UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANTHONY HASKINS,	:	
Plaintiff	:	**CIVIL ACTION NO. 1:10-2509**
v.	:	**(JONES, D.J.)** **(MANNION, M.J.)**
DOMINICK DeROSE, TOM TOOLAN and LAURA FISHEL,	:	
Defendants	:	

REPORT AND RECOMMENDATION[1]

Presently pending before the court are: (1) an unopposed motion to dismiss the plaintiff's complaint filed on behalf of defendants Toolan and Fishel, ("Primecare defendants"), (Doc. No. 17), and (2) an unopposed motion to dismiss the plaintiff's complaint filed on behalf of defendant DeRose, (Doc. No. 21). Based upon the court's review of the record, it is recommended that both motions be denied in part and granted in part, and the plaintiff's complaint be dismissed.

On December 9, 2010, the plaintiff, currently an inmate at the State Correctional Institution, Camp Hill, Pennsylvania, filed the instant civil rights action pursuant to 42 U.S.C. §1983 in which he alleges that he received inadequate medical treatment. (Doc. No. 1). On the same day, the plaintiff

[1]For the convenience of the reader of this document in electronic format, hyperlinks to the court's record and to authority cited have been inserted. No endorsement of any provider of electronic resources is intended by the court's practice of using hyperlinks.

filed the appropriate application to proceed in forma pauperis, (Doc. No. 2), and authorization form, (Doc. No. 3). As a result, a financial administrative order was issued. (Doc. No. 6).

By order dated January 10, 2011, it was directed that process issue. (Doc. No. 7).

On February 23, 2011, the Primecare defendants filed their motion to dismiss the plaintiff's complaint, (Doc. No. 17), along with a brief in support thereof, (Doc. No. 18).

On March 25, 2011, defendant DeRose filed his motion to dismiss the plaintiff's complaint, (Doc. No. 21), along with a brief in support thereof, (Doc. No. 22).

As of the date of this report, the plaintiff has failed to respond to either of the pending motions to dismiss. In light of the plaintiff's pro se status, however, the motions will be give a merits review pursuant to Stackhouse v. Mazurkiewicz, 951 F.2d 29 (3d Cir. 1991).

The defendants' motions to dismiss are brought pursuant to the provisions of Fed.R.Civ.P. 12(b)(6). In deciding a motion to dismiss brought pursuant to Rule 12(b)(6), the court must accept as true all of the factual allegations in the complaint, Erickson v. Pardus, 551 U.S. 89 (2007), and all reasonable inferences permitted by the factual allegations, Watson v. Abington Twp., 478 F.3d 144, 150 (3d Cir. 2007), viewing them in the light

most favorable to the plaintiff, Kanter v. Barella, 489 F.3d 170, 177 (3d Cir. 2007). If the facts alleged by the plaintiff are sufficient to "raise a right to relief above the speculative level" such that the plaintiff's claim is "plausible on its face," dismissal of the complaint is inappropriate. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007); Victaulic Co. v. Tieman, 499 F.3d 227, 234 (3d Cir. 2007). See Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (explaining a claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). However, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." Id. at 1950 (quoting Twombly, 550 U.S. at 555). Moreover, a simple recitation of the elements of a cause of action supported by nothing more than conclusory statements is insufficient. Id. at 1949 (citing Twombly, 550 U.S. at 555).

A *pro se* complaint should be construed liberally, Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003), and "must be held to less stringent standards than formal pleadings drafted by lawyers," Erickson, 551 U.S. at 94 (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). Before dismissing such a complaint as merely deficient, a court must grant leave to amend. See, e.g., Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 252 (3d Cir. 2007); Weston v. Pennsylvania, 251 F.3d 420, 428 (3d Cir. 2001);

Shane v. Fauver, 213 F.3d 113, 116 (3d Cir. 2000). "Dismissal without leave to amend is justified only on the grounds of bad faith, undue delay, prejudice, or futility." Alston v. Parker, 363 F.3d 229, 236 (3d Cir. 2004).

