisions from other Circuit Courts and District Courts, for the proposition that private corporations such as Primecare cannot be held liable under Section 1983 on the basis of respondeat superior. See Primecare's Supplemental Brief at 2-3.

Plaintiff responds with three contentions. First, Plaintiff contends that Primecare's reliance on Natale is misplaced. Plaintiff argues that at no point did the Natale Court hold that a Monell-type immunity applies to private contractors; rather, it decided the case on the narrower issue of whether the plaintiffs provided sufficient evidence to support their Section 1983 claim.

[1] The Court briefly notes that it finds no support for Defendant's contention that the expert report should be discounted because Dr. Sinaiko "does not have any documented experience in a prison setting." See Primecare's Supplemental Brief at 3. Dr. Sinaiko is a licensed physician who is board-certified in urology; he is well-qualified to opine as to the standard of care for treatment of Plaintiff's abdominal injury.

Second, Plaintiff refers to the U.S. Supreme Court decision in Richardson v. McKnight, 521 U.S. 399 (1997), a qualified immunity case. Plaintiff urges that the Supreme Court's language – e.g., finding "no conclusive evidence of a historical tradition of immunity for private parties carrying out [prison] functions" and noting that government employees, as opposed to private contractors, "typically act within a different system" than private employees – warrants a conclusion that private contractors like Primecare are subject to respondeat superior liability. See Richardson, 521 U.S. at 407-411. Finally, Plaintiff cites to a number of competing federal court decisions that have held Monell does not shield private contractors from respondeat superior liability under Section 1983. See Plaintiff's Supplemental Brief at 3.

The Court has analyzed this issue and reaches the following conclusions. First, the issue of whether immunity from respondeat superior liability under Section 1983 extends to private contractors was not one of the two issues presented to the Natale Court. See Natale, 318 F.3d at 577 (explicitly stating the only two issues decided by the Court). The language relied on by Primecare is therefore merely dicta. As such, there is currently no Third Circuit authority requiring a decision in favor of Primecare.

Second, the Court finds that there is clear disagreement among the federal courts concerning this issue. Both parties have cited persuasive authority for different conclusions. Richardson provides some persuasive support for Plaintiff's position, but it has clearly not resolved the split in authority on this question.

Third, even if Primecare is correct and a Monell-type immunity applies to it, an entity entitled to such immunity can still potentially be held liable under Section 1983 based on a theory of failure to train its employees, which Plaintiff alleges (although it is not a major part of

Plaintiff's case). See October 24, 2005 Order at 7-8; Beck v. City of Pittsburgh, 89 F.3d 966, 973-76 (3d Cir. 1996).

At this stage, therefore, the Court is not prepared to conclude that Primecare is entitled to summary judgment on this claim. As discussed above, the Court will allow Plaintiff to proceed against Primecare on a respondeat superior theory to support its negligence claim. Because Primecare must defend itself at trial against negligence claims based on the very same conduct, it makes little sense, in the absence of binding precedent, to dismiss Primecare as a defendant on the Section 1983 claim at this juncture. Furthermore, if this Court granted summary judgment to Primecare and the Third Circuit were to subsequently resolve the split in authority on this question in favor of Plaintiff, then the Court could be forced to hold a second trial. Thus, the Court finds the better course of action, from the standpoint of efficient litigation and judicial economy, is to allow Plaintiff to proceed on this claim under both common law and the Eighth Amendment at trial and address the question of Monell-type immunity for private contractors, if necessary, at the post-trial motion stage. It is also preferable that the legal sufficiency of this claim be decided on a full trial record, rather than on a summary judgment record.

The Court will therefore deny Primecare's Motion for Summary Judgment on this claim.

3. Count XI: Corporate Liability Claim Against Primecare

The Court finds that Count XI is merely duplicative of Counts IX and X. Based on the facts at hand, were the jury to find Primecare liable under Count XI, the jury would have necessarily found Primecare liable under Count IX or Count X. Stated differently, the Court cannot envision a situation where the jury could find Primecare liable for damages on Count XI alone. Damages, of course, cannot be duplicative.

