UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT J. ROBUS, Plaintiff v. PENNSYLVANIA DEPARTMENT OF CORRECTIONS, SUPERINTENDENT DAVID DIGUGLIELMO, JULIE KNAUER, LIEUTENANT RAYMOND KNAUER, CORRECTIONAL OFFICER CALVIN HARDNETT, CORRECTIONAL OFFICER HUMPHREY, and PRISON HEALTH SERVICES, INC., Defendants	CIVIL ACTION No. 04-2175

OPINION

Pollak, J. July 20, 2006

In 2004, Albert J. Robus, currently an inmate at the State Correctional Institution in Albion, Pennsylvania, brought suit for damages under both federal and state law against numerous defendants, alleging that he was subjected to physical abuse and inadequate medical care while incarcerated at the State Correctional Institution in Graterford,

Pennsylvania ("Graterford"). Robus claims that delays in treatment caused his already dislocated jaw to deteriorate, ultimately deforming his face and reducing him to a diet of pureed foods. Robus also claims that Graterford prison guards, angered by another lawsuit that he filed, beat him and placed him in the restricted housing unit. In his amended complaint, filed on June 30, 2005, Robus asserts six causes of action, naming some or all of the following parties in each claim: the Pennsylvania Department of Corrections ("DOC"); Graterford Superintendent David DiGuglielmo;[1] Graterford Health Care Administrator Julie Knauer; Lieutenant Raymond Knauer; Correctional Officer Calvin Hardnett; Correctional Officer Humphrey;[2] and Prison Health Services, Inc. ("PHS"), a private corporation that provides healthcare to Graterford prisoners.

Currently before the court are a motion to dismiss filed by PHS (Docket No. 31) and a motion to dismiss filed by DOC and by the Graterford officials, DiGuglielmo, Julie Knauer, Raymond Knauer, Hardnett, and Humphrey (Docket No. 32). For the reasons stated below, PHS's motion to dismiss will be granted in part and denied in part, and the motion to dismiss of DOC and the Graterford officials will be granted in part and denied in part.

I. Robus's Factual Allegations

[1]Although the complaint lists "David Digugleamo" as a defendant, the defendant's last name is properly spelled "DiGuglielmo." The Clerk of Court is directed to change the name "David Digugleamo" in the caption of this action to "David DiGuglielmo."

[2]Robus states in his amended complaint that he does not know Humphrey's first name.

In his amended complaint, Robus alleges the following facts, which the court must accept as true for purposes of a motion to dismiss. In April 2003, Robus dislocated his jaw, causing him severe pain, disfigurement, and loss of function. Amended Complaint at ¶ 12. He became unable to eat normally, and consequently lost weight. *Id*. Later that month, PHS contracted with Dr. Ellis, an oral and maxiofacial surgeon, to attend to Robus. *Id*. Dr. Ellis ordered an MRI, which was necessary to evaluate and treat Robus's jaw. *Id*. Dr. Ellis communicated the MRI order to PHS and Julie Knauer, the chief health care administrator at Graterford. *Id*.

As of May 2003, when Dr. Ellis again attended to Robus, the MRI had not occurred. Dr. Ellis again ordered an MRI and again communicated the order to PHS and Julie Knauer. *Id*. Despite both orders, the MRI did not occur until September 16, 2003, approximately five months after the first order. *Id*. at ¶ 13.

The MRI revealed that the condyle head of Robus's left temporomandibular joint was displaced with limited recapture. *Id*. at ¶ 14. Robus's condition, which allegedly required immediate surgery, was reported to DOC, PHS, and Julie Knauer, yet these defendants did not provide Robus with a follow-up visit until March 2004, approximately six months after the MRI. *Id*. at ¶¶ 15-16. During this period, while "endur[ing] constant pain and suffering," Robus sought medical care by writing letters and directing grievances to PHS and DOC. *Id*. at ¶ 16.

On March 11, 2004, Robus saw another oral and maxiofacial surgeon, Dr. Lucyk, at

Graterford. *Id*. at ¶ 18. By this time, according to Robus, his condition "had seriously deteriorated, resulting in permanent damage and loss of function." *Id*. at ¶ 19. Upon reviewing the MRI, Dr. Lucyk ordered DOC, PHS, and Julie Knauer to take Robus to Thomas Jefferson University Hospital in Philadelphia, Pennsylvania, for urgent surgery. *Id*. at ¶ 18.

In spite of this order, Robus was not taken to any hospital for surgery until December 10, 2004, approximately nine months after Dr. Lucyk ordered surgery. *Id*. at ¶¶ 20-21.[3] The surgery, performed at Shady Side hospital in Pittsburgh, Pennsylvania, was not successful because the delays described above worsened Robus's condition. *Id*. at ¶ 21. Robus now needs a total tempormandibular joint replacement on both the left and right sides of his jaw with titanium implants. *Id*. He has suffered permanent damage to his jaw, which has deformed his face and reduced him to a puree diet. *Id*. at ¶ 22.