In his complaint, the plaintiff allege that, on August 15, 2010, he had a tooth pulled and the dentist, defendant Fishel, left the root inside of his mouth. The plaintiff indicates that he was given pain medication and was told that defendant Fishel would return to schedule an appointment for the plaintiff to see an oral surgeon.

On September 12, 2010, when defendant Fishel had not returned, the plaintiff alleges that he filed a grievance to see an oral surgeon. He indicates that during the time of his initial treatment and the time of his grievance he continuously received pain pills and antibiotics.

When no response was received to his initial grievance, on November 1, 2010, the plaintiff alleges that he filed a second grievance indicating that he was in "excruciating pain" and that he was getting headaches. Three days later, on November 4, 2010, the plaintiff was seen by defendant Fishel for follow-up. At that time, the plaintiff alleges that defendant Fishel informed him that his condition was not such that he needed to see an oral surgeon. The plaintiff alleges that defendant Fishel, as well as defendant Toolan, informed him that the root would dissolve or push out on its own.

In his complaint, the plaintiff alleges that the defendants acted with

deliberate indifference to his medical needs in violation of his Eighth Amendment rights. He is seeking declaratory and injunctive relief, as well as compensatory and punitive damages. The plaintiff requests in his complaint that the court consider his claims "even though the prison grievance system was not completed."

In their motion to dismiss the plaintiff's complaint, the Primecare defendants argue that the plaintiff's complaint should be dismissed because he has admittedly failed to exhaust his administrative remedies and because he has failed to state a claim upon which relief can be granted.

Initially, with respect to the defendants' argument that the plaintiff failed to exhaust his administrative remedies, the Prison Litigation Reform Act, 42 U.S.C. §1997e(a), provides that "no action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prisons, or other correctional facility until such administrative remedies as are available are exhausted."

Here, the plaintiff's complaint makes a plausible claim that he exhausted his administrative remedies. Although he indicates that the grievance process was not complete, he also alleges that he filed various grievances to which he never received a response. Assuming these facts to be true, as the court must do on a motion to dismiss, this is sufficient for exhaustion purposes. See

Carter v. Morrison, 2007 WL 4233500 (E.D.Pa. Nov. 28, 2007)[2] ("a plaintiff who files grievances and receives no response has exhausted his or her remedies"). As such, the Primecare defendants' motion to dismiss the plaintiff's complaint for failure to exhaust his administrative remedies should be denied.

The Primecare defendants also argue that the plaintiff has failed to sufficiently state an Eighth Amendment claim upon which relief can be granted. Here, the court agrees.

The Eighth Amendment is violated with respect to the provision of medical care where a defendant acts with "deliberate indifference" to a plaintiff's "serious medical needs." See Estelle v. Gamble, 429 U.S. 97, 104 (1976). A prison official acts with deliberate indifference when he or she "knows of and disregards an excessive risk to inmate health or safety." Natale v. Camden Cnty. Corr. Facility, 318 F.3d 575, 582 (3d Cir. 2003) (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). Deliberate indifference may be evidenced by an intentional refusal to provided care, delayed provision of medical treatment for non-medical reasons, denial of reasonable requests for treatment that results in suffering or risk of injury, Durmer v. O'Carroll, 991 F.2d 64, 68 (3d Cir. 1993), or by persistent conduct in the face of resultant

[2]For the convenience of the reader, the Court has attached copies of unpublished opinions cited within this document.

pain and risk of permanent injury, White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990).