The Court therefore finds it most prudent, for the dual purposes of efficient litigation and avoiding confusion of the jury, to grant summary judgment on this redundant claim.

B. Defendants Kerns and Dougherty

1. Count X: Negligence Claim Against Kerns and Dougherty

Count X alleges that, as nurse employees of the health services contractor for the Chester County Prison, (1) Kerns and Dougherty owed a duty to Plaintiff to exercise the degree of care required and normally exercised by similarly situated professionals, (2) Kerns and Dougherty failed to exercise that required degree of care in regard to Plaintiff's injury, and (3) Plaintiff suffered harm as a result.

In their Motion for Summary Judgment, Kerns and Dougherty make essentially the exact same argument as Defendant Primecare – namely, that because Plaintiff's expert is not able to determine the exact extent (i.e., degree) of Plaintiff's injury, Plaintiff has not made a prima facie case for negligence.

The Court's analysis and conclusions are the same for Defendants Kerns and Dougherty. At this stage, Plaintiff's own testimony and the expert report sufficiently establish disputes of material fact concerning what happened at the prison and whether or not Kerns and Dougherty exercised the required degree of care in treating Plaintiff.

The Court will therefore deny Kerns and Dougherty's Motion for Summary Judgment on this claim.

2. Count IX: Eighth Amendment Deliberate Indifference Claim Against Kerns and Dougherty

Count IX alleges that Kerns and Dougherty are liable, pursuant to 42 U.S.C. § 1983, for violations of Plaintiff's Eighth Amendment right to medical treatment while incarcerated. Stated differently, Plaintiff claims that Kerns and Dougherty were deliberately indifferent to Plaintiff's serious medical needs.

Kerns and Dougherty's argument concerning this claim is almost identical to their argument concerning the negligence claim; i.e., they contend that because Dr. Sinaiko is unable to state the degree of the injury suffered by Plaintiff, Plaintiff is unable to establish that Plaintiff had a "serious medical condition," which is a basic element of the Section 1983 claim.

The Court has already explained its position on Dr. Sinaiko's expert report above. In short, the Court is satisfied that the expert report has (1) established that Plaintiff was injured and (2) raised genuine issues of material fact concerning the cause and extent of those injuries (i.e., whether Kerns and Dougherty were deliberately indifferent and whether Plaintiff had a serious medical condition). These existing factual disputes require the Court to submit this claim to a jury.

The Court will therefore deny Kerns and Dougherty's Motion for Summary Judgment on this claim.

C. The Chester County Defendants

1. Count I: Eighth Amendment Inhumane Living Conditions Claim Against the County of Chester, Chester County Prison Board and John H. Masters

Plaintiff has alleged inhumane living conditions at the Chester County Prison and has brought a claim against the County of Chester, Chester County Prison Board and former Chester County Prison Warden John H. Masters on a theory of failure to implement adequate policies and procedures and to properly train employees.

Plaintiff's claim is subject to the Prison Litigation Reform Act's requirement of the exhaustion of available administrative remedies. See Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002), Smith v. Mensinger, 293 F.3d 641, 647 n.3 (3d Cir. 2002). As discussed at oral argument, Plaintiff has admitted in deposition testimony that he never utilized the Chester County Prison administrative grievance procedure to complain about the living conditions at Chester County Prison. Indeed, Plaintiff acknowledged that he never felt the need to do so. See Plaintiff's Deposition at 110-111. The Chester County Defendants are therefore entitled to summary judgment on this claim.[2]

2. Counts II, III and IV: Eighth Amendment Excessive Force Claims

a. Count II: Excessive Force Claim Against Golden English

Count II alleges that Correctional Officer Golden English, in his personal capacity, assaulted Plaintiff in the prison counselor's office (a room without windows or cameras).

It is plainly evident that there are numerous disputes of material fact concerning this

[2] Although the Court does not need to reach the issue, the Court notes that there is also a significant lack of evidence that the living conditions either inflicted unnecessary or wanton pain on Plaintiff or were grossly disproportionate to the severity of crimes warranting punishment.

claim; Defendant English disputes almost every factual allegation made by Plaintiff and asserts different facts concerning whether he used excessive force during the incident. This requires the Court to submit the issue to a jury for a determination of whether the use of force was objectively reasonable.

