

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

ALBERT J. ROBUS,

Plaintiff

v.

PRISON HEALTH SERVICES, INC.,
DR. STANLEY STANISH; DR. RALPH
SMITH; PENNSYLVANIA
DEPARTMENT OF CORRECTIONS,
and JEFFREY A. BEARD, Secretary of
the Pennsylvania Department of
Corrections,

Defendants

CIVIL ACTION

No. 02-7663

OPINION

Pollak, J.

July 20, 2006

Albert J. Robus, currently an inmate at the State Correctional Institution in Albion, Pennsylvania, brings a suit for damages against the above-captioned parties, alleging that he received inadequate medical care for abdominal hernias while incarcerated at the State Correctional Institution in Graterford, Pennsylvania (“Graterford”). Now before the court is a motion (Docket No. 57) by three of the defendants—Prison Health Services, Inc. (“PHS”), a private corporation that provides health care to Graterford inmates; Dr.

Stanley Stanish, a PHS Regional Medical Director; and Dr. Ralph W. Smith, a PHS employee who is Director of Medical Services at Graterford—to dismiss the second amended complaint as to them.

In the second amended complaint,¹ filed on June 30, 2005, Robus makes the following allegations, which the court must accept as true for purposes of a motion to dismiss. In or about March of 2001, Robus developed an abdominal hernia. Second Amended Complaint at ¶ 9. He visited Graterford’s surgical clinic, and a doctor recommended surgery. *Id.* This recommendation was transmitted to PHS and to Drs. Stanish and Smith. *Id.* at ¶ 10. In spite of this recommendation, surgery was delayed for nearly two years. *Id.* at ¶ 11.

By that time, Robus’s condition had deteriorated: he had suffered five hernias over a large portion of his abdominal wall. *Id.* at ¶ 12. Because of the delay, Robus needed more serious surgery that involved a “large mesh placement.” *Id.* at ¶¶ 12, 14. Robus alleges that he experienced great pain and suffering because of the delay and that the operation produced scar tissue, which causes permanent pain to his abdomen. *Id.* at ¶¶ 13-14. Robus’s condition now prevents him from working as an electrician or a laborer, or in any other capacity that requires lifting heavy objects.² *Id.* at ¶ 13.

¹The second amended complaint under consideration is located at Docket No. 54. Although this document is labeled as a first amended complaint, it was submitted after a first amended complaint (Docket No. 15) had been filed.

²The second amended complaint does not specify whether Robus’s employment prior to his incarceration required such lifting.

In Count I, Robus asserts a claim against PHS, Stanish, and Smith, under 42 U.S.C. § 1983, alleging that these defendants violated the Eighth Amendment by providing inadequate medical care. In Counts II and III, Robus charges PHS, Stanish, and Smith with negligent supervision and negligence under Pennsylvania law.³

I. Claim Under 42 U.S.C. § 1983

PHS first contends that the § 1983 claim directed against it must be dismissed because Robus fails to allege that PHS maintained a policy or practice that caused his injuries. Because Robus's amended complaint does not point to an official regulation as a policy or practice, he must rely on the rule that "[a] custom 'can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law.'" *Carter v. State Corr. Inst. at Graterford Med. Health Dep't*, 04-3285, 2004 WL 3019239, at *4 n.5 (E.D. Pa. Dec. 28, 2004) (quoting *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir.1990)).

The second amended complaint alleges that, despite a doctor's recommendation that Robus receive surgery, PHS delayed the surgery for nearly two years, causing Robus's condition to worsen. The delay surrounding this single procedure does not suggest a policy "so well-settled and permanent as virtually to constitute law." *Id.*; see also *Dashley v. Corr. Med. Servs.*, 345 F. Supp. 2d 1018, 1022 (E.D. Mo. 2004)

³Robus names additional defendants in Counts I, II, and III, but motions by these defendants are not presently before the court.

(dismissing an Eighth Amendment claim based on inadequate medical care because the complaint “describes [discrete] actions taken by [prison health] employees, without any ratiocination of how these instances relate to an official . . . policy or practice”).⁴

Therefore, the court will dismiss the § 1983 claim against PHS.

Stanish and Smith move to dismiss the § 1983 claims against them, arguing that the second amended complaint does not allege that they were personally involved in delaying Robus’s medical treatment. As the Third Circuit has stated, “[a] defendant in a civil rights action must have personal involvement in the alleged wrongs Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity.” *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988) (citations omitted); *see also Sutton v. Rasheed*, 323 F.3d 236, 249 (3d Cir. 2003).