Robus also alleges that guards at Graterford physically abused him because he brought suit against Julie Knauer in another case, Civil No. 02-7663, which commenced prior to this case. In No. 02-7663, Robus alleges that he received inadequate medical care in connection with an abdominal hernia. In the case at bar, Robus alleges that on or about March 12, 2004, some five days after he sought leave to add Julie Knauer as a defendant in No. 02-7663, defendant Raymond Knauer, a guard at Graterford who is Julie Knauer's

[3]By that time, Robus had been transferred to another prison, the State Correctional Institution at Waymart, Pennsylvania. Amended Complaint at ¶ 20.

husband, repeatedly struck him, threw him against a wall, and injured his head and ribs. *Id*. at ¶ 24. During the assault, Raymond Knauer allegedly said to Robus: "Who the fuck are you to sue my wife," and "you better knock off all your lawsuit bullshit." *Id*. at ¶ 24. Referring to the restricted housing unit, located in death row, Raymond Knauer declared, "I'll bury you in the hole and you'll never come out." *Id*.

At the direction of Raymond Knauer or other Graterford officials, Robus was placed in the restricted housing unit that same day. *Id*. at ¶ 26. Robus claims that, while in the restricted housing unit, he was beaten without cause by Officers Hardnett and Humphrey, acting at the direction of Raymond Knauer or other Graterford officials. *Id*. at ¶ 28. This beating caused injuries to Robus's face, torso, and legs. *Id*. at ¶ 29. Approximately one week after Robus was sent to "the hole," a prison doctor ordered him released. *Id*. at ¶ 30.

II. Robus's Legal Claims, and Summary of the Court's Rulings

Because the motions presently before the court involve an extended array of claims, defendants, and arguments, the court will summarize its dispositions in this portion of the opinion (Part II) and will then explicate its reasoning in Part III.

A. Federal Claims

In his amended complaint, Robus presents two sets of federal claims. In Count I,

Robus asserts claims under 42 U.S.C. § 1983[4] against PHS, DOC, DiGuglielmo, Hardnett, Humphrey, Raymond Knauer, and Julie Knauer. The claims against Julie Knauer and PHS involve their alleged role in denying adequate medical care to Robus, in violation of the Eighth Amendment. The claims against Raymond Knauer, Hardnett, and Humphrey pertain to their alleged physical abuse of Robus, and the claims against DOC and Superintendent DiGuglielmo involve both medical care and physical abuse. In Count VI, Robus asserts claims against Raymond Knauer and DOC under 42 U.S.C. § 1985.[5]

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[4]Title 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[5]Title 42 U.S.C. § 1985(3) provides:

> Depriving persons of rights or privileges
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> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account

DOC moves to dismiss the § 1983 and § 1985 claims directed against it on the basis of Eleventh Amendment immunity, and the court will grant this motion. DiGuglielmo, Julie Knauer, Raymond Knauer, Hardnett, and Humphrey also assert Eleventh Amendment immunity in moving to dismiss the § 1983 claims against them, and Raymond Knauer moves to dismiss the § 1985 claim against him on the same basis. Although the Eleventh Amendment shields state officials acting in their official capacity from suits for damages, the court reads the amended complaint to assert both official-capacity and individual-capacity causes of action under §§ 1983 and 1985. The Eleventh Amendment requires the court to dismiss only the official-capacity claims.

Julie Knauer and DiGuglielmo also move to dismiss the § 1983 claims against them on their merits, asserting that the amended complaint fails to allege both deliberate indifference, a requirement for Eighth Amendment claims based on inadequate medical care, and personal involvement in a deprivation of civil rights, a requirement for § 1983 suits. The court concludes that the amended complaint adequately alleges that Julie Knauer was personally involved in denying adequate medical care to Robus and that she was deliberately indifferent to his serious medical needs. Therefore, the court will not

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> of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

dismiss the § 1983 claim against Julie Knauer to the extent that Robus brings suit against her in her individual capacity.

However, the amended complaint does not allege that DiGuglielmo was deliberately indifferent to or personally involved in Robus's medical care, his placement in the restricted housing unit, or the beatings he allegedly received. Thus, the § 1983 claim against DiGuglielmo will be dismissed.

Finally, PHS moves to dismiss the § 1983 claim asserted against it, submitting that Robus fails to allege a policy or practice that caused his injuries, as required in § 1983 suits against private corporations alleged to have performed, or to have cooperated in the performance of, public functions. The court agrees and will therefore dismiss the § 1983 claim against PHS.

B. State Law Claims

Based on the beatings alleged in Count I, Robus, in Count II, alleges assault and battery under Pennsylvania law against DOC, DiGuglielmo, Raymond Knauer, Hardnett, and Humphrey. Based on his alleged placement in the restricted housing unit, Robus, in Count III, accuses DOC, DiGuglielmo, and Raymond Knauer of false imprisonment under Pennsylvania law.