However, the mere misdiagnosis of a condition or medical need, or negligent treatment provided for a condition, is not actionable as an Eighth Amendment claim. Estelle, 429 U.S. at 106. "Indeed, prison authorities are accorded considerable latitude in the diagnosis and treatment of prisoners." Durmer, 991 F.2d at 67 (citations omitted). In the prison context, deliberate indifference is generally not found when some significant level of medical care has been offered to the inmate. Clark v. Doe, 2000 WL 1522855, at *2 (E.D.Pa. Oct.13, 2000) ("courts have consistently rejected Eighth Amendment claims where an inmate has received some level of medical care"). In fact, courts within the Third Circuit have consistently rejected Eighth Amendment claims that are based upon the level of professional care that an inmate received. See, e.g., Ham v. Greer, 269 F. App'x 149 (3d Cir. 2008); Bronson v. White, 2007 WL 3033865 (M.D.Pa. Oct. 15, 2007); Gindraw v. Dendler, 967 F.Supp. 833 (E.D.Pa.1997). Thus, on an Eighth Amendment claim, any attempt to second-guess the propriety or adequacy of a particular course of treatment is disavowed by courts since such determinations remain a question of sound professional medical judgment. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979) (quoting Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir.1977)).

An inmate's dissatisfaction with a course of medical treatment, standing alone, also does not give rise to a viable Eighth Amendment claim. See Taylor v. Norris, 36 Fed. Appx. 228, 229 (8th Cir. 2002) (deliberate indifference claim failed when it boiled down to a disagreement over recommended treatment and decision not to schedule a doctor's appointment); Abdul-Wadood v. Nathan, 91 F.3d 1023, 1024-35 (7th Cir. 1996) (inmate's disagreement with course of treatment fell short of demonstrating deliberate indifference). "[T]he exercise by a doctor of his professional judgment is never deliberate indifference." Gindraw v. Dendler, 967 F.Supp. 833, 836 (E.D.Pa. 1997) (citations omitted).

Here, there is no indication of deliberate indifference on the part of the Primecare defendants. In fact, the only claim of involvement by defendant Toolan was that he agreed with defendant Fishel that the root would either dissolve or push out by itself. As to defendant Fishel, according to the plaintiff's complaint, she performed the procedure and provided the plaintiff with pain medication. Although she indicated that she would return to schedule the plaintiff for a consult with an oral surgeon, she did not. Instead, she followed up with the plaintiff and, upon examination, opined that the plaintiff did not need an oral surgeon consult. In the meantime, while the plaintiff was awaiting the follow-up, his complaint indicates that he was provided with pain medication and antibiotics. There is no indication from the

plaintiff's complaint that defendant Fishel was made aware of the grievances filed by him in which he indicated that he was having pain and headaches due to his condition. In light of all of this, there is no indication that defendant Fishel was deliberately indifferent to the plaintiff's medical needs. Instead, it appears that the plaintiff is simply disagreeing with the treatment provided by defendant Fishel. On this basis, his complaint should be dismissed.

With respect to the motion to dismiss filed on behalf of defendant DeRose, he too argues that the plaintiff's complaint should be dismissed for his failure to exhaust administrative remedies. For the reasons set forth above, defendant DeRose's motion to dismiss on this basis should be denied.

Moreover, defendant DeRose argues that the plaintiff has failed to state a claim against him upon which relief can be granted in that the plaintiff has failed to set forth any allegations in the body of his complaint which would indicate that defendant DeRose violated the plaintiff's constitutional rights.

To state a claim under §1983, the plaintiff must show that the defendants, acting under color of state law, deprived him of a right secured by the Constitution or laws of the United States. 42 U.S.C. §1983; Morse v. Lower Merion School District, 132 F.3d 902 (3d Cir. 1997); Maine v. Thiboutot, 448 U.S. 1 (1980). Liability under §1983 is personal in nature and can only follow personal involvement in the alleged wrongful conduct shown through specific allegations of personal direction or of actual knowledge and

acquiescence. Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997) (citing Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988)). Moreover, relief cannot be granted against a defendant pursuant to §1983 based solely on the theory of respondeat superior or the fact that the defendant was the supervisor or superior of the person whose conduct actually deprived the plaintiff of one of his federally protected rights under color of state law. Rouse v. Plantier, 182 F.3d 192 (3d Cir. 1999); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976); Goode v. Rizzo, 506 F.2d 542, 550 (3d Cir. 1974), rev'd on other grounds, Rizzo v. Goode, 423 U.S. 362 (1976).