Defendant English is therefore not entitled to summary judgment on this claim.

b. Count III – Use of Excessive Force by Correctional Officers English, Axe, Greene, Dawson, Gomez, and Denny

Count III alleges that Correctional Officers English, Axe, Greene, Dawson, Gomez and Denny, in their personal capacities, used excessive force against Plaintiff during the assault on Plaintiff in the counselor's office and during the restraint and transfer of Plaintiff to various locations thereafter.

Similar to Count II, the Court finds that there are numerous disputes of material fact concerning this claim; these Defendants dispute most of the factual allegations made by Plaintiff[3] and assert different facts concerning whether they used excessive force during or following the incident (or whether their responses were commensurate with the seriousness of the situation). Moreover, the Third Circuit has suggested that, where correctional officers are in the vicinity of an assaulted inmate, summary judgment should be denied with respect to those officers so that a fact finder may sort out their respective levels of involvement. See Smith, 293 F.3d 641, 647-50 (3d Cir. 2002).

The Court therefore concludes that Defendants English, Axe, Greene, Dawson, Gomez

[3] For example, Defendants' contend that "All of the testimony of the officers show that Plaintiff was the aggressor. Plaintiff's account of the incident is fantastic and inconsistent."

and Denny are not entitled to summary judgment on this claim.

c. Count IV: Monell Eighth Amendment Claim Regarding Policy or Custom of Excessive Force Against the County of Chester, Chester County Prison Board, and John H. Masters

Plaintiff brings Count IV against Defendants County of Chester, Chester County Prison Board and former Warden John H. Masters (in both his individual and official capacities) based on claims of failure to implement adequate policies and procedures and failure to train employees concerning the use of appropriate force.

As an initial matter, Plaintiff has failed to adduce any evidence to support his claim against former Warden Masters in his individual capacity. Indeed, the extent of Plaintiff's allegations against former Warden Masters is that Masters, at some point, received a report about the incident at issue. However, the Third Circuit requires that Plaintiff demonstrate that each individual defendant personally participated in violating Plaintiffs' rights or directed others to violate them. Carter v. State Corr. Inst. at Graterford Med. Health Dep't, 2004 U.S. Dist. LEXIS 26058 at *15 (E.D. Pa. 2004) (citing Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir. 1995)). In the Court's judgment, Plaintiff has failed to do so and has not raised any disputes of material fact that put Masters' personal participation at issue. The Court will therefore grant summary judgment for Masters on the claim against him in his individual capacity.

The claims against the remaining Defendants – County of Chester, Chester County Prison Board and Masters in his official capacity – are governed by Monell and its progeny.[4] Under Monell, when a suit against a municipality is based on § 1983, the municipality can only be liable

[4] Claims against individuals in their official capacity are treated as if the claim is brought directly against the municipality. See McGreevy v. Stroup, 413 F.3d 359, 369-70 (3d Cir. 2005).

when the alleged constitutional transgression implements or executes a policy, regulation or decision officially adopted by the governing official or 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). "Only those municipal officials who have final policymaking authority may by their actions subject the government to § 1983 liability." Jacobs v. City of Philadelphia, 2004 U.S. Dist. LEXIS 24908, at *7 (E.D. Pa. Dec. 10, 2004). 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).

After careful review of the pleadings and record, the Court concludes that Plaintiff has failed to adduce specific facts sufficient to establish the existence of any official policy, practice or custom that caused the alleged deprivation of Plaintiff's Eighth Amendment rights. Moreover, Plaintiff has failed to adduce facts sufficient to support a theory of liability based on a failure to adequately train employees that was so deliberate or conscious that one could call it a policy or custom. Grazier v. City of Philadelphia, 328 F.3d 120, 124 (3d Cir. 2003). The mere arbitrary assertion that the Defendants, at various times, "failed to act" is not sufficient to survive summary judgment.