Raymond Knauer, DiGuglielmo, Humphrey, and Hardnett contend that they are

immune from the assault and battery claim under 1 Pa. C.S. § 2310,[6] which shields Commonwealth officials acting within the scope of their duties from liability under Pennsylvania law. Likewise, Raymond Knauer and DiGuglielmo assert immunity under § 2310 from the false imprisonment claim. The court concludes that if Raymond Knauer acted as alleged in beating Robus and placing him in the restricted housing unit, then his conduct fell outside the scope of his employment. Therefore, the assault and battery and false imprisonment claims against Raymond Knauer will not be dismissed. However, because the allegations against DiGuglielmo, Hardnett, and Humphrey still place them within the scope of their duties, the court will dismiss the assault and battery claims against DiGuglielmo, Hardnett and Humphrey and the false imprisonment claim against DiGuglielmo.

In Count IV, Robus alleges negligent supervision under Pennsylvania law against DOC, DiGuglielmo, Julie Knauer, Raymond Knauer, and PHS. DiGuglielmo, Julie Knauer, and Raymond Knauer move to dismiss this claim under § 2310. Because the amended complaint does not allege that these officials acted outside the scope of their

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[6]Title 1 Pa. C.S. § 2310 provides in relevant part:

> Pursuant to section 11 of Article 1 of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity.

duties, the court will grant this motion. The court will also dismiss Count IV against PHS. Although the amended complaint lists PHS as a defendant in the negligent supervision claim, Robus now states that he does not intend to hold PHS liable for negligent supervision. *See* Plaintiff's Br. in Support of Plaintiff's Response to Prison Health Services, Inc.'s Motion to Dismiss.

In Count V, Robus accuses PHS, Julie Knauer, DOC, and DiGuglielmo of negligence under Pennsylvania law based on allegations that they failed to provide him with adequate medical care. Julie Knauer and DiGuglielmo move to dismiss the claim, asserting their immunity as Commonwealth officials under § 2310. However, 42 Pa. C.S. § 8522(b)[7] creates a medical professional liability exception to § 2310. This exception defeats the immunity asserted by Julie Knauer, Graterford's Health Care Administrator, but does not vitiate the immunity asserted by DiGuglielmo, the Superintendent. Therefore, the court will dismiss the negligence claim against DiGuglielmo, but not against Julie

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[7]Title 42 Pa. C.S. § 8522(b) provides in relevant part:

> (b) Acts which may impose liability.--The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:
> . . .
>
> (2) Medical-professional liability.--Acts of health care employees of Commonwealth agency medical facilities or institutions or by a Commonwealth party who is a doctor, dentist, nurse or related health care personnel.

Knauer.

DOC moves to dismiss all state law claims against it—Counts II, III, IV, and V—under § 2310, which shields not only Commonwealth employees acting in their individual capacities but also the Commonwealth itself. The court will dismiss Counts II, III, and IV against DOC on this basis. However, the negligence claim—Count V—will not be dismissed because the medical professional liability exception applies.

Finally, PHS moves to dismiss the Count V negligence claim, asserting that (1) Robus failed to comply with Pennsylvania Rule of Civil Procedure 1042.3,[8] which required him to submit a certificate of merit, and (2) the amended complaint does not state a cause of action for corporate negligence. The court disagrees with both contentions and will not dismiss the negligence claim against PHS.

III. Discussion

A. Federal Claims

1. Federal Claims Against DOC

Robus's federal claims against DOC must be dismissed because DOC is not a "person" for purposes of §§ 1983 and 1985, but is, within the intendment of the Eleventh

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[8]Rule 1042.3(a) provides in relevant part:

> In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party . . .

Amendment, an arm of the state. *See Independent Enters. Inc. v. Pittsburgh Water & Sewer Auth.*, 103 F.3d 1165, 1173 (3d Cir 1997).

2. Federal Claims Against Graterford Officials

a. Individual or Official Capacity

State officials are subject to suit under §§ 1983 and 1985 in their individual capacities, but not in their official capacities. *See Melo v. Hafer*, 912 F.2d 628, 635 (3d Cir. 1990). DiGuglielmo, Julie Knauer, Raymond Knauer, Hardnett, and Humphrey contend that all § 1983 and § 1985 claims against them must be dismissed, at least to the extent that Robus seeks to hold them liable in their official capacities.

The amended complaint does not explicitly state the capacity in which Robus seeks to hold the Graterford officials liable. In such cases, the Third Circuit determines the capacity in which defendants are sued by using a "flexible approach" that requires "'interpret[ing] the pleading.'" *See id*. at 636 n.7 (citation omitted). In particular, the Third Circuit looks to the type of damages the plaintiff seeks. In *Gregory v. Chehi*, the court concluded that the plaintiff was suing the defendants in both their official and personal capacities where the complaint did not specify the capacity in which the defendants were being sued but did request both compensatory and punitive damages. 843 F.2d 111, 119-20 (3d Cir. 1988). Like the plaintiff in *Gregory*, Robus seeks compensatory and punitive damages against the Graterford officials, and the court therefore construes the amended complaint to assert causes of action against the Graterford officials in both their

official and individual capacities. The Eleventh Amendment requires the court to dismiss the claims against DiGuglielmo, Julie Knauer, Raymond Knauer, Hardnett, and Humphrey to the extent that Robus asserts claims against them in their official capacity, but not to the extent that Robus asserts claims against them in their individual capacity.

b. Deliberate Indifference and Personal Involvement of DiGuglielmo and Julie Knauer

Separate from the Eleventh Amendment argument made by all Graterford officials, DiGuglielmo and Julie Knauer move to dismiss Robus's § 1983 claim on two additional grounds. First, they contend that the amended complaint fails to allege that they acted with deliberate indifference to Robus's serious medical needs, a requirement for Eighth Amendment claims. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Colburn v. Upper Darby Twp*., 946 F.2d 1017, 1023 (3d Cir. 1991). Second, they submit that the amended complaint fails to allege that they were personally involved in a deprivation of civil rights, a requirement for § 1983 claims. *See Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988).