Upon review of the plaintiff's complaint, other than naming defendant DeRose in the caption of his complaint, the plaintiff has failed to set forth any allegations with respect to him. It would appear that the plaintiff is attempting to name defendant DeRose based upon a theory of respondeat superior. As such, defendant DeRose's motion to dismiss the plaintiff's complaint should be granted on this basis.

On the basis of the foregoing, **IT IS RECOMMENDED THAT:**

(1) the Primecare defendants' unopposed motion to dismiss the plaintiff's complaint, **(Doc. No. 17)**, be **DENIED** to the extent it is argued that the plaintiff failed to exhaust his administrative remedies and **GRANTED** to the extent it is argued that the plaintiff has failed to state a claim upon

which relief can be granted; and

(2) defendant DeRose's unopposed motion to dismiss the plaintiff's complaint, **(Doc. No. 21)**, be **DENIED** to the extent that it is argued that the plaintiff failed to exhaust his administrative remedies and **GRANTED** to the extent that it is argued that the plaintiff has failed to state a claim upon which relief can be granted.

s/ Malachy E. Mannion
MALACHY E. MANNION
United States Magistrate Judge

Date: May 20, 2011

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Not Reported in F.Supp.2d, 2007 WL 4233500 (E.D.Pa.)
(Cite as: 2007 WL 4233500 (E.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
Dana CARTER, Plaintiff,
v.
Ronald MORRISON, Manny Arroyo, Bernon Lane, Pamela Brown, Patricia Johnson, Lenora King, Lauren Troppauer, Junius Russell, Community Education Centers, Monique Rogers, Jose Alvarado, Elda Casillas, Freddie Harris, Thomas Costa, Paul O'Connor, Lawrence Murray, Dale Evans, Lauren Taylor, Mark Carey, Willie Jones, Julie Stowitzky, Thomas Pekar, Jeffrey Beard, Evans Gary, Defendants.

Civil Action No. 06-3000.
Nov. 28, 2007.

Dana Carter, Philadelphia, PA, pro se.

Carla P. Maresca, Sheryl L. Brown, Deasey, Mahoney & Valentini, Ltd., Philadelphia, PA, for Defendants.

Beth Anne Smith, Office of Attorney General, Philadelphia, PA, for Defendants.

MEMORANDUM

BUCKWALTER, Senior District Judge.

***1** Presently before the Court are Defendants O'Connor, Alvarado, and Casillas's Motion to Dismiss, in part, pursuant to Fed.R.Civ.P. 12(b)(6) (Docket No. 41), Plaintiff's Answer thereto (Docket No. 46), and Defendants O'Connor, Alvarado, and Casillas's Reply to Plaintiff's Answer (Docket No. 47); Defendants King, Troppauer, Russell, Morrison, Arroyo, Lane, and Johnson's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and Motion to Strike the Amended Complaint pursuant to Fed.R.Civ.P. 12(f) (Docket No. 55), and Plaintiff's Declaration in Opposition (Docket No. 70); Defendants Costa, Murray, Stowitzky, Beard, and Gary's Motion to Dismiss pursuant to Fed R. Civ. P. 12(b)(6) (Docket No. 56) and Plaintiff's Declaration in Opposition (Docket No. 69); Defendant Taylor's Motion to Dismiss pursuant to Fed R. Civ. P. 12(b)(6) (Docket No. 57) and Plaintiff's Declaration in Opposition (Docket No. 67); Defendant Carey's Motion to Dismiss pursuant to Fed R. Civ. P. 12(b)(6) (Docket No. 61) and Plaintiff's Declaration in Opposition (Docket No. 68); and Defendants Community Education Centers and Monique Rogers's Motion for Joinder of Defendants King, Troppauer, Russell, Morrison, Arroyo, Lane, and Johnson's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and Motion to Strike the Amended Complaint pursuant to Fed.R.Civ.P. 12(f) . For the reasons stated below, Defendants' Motions to Dismiss are **GRANTED** in part and **DENIED** in part, and the Motion to Strike the Amended Complaint is **DENIED.**