Furthermore, the Court concludes that Plaintiff has also failed to identify any "policymaker" with the ability to implement or countenance a policy or custom that resulted in a violation of Plaintiff's Eighth Amendment rights. The suggestion that former Warden Masters is a policymaker for the purposes of § 1983 is unpersuasive because Plaintiff provides no factual support for the suggestion that Warden Masters had final policymaking authority. The mere fact

that Warden Masters, as part of his duties, supervised prison officers is, by itself, insufficient to confer "policymaker" status. Without relevant factual or statutory support, Plaintiff is unable to establish that Warden Masters had the necessary authority to subject the Defendants to § 1983 liability. The Court will not presume such authority exists in the absence of evidence.

Accordingly, the Court will grant summary judgment on this claim to the County of Chester, Chester County Prison Board, and former Warden Masters in his official capacity.

3. Counts V and VI: Eighth Amendment Right to Medical Treatment ("Deliberate Indifference") Claims

a. Count V: Eighth Amendment Right to Medical Treatment Claim Against Correctional Officers McMillen, Yancey, and Nelson

Count V alleges that Defendant Correctional Officers McMillen, Yancey, and Nelson, in their personal capacities, demonstrated deliberate indifference to Plaintiff's serious medical need by not responding to Plaintiff's multiple requests for medical assistance.

The Court finds that there are numerous disputes of material fact concerning this claim; these Defendants dispute most of the factual allegations made by Plaintiff and assert different facts concerning Plaintiff's injuries and their behavior. Moreover, as discussed supra, at this stage the Court is satisfied that Dr. Sinaiko's expert report has (1) established that Plaintiff was injured and (2) raised genuine issues of material fact concerning the cause and extent of those injuries – including whether Plaintiff even had a serious medical condition. The existing factual disputes require the Court to submit this claim to a jury.[5]

[5] The Court notes that the Chester County Defendants did not specifically address this claim in the briefing in support of their Motion for Summary Judgment. Rather, they merely incorporated by reference the argument of Defendants Primecare, Kerns and Dougherty.

The Court therefore concludes that Defendants McMillen, Yancey, and Nelson are not entitled to summary judgment on this claim.

b. Count VI: Monell Eighth Amendment Claim Regarding Policy or Custom of Failure to Provide Medical Treatment Against the County of Chester, Chester County Prison Board, and John H. Masters

Plaintiff brings Count VI against Defendants County of Chester, Chester County Prison Board and former Warden John H. Masters (in both his individual and official capacities) based on claims of failure to implement adequate policies and procedures and failure to train employees concerning the provision of medical treatment for serious medical needs.

The Court's analysis on this claim mirrors its analysis, supra, for Count IV against these same defendants. The Court reaches the same conclusions for Count VI as it did for Count IV, namely, that: Plaintiff has (1) failed to demonstrate former Warden Masters' personal participated in a violation of Plaintiffs' rights or direction of others to violate those rights, (2) failed to adduce specific facts sufficient to establish the existence of any official policy, practice or custom that caused the alleged deprivation of Plaintiff's constitutional rights or sufficient to support a theory of liability based on a failure to adequately train employees, and (3) failed to establish that former Warden Masters was a "policymaker" for Section 1983 purposes.

Accordingly, the Court will grant summary judgment on this claim to the County of Chester, Chester County Prison Board and former Warden Masters (in his individual and official capacities).

Although those particular Defendants did discuss the import of Dr. Sinaiko's report in their separate briefing, they understandably did not address the factual disputes concerning the actions of the Chester County Defendants.

4. Counts VII, VIII, XII and XIII: First Amendment Retaliation Claims

a. Count VII: First Amendment Retaliation Claim Against Correctional Officers McMillen, Yancey, and Nelson

Count VII alleges that Defendant Correctional Officers McMillen, Yancey, and Nelson, in their individual capacities, ignored or denied Plaintiff's requests for medical assistance as retaliation for conduct protected by the First Amendment – namely, the attempted exercise of the right to file administrative grievances. Complaint ¶¶ 76, 195.