The issues of deliberate indifference and personal involvement present a common question: whether the amended complaint alleges that DiGuglielmo and Julie Knauer had actual knowledge that Robus was receiving inadequate medical care and knowingly declined to remedy the situation. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (stating that for the plaintiff to demonstrate deliberate indifference in an Eighth Amendment claim, officials "must both be aware of facts from which the inference could

be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference."); *Rode*, 845 F.2d at 1207 ("A defendant in a civil rights action [under § 1983] must have personal involvement in the alleged wrongs . . . . Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence.") (citations omitted).

The amended complaint contains the following allegations about Julie Knauer's knowledge of Robus's medical treatment. Dr. Ellis twice communicated to Julie Knauer that Robus needed an MRI, but Robus did not receive an MRI for approximately five months. Furthermore, although Dr. Lucyk ordered Julie Knauer to provide Robus with urgent jaw surgery, the surgery did not occur for approximately nine months. Assuming these allegations to be true, one could infer that Julie Knauer knew of and disregarded a serious risk to Robus's health. Therefore, the court will not dismiss Robus's § 1983 claim against Julie Knauer.

Robus's allegations that DiGuglielmo knew of Robus' medical treatment, his placement in the restricted housing unit, and the beatings he allegedly received are much less specific. Using boilerplate language, Robus alleges that "[DiGuglielmo] was at all times aware of the circumstances of the lack of care and punitive actions taken against plaintiff." *Id*. at ¶ 33. Robus alleges that he wrote letters to Graterford officials and filed grievances regarding his need for medical care, but he does not specify that any of the letters or grievances reached, or were directed to, DiGuglielmo. Amended Complaint at ¶

16.

Because the amended complaint fails to cite any facts that would give rise to actual knowledge, the court concludes that Robus does not adequately allege that DiGuglielmo knew of Robus's medical treatment, his physical abuse, or his placement in the restricted housing unit. In *Evancho v. Fisher*, 423 F.3d 347, 349 (3d Cir. 2005), an employee of the Pennsylvania Bureau of Narcotics Investigation and Drug Control alleged that the Attorney General of Pennsylvania played a role in her transfer. The plaintiff, however, did not "allege[] any facts to indicate that [the Attorney General] individually directed [her] transfer or knew of and acquiesced in it." *Id.* at 353-54. Likewise, in this case, Robus proffers the conclusion that DiGuglielmo knew of his predicament but fails to support that conclusion with concrete facts. *See Gay v. Petsock*, 917 F.2d 768, 771 (3d Cir. 1990) (affirming dismissal of complaint against prison superintendent on the ground that "nothing in the record . . . suggests that [he] was involved in the acts complained of or that they were done with his knowledge and acquiescence").[9] Because Robus does not adequately allege actual knowledge and acquiescence, the court will dismiss his § 1983 claim against DiGuglielmo.

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[9]*See also Carter v. State Corr. Inst. at Graterford Med. Health Dep't*, No. 04-3285, 2004 WL 3019239, at *5 (E.D. Pa. Dec. 28, 2004) ("Although the Complaint states that 'all defendants had personal knowledge and personal involvement in delaying and/or decision making in what medical care plaintiff would be allotted,' the Complaint fails to state any particular facts indicating that Defendant DiGuglielmo had any personal involvement with Plaintiff's medical treatment. As a result, Defendant DiGuglielmo may not properly be named as a defendant in this action and the claims against him will be dismissed.").

3. Claim Against PHS Under § 1983

Like a prison official, a private corporation such as PHS may be sued under § 1983 for actions taken under color of state law that deprive a prisoner of adequate medical care. However, the status of PHS as a private corporation involved in the performance of governmental functions limits the type of liability to which it may be subjected. Specifically, Robus cannot hold PHS liable in respondeat superior (that is, based solely on the actions of its employees). Rather, Robus must demonstrate that a PHS policy or practice caused his injuries. *See Roach v. SCI Graterford Med. Dep't*, 398 F. Supp 2d 379, 388 (E.D. Pa. 2005).[10] Robus must also show that PHS maintained the policy "'with deliberate indifference to the consequences.'" *Searles v. Southeastern Pa. Transp. Auth.*, 990 F.2d 789, 794 n.7 (3d Cir. 1993) (quoting *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989)).