In this case, the second amended complaint alleges that the doctor who attended to Robus recommended surgery and that this recommendation was transmitted to Stanish and Smith. Nonetheless, Robus did not receive surgery for over two years. While the second amended complaint does not specify exactly when the recommendation was transmitted, it seems difficult to suppose that a recommendation for surgery did not reach

⁴The requirements for adequately pleading a policy or practice are discussed more fully in this court’s opinion issued today in Civil Action No. 04-2175, another suit brought by Robus in which PHS is named as a defendant.

the responsible administrators long before two years had elapsed.

Moreover, it can be inferred from the second amended complaint that upon learning of the recommendation, Stanish and Smith could have insured that Robus received surgery. According to the second amended complaint, Stanish “had the responsibility of approving medical treatment and providing necessary medical care to inmates at [Graterford],” and Smith was the Director of Medical Services at Graterford. Second Amended Complaint at ¶¶ 3-4. In light of these statements, the second amended complaint sufficiently alleges that Stanish and Smith either personally directed the delay in Robus’s care or knew of the delay and acquiesced in it. *See Rode*, 845 F.2d at 1207.

In order to make out an Eighth Amendment claim based on inadequate medical care, Robus must also allege that Stanish and Smith acted with deliberate indifference to his serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004). Stanish and Smith do not dispute the seriousness of Robus’s condition, but they contend that the second amended complaint fails to allege that they acted with deliberate indifference. In the Eighth Amendment context, deliberate indifference means that the defendant must “know[] of and disregard[] an excessive risk to inmate health or safety.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). In other words, the defendant “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.” *Id.*

Here, the second amended complaint alleges that Stanish and Smith knew both of Robus's condition and of the need for surgery. It can be reasonably inferred from these allegations that Stanish and Smith were aware that long delays in surgery would expose Robus to an excessive risk of harm. Yet, according to the second amended complaint, they disregarded that risk by delaying Robus's surgery. This alleged conduct rises to the level of deliberate indifference. *See Williams v. Prison Health Services*, No 05-2400, 2006 WL 133241, at *2 (7th Cir. Jan. 4, 2006) (holding that an inmate adequately pled deliberate indifference where the complaint stated that a prison medical director knew of the inmate's umbilical hernia yet failed to provide meaningful medical care). Therefore, the § 1983 claims against Stanish and Smith will not be dismissed.

II. State Law Claims

Finally, PHS, Stanish, and Smith argue that Robus's state-law claims of negligence and negligent supervision—Counts II and III—must be dismissed for lack of subject matter jurisdiction. Specifically, they contend that if Robus's § 1983 claims are dismissed, the suit will no longer contain a federal cause of action. Without a federal cause of action, there will be no basis to assert supplemental jurisdiction over state law claims. *See* 28 U.S.C. § 1367. This argument assumes that the court will dismiss the § 1983 claims against all defendants, but, for the reasons stated above, the court will not dismiss the § 1983 claims against Stanish and Smith. Therefore, the decision whether to exercise jurisdiction over the state law claims is within the discretion of the court. *See*

Peter Bay Homeowners Ass'n, Inc. v. Stillman, 294 F.3d 524, 534 (3d Cir. 2002).

Because the § 1983 claims against Stanish and Smith are closely related to the state law claims in Counts II and III, and because both the federal and state claims against Stanish and Smith involve actions or omissions allegedly arising out of their employment by PHS, the court will exercise jurisdiction over the state law claims against all three defendants.

III. Conclusion

An order effectuating the foregoing rulings accompanies this opinion.

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ORDER

AND NOW, this 20th day of July, 2006, for the reasons stated in the foregoing memorandum opinion, it is hereby **ORDERED** that the motion to dismiss of Dr. Stanley Stanish, Dr. Ralph Smith, and Prison Health Services, Inc. ("PHS") (Docket No. 57) is **GRANTED IN PART** and **DENIED IN PART**.

- (1) With regard to Prison Health Services, Inc., the motion to dismiss is **GRANTED** as to Count I and **DENIED** as to Counts II and III.
- (2) With regard to Dr. Stanley Stanish and Dr. Ralph Smith, the motion to dismiss is **DENIED** as to Counts I, II, and III.

/s/ Louis H. Pollak