Plaintiff alleges Defendants used false disciplinary charges to prevent or obstruct Plaintiff from pressing his claims. However, Plaintiff disowned any interest in making claims at his deposition. Plaintiff's Deposition Transcript at 110-111. Moreover, Plaintiff's brief in opposition to the summary judgment motions (see pages 13-14) cites no evidence to support a retaliation claim. The Court finds that Defendants' motion on this claim, although devoid of specific facts, is sufficient to require Plaintiff to come forward with a genuine issue of fact for trial, which Plaintiff has failed to do.

The Court therefore concludes that Defendants McMillen, Yancey, and Nelson are entitled to summary judgment on this claim.

b. Count VIII: Monell Claim of a Policy or Custom of Retaliation Against the County of Chester, Chester County Prison Board, and John H. Masters

Plaintiff brings Count VIII against Defendants County of Chester, Chester County Prison Board and former Warden John H. Masters (in both his individual and official capacities) based on claims of denying medical assistance as retaliation for attempts to exercise right to file

grievances.[6] Although Plaintiff has established sufficient disputes of material fact to proceed to trial on his claims that he was denied medical treatment (i.e., that prison officials were deliberately indifferent to his serious medical need), Count VIII asserts that such behavior was undertaken in retaliation for Plaintiff's attempts to file administrative grievances.

As an initial matter, the Court reaches the same conclusion with regard to the claim against former Warden Masters in his individual capacity as it reached for Counts IV and VI – namely, that Plaintiff has failed to demonstrate former Warden Masters' personally participated in a violation of Plaintiffs' rights or direction of others to violate those rights. As discussed supra, the claims against the County of Chester, the Chester County Prison Board, and Warden Masters in his official capacity are governed by the principles of Monell and its progeny. As with Counts IV and VI, regarding Count VIII the Court finds that Plaintiff has failed to establish evidence of a policy or custom sufficient to withstand summary judgment. Plaintiff has set forth no evidence that there may have been either an actionable custom to deny medical care as retaliation against prisoners who attempted to file grievances, or a failure to train employees concerning the relationship (or non-relationship) of the grievance procedure to the provision of medical care.

The Court will therefore grant summary judgment on the retaliation claims contained in this Count.

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[6] As a matter of law, a First Amendment claim can be based on the allegation that prison officials retaliated against an inmate for attempting to take legal action against prison officials. See Order dated October 26, 2005 at 7; see also, e.g., Purkey v. Green, 2001 WL 998057, *6 (10th Cir. 2001).

c. Count XII: First Amendment Retaliation Claim Against Disciplinary Board Members Boan, Zambrana, Flecha, Sergi, Zepp Jr., and Duane

Plaintiff brings Count XII against prison Disciplinary Board members Boan, Zambrana, Flecha, Sergi, Zepp, Jr., and Duane, in their official capacities. Plaintiff alleges that these Defendants violated his First Amendment rights (via adverse citations) in retaliation for Plaintiff's attempts to file administrative grievances.

Claims against individuals in their official capacity are treated as if the claim is brought directly against the municipality. See McGreevy v. Stroup, 413 F.3d 359, 369-70 (3d Cir. 2005). Therefore, because this claim is brought only against the officers in their official capacities, it is essentially duplicative of Count XIII, which is brought directly against the County of Chester and arises from the very same conduct (i.e., the same allegations concerning allegedly adverse grievance determinations in retaliation for Plaintiff's attempts to file grievances). As discussed infra, the Court will grant summary judgment on Count XIII because Plaintiff has failed to establish evidence of a policy or custom sufficient to withstand summary judgment to proceed to trial. The Court will therefore grant summary judgment on this claim for the same reasons.

d. Count XIII: Monell Claim of a Policy or Custom of Retaliation Against the County of Chester, Chester County Prison Board, and Warden Masters

Finally, Plaintiff brings Count XIII against Defendants County of Chester, Chester County Prison Board and former Warden John H. Masters (in both his individual and official capacities) based on claims of failure to implement adequate policies and procedures and failure to train employees concerning the conduct of Disciplinary Board hearings and First Amendment rights.