PHS contends that the amended complaint is deficient because Robus has failed to allege a PHS policy, custom, or practice that caused his injuries.[11] Because Robus's

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[10]While the policy or practice requirement originated in the context of municipal liability under § 1983, *see Monell v. Dept. of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978), several courts, including the Third Circuit, have treated it as a necessary element of a § 1983 suit against a private corporation. The Third Circuit held in *Natale v. Camden County Correctional Facility*, that PHS, the very defendant in the case at bar, could be held liable only if it maintained a policy or practice that caused a constitutional violation. 318 F.3d 575, 583-84 (3d Cir. 2003); *see also Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972, 975-76 (8th Cir. 1993); *Rodriguez v. Smithfield Packing Co.*, 338 F.3d 348, 355 (4th Cir. 2003); *Woodward v. Corr. Med. Servs. of Ill., Inc*., 368 F.3d 917, 927 & n.1 (7th Cir. 2004).

[11]PHS concedes that Robus has alleged that he had serious medical needs.

amended complaint does not point to an official regulation as a policy or practice, Robus 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*, 2004 WL 3019239, at *4 n.5 (quoting *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir.1990)). The question therefore becomes whether the amended complaint alleges such a well-settled custom.

The Supreme Court has made it clear that allegations of a policy or practice are not subject to heightened pleading requirements. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).[12] Notwithstanding this general principle, courts have viewed policy or practice allegations with varying degrees of rigor, reaching somewhat different conclusions on at least two issues: (1) how clearly or specifically a complaint must describe the policy or practice in question; and (2) the extent to which the complaint must cite fact-based examples of the policy or practice. *Compare McTigue v. City of Chicago*, 60 F.3d 381, 382 -383 (7th Cir. 1995) (stating, subsequent to *Leatherman*, that "boilerplate allegations of a municipal policy, entirely lacking in any factual support that a [municipal] policy does exist, are insufficient . . . . The absence of any facts at all to support plaintiff's claim renders the

[12]In *Leatherman*, the Supreme Court held that a § 1983 suit against a municipality does not impose heightened pleading requirements on the plaintiff; rather, Federal Rule of Civil Procedure 8(a) requires only a short and plain statement of the claim. *Leatherman*, 507 U.S. at 168. Although PHS is not a municipality, there is no reason to impose a heightened standard here, especially since courts have applied doctrines based on municipal liability under § 1983 to corporate liability under § 1983.

allegations mere legal conclusions of section 1983 liability devoid of any well-pleaded facts.") (citation and internal quotation omitted) (alterations in original); *Dashley v. Corr. Med. Servs.*, 345 F. Supp. 2d 1018, 1022 (E.D. Mo. 2004) (dismissing a claim 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"); *Floyd v. Flood*, No. 84-3583, 1987 WL 10823, at *1 (E.D.N.Y. Apr. 23, 1987) (citation and internal quotation omitted) (stating, prior to *Leatherman*, that "sweeping allegations" regarding a policy or practice are insufficient "unless amplified by specific instances of misconduct") (citation and internal quotation omitted) *with Young v. Sheehan*, No. 98-6527, 2000 WL 288516, at *5 (N.D. Ill. Feb. 24, 2000) ("[Plaintiff's] allegations . . . *while conclusory*, are sufficient to support the inference of an official county jail policy, practice or custom.") (emphasis added); *Lomax v. City of New Orleans*, No. 04-0461, 2004 WL 1586539, at *1-*3 (E.D. La. July 14, 2004) (denying a motion to dismiss where the complaint referred to actions "under color of custom and usage" but did not specify the particular custom or usage at issue); *Garcia v. City of Boston*, 115 F. Supp. 2d 74, 82 n.5 (D. Mass. 2000) ("Although the amended complaint makes no express assertions or references to an unconstitutional 'custom, policy or practice,' the allegations are sufficient to place the City on notice of the customs, policies and practices the plaintiff has relied upon in bringing this suit.") (citation and internal quotation omitted).

Of the cases cited above, the court finds *Dashley* to be the most analogous and the

most persuasive. In *Dashley*, the plaintiff alleged that various actions by a prison health corporation, including delays in physician visits and x-rays, worsened his injured back. 345 F. Supp. 2d at 1022. However, the *Dashley* court found the complaint deficient because it contained no explanation of how the various actions related to a policy or practice. *Id*. Similarly, Robus fails to allege that the various delays in his medical treatment stemmed from a policy or practice; indeed, the amended complaint provides no basis for concluding that the delays were anything but isolated incidents. Therefore, the court will dismiss the § 1983 claim against PHS for failure to articulate a custom, policy, or practice.

B. State Law Claims

1. State Law Claims Against Individual DOC Defendants

a. False Imprisonment and Assault and Battery

Based on the alleged beatings, Robus, in Count II, charges several Graterford officials—DiGuglielmo, Raymond Knauer, Hardnett, and Humphrey—with assault and battery. Robus also submits, in Count III, that DiGuglielmo and Raymond Knauer falsely imprisoned him by placing him in the restricted housing unit.