I. BACKGROUND

Plaintiff, Dana Carter, proceeding *pro se,* makes a number of claims against twenty-three defendants. These claims arise out of Plaintiff's confinement in the Joseph E. Coleman Center (the "Coleman Center"), a halfway house (known as a community corrections center) where Plaintiff was serving a portion of his criminal sentence imposed in Pennsylvania state court.

A. THE ALLEGATIONS

Because these motions are filed under Rule of Civil Procedure 12(b)(6), the Court must accept as true all of Plaintiff's allegations.[FN1]

FN1. The Coleman Defendants have argued that the amended complaint should be stricken under Federal Rule of Civil Procedure 12(f) because it is a supplement to the original complaint, and procedure requires one cohesive complaint. (Mem. Supp. Defs.' Morrison, Arroyo, Lane, Johnson, King, Troppauer and Russell's Mot. Strike Pursuant to F.R.C.P. 12(f), or

> Mot. Dismiss Pursuant F.R.C.P. 12(b) (6), at 7-8.) Because Plaintiff proceeds *pro se,* and courts have an obligation to read a *pro se* litigant's pleadings liberally, this motion is denied, and the Court will read Plaintiff's amended complaint as he intended, as a supplement to the original complaint.

On March 1, 2004, Plaintiff was paroled to the Coleman Center (the "Center") from the State Correctional Institute at Greene (SCI-Greene), a state penitentiary. (Compl.¶ 9.) Upon his arrival, he was given the Resident Handbook, which listed the Center's policies, procedures, and services. (*Id.* ¶ 9.) Plaintiff immediately began to question why certain services were not being offered as promised in the Handbook. Plaintiff also assisted other residents in filing grievances about policy violations and unprovided services. Writing to local politicians on his own behalf and on the behalf of others, Plaintiff advocated for change at the Center. (Pl.'s Aff. 1.)

On July 1, 2004, Defendants Arroyo, King, and Brown, all employees at the Center, called Plaintiff into King's office. They told Plaintiff that he was becoming a problem, and they suggested that he stop the "complaining and adjust like the rest." Plaintiff did not stop raising his concerns, however. (Compl.¶ 17.)

***2** On the morning of July 11, 2004, Plaintiff heard a gunshot as he was leaving the Center on a social pass. He telephoned the police from a pay phone and then left for the day. When he returned, he learned that a resident had been killed. Upon seeing Defendant Alvarado, his parole agent, Plaintiff told Alvarado that he had reported the shooting to the police, and because the shooting frightened him, Plaintiff requested a transfer. Alvarado replied that Plaintiff should have minded his own business and that he would not be transferred. Plaintiff then sent an official transfer application to Arroyo, who was the Director of the Center. Plaintiff never received a response. (*Id.* ¶¶ 19-25.)

During his stay at the Center, Plaintiff volunteered in the kitchen. There was no bathroom in the kitchen, and kitchen workers who needed to use the bathroom were directed to go outside, behind a dumpster. On July 21, 2004, Plaintiff was bitten by a spider while relieving himself. The spider bite resulted in abscesses that required medical treatment, including minor surgery. (*Id.* ¶¶ 26-30.) This risk was well known, yet Defendants Arroyo, Morrison, and Lane, all Center employees, as well as the Community Education Center (CEC), repeatedly refused to install a restroom. (Pl.'s Aff. 2.) After this incident, Plaintiff filed a grievance about the lack of a restroom, which went unanswered. (Compl.¶¶ 28-29.) Plaintiff was bitten by another spider on October 21, 2005, this time in his sleeping quarters. He filed another grievance that again went unanswered. That bite also resulted in abscesses and medical treatment. (Pl.'s Aff. 5-6.)