For the same reasons stated in the discussion of Counts IV, VI , and VIII, supra, the Court will again grant summary judgment to all Defendants on this claim. Plaintiff has failed to establish evidence of a policy or custom of retaliation in the form of adverse disciplinary actions in retaliation for Plaintiff's attempts to file administrative grievances that is sufficient to withstand summary judgment.

D. Qualified Immunity

The Court notes that the Chester County Defendants have made an argument, albeit exceedingly brief, for application of the doctrine of qualified immunity. Defendants' entire argument on this point is as follows: "Here, no County employee violated any constitutional right of Plaintiff. To the extent subduing Plaintiff and cuffing him behind his back is a Constitutional violation, it is not clearly established. Therefore, Plaintiff's claims must be dismissed." Chester County Defendants' Summary Judgment Brief at 9-10.

It is clearly established that prison inmates have a right to be free of assaults by correctional officers. See, e.g., Wright v. Hara, 2002 WL 1870479, at *6 (E.D. Pa. 2002). Plaintiff clearly alleges that such an assault occurred and, as discussed supra, has raised multiple disputed issues of material fact that must be resolved by a jury. The Court agrees with Plaintiff that Defendants' brief qualified immunity argument does nothing more than assume the truth of the Chester County Defendants' versions of the facts. Under Fed. R. Civ. P. 56, that is not appropriate at this stage of the case.[7] The Court will therefore deny Defendant's motion for summary judgment on the grounds of qualified immunity.

[7] Defendants are, of course, free to raise this issue again at trial.

E. Summary of Remaining Claims For Trial

In accordance with the foregoing discussion, the following claims will proceed to trial:

1. Eighth Amendment Excessive Force Claims

    a. Count II – against English in his individual capacity

    b. Count III – against English, Axe, Greene, Dawson, Gomez and Denny in their individual capacities

2. Eighth Amendment Denial of Medical Treatment ("Deliberate Indifference") Claims

    a. Count V – against McMillen, Yancey, and Nelson in their individual capacities

    b. Count IX – against Primecare, Kerns and Dougherty

3. Negligence Claims

    a. Count X – against Primecare, Kerns and Dougherty

V. Conclusion

For the foregoing reasons and the reasons stated on the record on May 15, 2006, the Court will (1) grant in part and deny in part the motion of Defendant Primecare, (2) deny the motion of Defendants Kerns and Dougherty, and (3) grant in part and deny in part the motion of the Chester County Defendants.

An appropriate order follows.

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 May, 2006, upon consideration of the pleadings, briefs, and oral arguments of the parties, and based on the foregoing Memorandum and the reasons stated on the record on May 15, 2006, it is hereby ORDERED that:

1. Defendant Primecare's Motion for Summary Judgment (Doc. No. 61) is GRANTED IN PART and DENIED IN PART.
2. Defendant Kerns and Dougherty's Motion for Summary Judgment (Doc. No. 64) is DENIED.
3. The Chester County Defendants' Motion for Summary Judgment (Doc. No. 67) is GRANTED IN PART and DENIED IN PART.
4. Count I is dismissed.
5. Count IV is dismissed.
6. Count V is dismissed only as to John Doe Defendants.
7. Count VI is dismissed.
8. Count VII is dismissed.
9. Count VIII is dismissed.
10. Count XI is dismissed.
11. Count XII is dismissed.
12. Count XIII is dismissed.
13. Officers Boan, Zambrana, Flecha, Sergi, Zepp, Jr., Duane, and "John Doe(s)" are no longer Defendants in this case.

14. The County of Chester, Chester County Prison Board, and Warden John H. Masters are no longer Defendants in this case.

15. Trial is scheduled to start on June 5, 2006.

16. A final pre-trial conference will be held by telephone at 4:30 p.m. on Friday, June 2, 2006. Plaintiff's counsel will initiate the call and, when all parties are on the line, call chambers at (267) 299-7520.

BY THE COURT:

/s/ MICHAEL M. BAYLSON
Michael M. Baylson, U.S.D.J.