Under 1 Pa. C.S. § 2310, Pennsylvania "officials and employees acting within the scope of their duties" are immune from suit, unless one of nine exceptions contained in 42 Pa. C.S. § 8522(b) applies.[13] Because none of the exceptions[14] is relevant to the false

[13]*See McGrath v. Johnson*, 67 F. Supp. 2d 499, 511 (E.D. Pa. 1999) ("The doctrine of sovereign immunity bars damage claims for state law torts against employees of

imprisonment or assault and battery claims, the dispositive question becomes whether the defendants acted within the scope of their duties. If so, the court must dismiss these claims.

i. Raymond Knauer

In support of the claims in Counts II and III, the amended complaint alleges that, on the same day that Robus was beaten and placed in the restricted housing unit, Raymond Knauer said to him, "[w]ho the fuck are you to sue my wife," and "you better knock off all your lawsuit bullshit." Amended Complaint at ¶ 24. Viewing the amended complaint in the light most favorable to Robus, one could reasonably infer from these statements that Raymond Knauer acted solely to settle a score or to bully Robus into dropping his claims against Julie Knauer. Thus, to determine whether Raymond Knauer is entitled to immunity, the court must consider whether retaliatory abuse motivated solely by personal concerns falls within the scope of a prison guard's duty. The doctrine of respondeat superior, where the "scope of duty" question commonly arises, is instructive. *See Crawford v. Commonwealth of Pa.*, No. 03-693, 2005 WL 2465863, at *13 (M.D. Pa. Oct.

Commonwealth agencies acting within the scope of their duties, except for several narrow enumerated exceptions.").

[14]The exceptions apply in cases involving: "(1) vehicle liability; (2) medical-professional liability; (3) care, custody or control of personal property; (4) Commonwealth real estate, highways and sidewalks; (5) potholes and other dangerous conditions (6) care, custody or control of animals; (7) liquor store sales; (8) National Guard activities; and (9) toxoids and vaccines." *Frazier v. Southeastern Pennsylvania Transp. Auth.*, 868 F.Supp. 757, 762 (E.D. Pa. 1994) (citing 42 Pa. C.S. § 8522(b)).

6, 2005) (construing § 2310 with reference to principles of respondeat superior), *vacated in part on other grounds*, 2006 WL 148881 (M.D. Pa. Jan. 19, 2006).

In respondeat superior cases, Pennsylvania courts have repeatedly relied on § 228 of the Restatement (Second) of Agency. *See, e.g.*, *Fitzgerald v. McCutcheon*, 410 A.2d 1270, 1272 (Pa. Super. 1979). Under the Second Restatement, conduct falls within the scope of employment only if "'it is actuated, at least in part, by a purpose to serve the master.'" *Id.* (quoting § 228). Thus, in Pennsylvania, "an assault committed by an employee upon another for personal reasons . . . is not actuated by an intent to perform the business of the employer and, as such, is not within the scope of employment." *R.A. ex rel. N.A. v. First Church of Christ*, 748 A.2d 692, 700 (Pa. Super. Ct. 2000) (citations omitted). Because it can be reasonably inferred from the amended complaint that personal concerns alone motivated Raymond Knauer's actions, the amended complaint adequately alleges that Raymond Knauer acted outside the scope of his duty.[15] Therefore, Raymond Knauer is not entitled to immunity with respect to Robus's assault and battery and false imprisonment claims.[16]

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[15]*Vargas v. Correa*, 416 F. Supp. 266 (S.D.N.Y. 1976), a case presenting a very different factual scenario, reaches a similar legal conclusion. In *Vargas*, a guard started a fight with an inmate by changing the channel on the television the inmate was watching, even though the television was for inmate use. *Id.* at 267-68. The court stated: "The incident occurred because [the guard] wanted to watch a basketball game on a television set provided for the use of the inmates and did not arise out of any action within the scope of [the guard's] authority or in furtherance of his master's interest." *Id.* at 272.

[16]The court notes that Raymond Knauer's actions would fall within the scope of employment if they were motivated in part by a purpose to serve DOC and in part by

ii. Hardnett, Humphrey, and DiGuglielmo

In Count II, Robus charges Hardnett and Humphrey with assault and battery, alleging that they beat him without cause while he was in the restricted housing unit. Amended Complaint at ¶ 28. Robus charges DiGuglielmo with both assault and battery and false imprisonment.

Nothing in the amended complaint suggests that Hardnett, Humphrey, and DiGuglielmo, in contrast to Raymond Knauer, had a personal motive for their actions. Thus, it would appear that their actions were motivated, at least in part and perhaps in whole, to serve the employer.

To fall within the scope of duty, their conduct must also have the following characteristics: (1) "'it occurs substantially within the authorized time and space limits,'"(2) "'it is of the kind [the employee] is employed to perform,'" and (3) "'if force is intentionally used by the servant against another, the use of the force is not unexpectable by the master.'" *Fitzgerald*, 410 A.2d at 1272 (quoting the Restatement (Second) of Agency § 228). The first two requirements are easily met because the actions of Hardnett, Humphrey, and DiGuglielmo occurred within Graterford's walls, and guards are employed

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personal concerns. In *Maclean v. Secor*, this court held that prison guards acted within the scope of duty when they threatened an inmate because their "conduct was at least *in part* actuated by the desire to promote prison security, and was thus in furtherance of their employer's interest." 876 F. Supp. 695, 705 (E.D. Pa. 1995) (emphasis added) (citation omitted); *see also Brumfield v. Sanders*, 232 F.3d 376, 380 (3d Cir. 2000) ("[U]nder Pennsylvania law, the mere existence of a personal motivation is insufficient to relieve the employer from liability [in respondeat superior] where the conduct also benefitted him and was within the scope of employment generally.").