On September 1, 2004, Defendants Alvarado and Casillas arrested Plaintiff for technical parole violations. (Compl.¶¶ 31-33.) Plaintiff was held in a cold, smelly cell without access to a telephone, before being moved more than a day later to the State Correctional Institute at Graterford (SCI-Graterford) while he awaited a parole hearing. (Pl.'s Aff 3.) On September 8, 2004 Alvarado visited Plaintiff and advised him to plead guilty in order to avoid a twelve month "parole hit." Plaintiff refused. (Compl.¶¶ 38.) He remained at SCI-Graterford until January 19, 2005, when he was transferred to SCI-Greene-still awaiting his parole hearing. Upon arriving at SCI-Greene, Plaintiff was told he would be reparoled to the Coleman Center, again under the supervision of Alvarado. No hearing was ever given, and Plaintiff was not found guilty of any parole violations. (Compl.¶¶ 42-45.) Plaintiff later determined that the technical violations that had been asserted were not violations at all, that in fact the complaint had been entirely fabricated to retaliate against him for raising concerns at the Center. (Pl.'s Aff. 4.)

Upon his return to the Center, King told

Plaintiff that he would have to start over at phase one at the Coleman Center, meaning the progress he made and privileges he attained prior to the parole violation arrest were lost. Plaintiff protested this decision since he had not been convicted of any parole violations. King told Plaintiff that the decision had been made by Arroyo. Yet other residents in similar situations were permitted to stay in their previous phase. On February 10, 2005, Plaintiff requested that King ask Arroyo why he had to start over from phase one. King asked Arroyo, but no reason was ever provided. Plaintiff again formally requested from Arroyo that he be transferred. His request again went unanswered. (*Id.*)

***3** The stress from these events mounted and culminated in April 2005 when Plaintiff checked himself into the psychiatric ward at Episcopal Hospital where he stayed for one week. The hospital treated Plaintiff for depression and prescribed drugs that Plaintiff continues to take on a regular basis. (Compl.¶¶ 53-56.)

During this time, and at other times throughout his residence at the Coleman Center, Plaintiff submitted home plans. Based on the Court's best understanding of Plaintiff's allegations, a home plan consists of a request by a resident to be allowed to live outside the Center while on parole. The Center employees and/or the parole agents then investigate the plan to ensure that the resident will be moving into a stable home. Plaintiff submitted many home plans that were never investigated by anyone. (*Id.* ¶ 57.)

In May 2005, Plaintiff completed a course in waste removal. Thereafter, he began working at the Philadelphia Naval Base, where he was paid $12.00 an hour. After just his third paycheck, Alvarado forced Plaintiff to quit his job, stating inaccurately that Plaintiff was required to quit because the Naval Base was unaware of his parole status. As a result, Plaintiff returned to his previous position in a furniture factory, earning $5.50 an hour. (Pl.'s Aff. 4-5.) At all times during his residence, the Center withdrew twenty percent of Plaintiff's earnings from each paycheck. There was nothing in the Handbook that mandated these deductions. Plaintiff asserts that Center employees were keeping these funds for themselves. (Compl.¶¶ 11-14.)

On July 14, 2005, Plaintiff was again arrested for technical violations, this time on the false charge that a phone was found by Defendant King in Plaintiff's bed. The Center confined Plaintiff in the PennCapp unit, a part of the Coleman Center where violators are confined and receive counseling. On July 20, 2005, Alvarado visited Plaintiff. He urged Plaintiff to plead guilty and thus avoid another stay at SCI-Graterford where he might remain until the expiration of his maximum sentence. Under Alvarado's pressure, Plaintiff pleaded guilty. As a result, Plaintiff spent ninety days in the PennCapp program. (Compl.¶¶ 62-65.) While he was at PennCapp, Arroyo and Morrison did not allow Plaintiff to leave for doctors' appointments even though they permitted others in PennCapp to keep their appointments. (*Id.* ¶¶ 68-69.)