in part to use physical force and to place inmates in the restricted housing unit where necessary. As for the final requirement, if Robus's allegations are true, the force used by Hardnett and Humphrey and ordered by DiGuglielmo was reprehensible, but not entirely unexpectable. As one court observed in a case involving guards who severely beat an inmate, "[s]uch acts, while barbaric, do not represent such a great departure from the roughhewn reality of a correction officer's daily routine as to fall outside of the scope of . . . employment." *Pizzuto v. County of Nassau*, 239 F.Supp.2d 301, 315 (E.D.N.Y. 2003). Thus, DiGuglielmo, Hardnett, and Humphrey acted within the scope of their duties.

For the reasons stated, the court will dismiss the assault and battery count against Hardnett and Humphrey, and will dismiss the assault and battery claim and the false imprisonment claim against DiGuglielmo.

b. Negligent Supervision

In Count IV, Robus asserts a negligent supervision claim against the following Graterford officials: DiGuglielmo, Julie Knauer, and Raymond Knauer. Because no exception under § 8522(b) applies, these claims must be dismissed, for the amended complaint is devoid of allegations that these officials acted outside the scope of their employment.

c. Negligence

In Count V, Robus contends that he received inadequate medical care due to the negligence of Julie Knauer and DiGuglielmo. Because Robus does not allege that these

officials acted outside the scope of their duties, the decisive question is whether an exception under § 8522(b) applies. Section 8522 (b) provides:

> Acts which may impose liability.--The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:
> . . .
> (2) Medical-professional liability.--Acts of health care employees of Commonwealth agency medical facilities or institutions or by a Commonwealth party who is a doctor, dentist, nurse or related health care personnel.

42 Pa. C.S. § 8522(b).

In *Williams v. Syed*, a prisoner alleged that a prison health care administrator negligently cleared him to be transferred to another prison in spite of his medical condition. 782 A.2d 1090, 1093 (Pa. Commw. Ct. 2001). The court concluded that these actions "f[ell] within the medical professional liability exception to sovereign immunity." *Id.* at 1096; *see also Wareham v. Jeffes*, 564 A.2d 1314, 1323-24 (Pa. Commw. Ct. 1989). Similarly, Robus alleges that Julie Knauer, the health care administrator at Graterford, made an administrative decision to deny him health care. Thus, Julie Knauer's actions fall within the medical professional liability exception, and the court will not dismiss Robus's negligence claim against her.

DiGuglielmo, by contrast, is the Superintendent of Graterford, not a health care employee as defined by § 8522(b). Therefore, the court will dismiss Robus's negligence claim against DiGuglielmo.

2. State Law Claims Against DOC

Section 2310 immunizes not only Commonwealth officials acting in their official capacity but also Commonwealth agencies, such as DOC. *Johnson v. Commonwealth of Pa. Dep't of Corrections*, No. 92-5149, 1992 WL 392601, at *1 (E.D. Pa. 1992). Because none of the § 8522(b) exceptions applies to Robus's Count II claim of assault and battery, his Count III claim of false imprisonment, or his Count IV claim of negligent supervision, these claims against DOC will be dismissed. However, the court will not dismiss the Count V negligence claim against DOC because the § 8522(b) medical professional liability exception to § 2310 enables Robus to sue DOC, just as it allows him to sue Julie Knauer. *See* 42 Pa. C.S. § 8522 (stating that where an exception applies, conduct by a Commonwealth party "may result in the imposition of liability on the Commonwealth").

3. Negligence Claim Against PHS

PHS submits that the negligence claim directed against it in Count V must be dismissed because Robus failed to submit a certificate of merit. Pennsylvania Rule of Civil Procedure 1042.3 provides:

> In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party . . .

Pa. R.C.P. 1042.3 (a). The certificate of merit must state either: (1) that an appropriate licensed professional has opined in writing that there is a reasonable probability that the

defendant's care did not measure up to professional standards and caused the plaintiff's injury; (2) that the claim against the defendant is based on respondeat superior (in which case, the plaintiff must obtain an opinion from an appropriate licensed professional that there is a reasonable probability that the care provided by the defendant's agents did not measure up to professional standards and caused the plaintiff's injury); or (3) that expert testimony is unnecessary to the plaintiff's claim. Pa. R.C.P. 1042.3 (a). It is undisputed that Robus did not submit a certificate of merit.

Applying the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts in Pennsylvania have held that Rule 1042.3 constitutes state substantive law and therefore applies in diversity cases governed by Pennsylvania law. *See Scaramuzza v. Sciolla*, 345 F. Supp. 2d 508, 509-10 (E.D. Pa. 2004); *see also Iwanejko v. Cohen & Grigsby, P.C.*, No. 2:03-1855, 2005 WL 3234327, at *2 (W.D. Pa. Nov. 30, 2005); *Schwalm v. Allstate Boiler & Const., Inc.*, No. 3:04-593, 2005 WL 1322740, at *1 (M.D. Pa. May 17, 2005). This conclusion is based largely on *Chamberlain v. Giampapa*, 210 F.3d 154, 158-61 (3d Cir. 2000), where the Third Circuit ruled that a New Jersey affidavit of merit requirement constitutes substantive law. *Scaramuzza*, 345 F. Supp. 2d at 509-510. Rule 1042.3 applies regardless of whether state law claims are brought under diversity jurisdiction (as in *Iwanejko*, *Scaramuzza*, and *Schwalm*), or under supplemental jurisdiction (as here). *See Rodriguez v. Smith*, No. 03-3675, 2005 WL 1484591, at *7 n. 13 (E.D. Pa. June 21, 2005) (explaining that Rule 1042.3 applies where a court exercises

supplemental jurisdiction because "the *Erie* doctrine applies equally to state law claims over which federal courts exercise supplemental jurisdiction.") (citing *Houben v. Telular Corp.*, 309 F.3d 1028 (7th Cir.2002)).

By its terms, Rule 1042.3 applies only where the plaintiff alleges "that a licensed professional deviated from an acceptable professional standard." However, Robus does not allege that the doctors who treated him deviated from professional standards. In fact, Robus claims that Dr. Ellis properly ordered an MRI and that Dr. Lucyk properly ordered immediate surgery. Thus, Robus's allegations of negligence cannot be characterized as a malpractice claim, the quintessential type of action that involves deviation from professional standards.

Rather, Robus contends that the fault lies with PHS, which is alleged to have delayed the MRI and the surgery in spite of the doctors' orders. Based on the amended complaint, the court views the decision to postpone Robus's care in spite of doctors' orders as administrative, not professional, in nature. Accordingly, Robus alleges ordinary negligence, not a deviation from specialized professional standards. A claim of ordinary negligence does not require a certificate of merit under Rule 1042.3.

PHS offers a second reason to dismiss Robus's negligence claim: his allegations are insufficient to assert a cause of action for corporate negligence.[17] The Pennsylvania

[17]Robus asserts claims solely for corporate negligence, not for respondeat superior. His amended complaint does not accuse any particular PHS employee of negligence and does not mention respondeat superior, and his brief discusses only corporate negligence.

Supreme Court has articulated four possible bases for a corporate negligence claim against a hospital, including a violation of the "duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients." *Thompson v. Nason Hosp.*, 591 A.2d 703, 707 (Pa. 1991) (citation omitted). Robus alleges that he received inadequate medical care over a long period of time and that PHS repeatedly disregarded doctors' orders. Because these allegations support a claim that PHS's rules were not adequate to provide quality care, the court concludes that Robus has stated a cause of action for corporate negligence.

IV. Conclusion

An order effectuating the foregoing rulings accompanies this opinion.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALBERT J. ROBUS, Plaintiff v. PENNSYLVANIA DEPARTMENT OF CORRECTIONS, SUPERINTENDENT DAVID DIGUGLIELMO, JULIE KNAUER, LIEUTENANT RAYMOND KNAUER, CORRECTIONAL OFFICER CALVIN HARDNETT, CORRECTIONAL OFFICER HUMPHREY, and PRISON HEALTH SERVICES, INC., Defendants	CIVIL ACTION No. 04-2175

ORDER

AND NOW, this 20th day of July, 2006, for the reasons stated in the foregoing memorandum opinion, it is hereby ORDERED as follows:

(1) The motion to dismiss filed by the Pennsylvania Department of Corrections ("DOC"), David DiGuglielmo, Julie Knauer, Raymond Knauer, Calvin Hardnett, and Humphrey (Docket No. 32) is GRANTED IN PART and DENIED IN PART.

(a) With regard to Defendant DOC, the motion to dismiss is GRANTED as to Counts I-IV and Count VI, but DENIED as to Count V.

(b) With regard to Defendant David DiGuglielmo, the motion to dismiss is

GRANTED as to all Counts.

(c) With regard to Defendant Julie Knauer, the motion to dismiss is GRANTED as to Count IV and DENIED as to Count V; in addition, the motion to dismiss Count I is GRANTED with regard to Julie Knauer's official capacity but DENIED with regard to her individual capacity.

(d) With regard to Defendant Raymond Knauer, the motion to dismiss is GRANTED as to Count IV and DENIED as to Counts II and III; in addition, the motion to dismiss Counts I and VI is GRANTED with regard to Raymond Knauer's official capacity but DENIED with regard to his individual capacity.

(e) With regard to Defendants Calvin Hardnett and Humphrey, the motion to dismiss is GRANTED as to Count II; in addition, the motion to dismiss Count I is GRANTED with regard to Hardnett's and Humphrey's official capacity but DENIED with regard to their individual capacity.

(2) The motion to dismiss filed by Prison Health Services, Inc. ("PHS") (Docket No. 31) is DENIED as to Count V and GRANTED as to Counts I and IV.

(3) The Clerk of Court shall change the name "David Digugleamo" in the caption of this action to "David DiGuglielmo."

/s/ Louis H. Pollak