In August, 2005, Arroyo resigned as Director of the Coleman Center. Defendant Lane replaced him. (Pl.'s Aff. 5.)

Alvarado visited Plaintiff in PennCapp on September 19, 2005. Plaintiff pleaded with Alvarado to be transferred once he finished his ninety days there. Alvarado agreed. However, when Plaintiff was released, he once again had to report to the Coleman Center-with Alvarado as his parole agent and phase one as his starting point. Defendant Troppauer was his new counselor. In response to his complaints about starting over again, Lane and Alvarado merely told him that he was lucky not to be back in prison. (*Id.;* compl. ¶¶ 71-74.)

***4** The problems persisted after Plaintiff's return. On December 13, 2005, Plaintiff was punished for unsubstantiated complaints made to the Center by Plaintiff's acquaintance from outside the Center. As a result, Plaintiff was confined at the Center during the holiday season. (Pl.'s Aff. 6.)

Also in December, a supervisor was fired in response to complaints by Plaintiff and other residents, which created rising tension between the staff and residents at the Center. Those who had complained about the fired supervisor were systematically forced to leave the Center-sent back to prison or to PennCapp. (*Id.*) On January 9, 2006, Defendant Russell-who had only been hired as an Operations Counselor as of December 19, 2005-searched Plaintiff as he arrived back to the Center from classes. Russell's search was "unprofessional and rude." (*Id.*). Plaintiff filed another grievance. When Russell found out about the grievance, he filed a "special report" falsely claiming that Plaintiff and two other residents had threatened him while conducting the search. Morrison assisted in filing the special report. On January 11, Plaintiff, along with several others, was arrested for making the threats. (*Id.* at 7.) Alvarado and Casillas were also involved in this plan to arrest those who had complained. Of those arrested, at least three were African American. Unlike residents of other races, they were not given the opportunity to have a case conference or explain themselves. After the arrest, Plaintiff was taken back to SCI-Graterford. (*Id.*)

Alvarado visited Plaintiff, and he again suggested that Plaintiff plead guilty, this time with the promise to spend forty-five days at SCI-Graterford and return "back on track." Plaintiff refused. (*Id.*) On January 24, 2006 there was an initial parole hearing. Russell gave testimony, and the charges were not dismissed. After the hearing, Defendant Harris, another Center employee, told Plaintiff that "they have wanted to get you for a long time." Harris would not say who "they" were. Plaintiff learned from his follow residents that Morrison had a list of residents he wanted removed from the Center. Those who had complained about the fired supervisor were each on this list. (*Id.*) On January 26, 2006, Plaintiff sent a letter to the Center asking for an update on his grievance of January 9, 2006 and for his belongings and money the Center allegedly still owed him. No response ever came. (*Id.* at 8.)

On April 25, 2006, Plaintiff had his parole revocation hearing. Plaintiff still awaits the final determination from this hearing. (*Id.*)

Plaintiff commenced this action on July 10, 2006.

B. THE CLAIMS

After a review of Plaintiff's pleadings and Defendants' responses, the Court has determined that Plaintiff is making the following claims:

1. A series of damages claims and requests for declaratory relief under 42 U.S.C. § 1983 for violations of Plaintiff's First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights;

***5** 2. A damages claim under 42 U.S.C. § 1985(3) for conspiracy;

3. A claim under the Privileges and Immunities Clause of Article IV of the U.S. Constitution;

4. A request that the Court declare unconstitutional 37 Pa. Cons.Stat. §§ 71.1(a) and 94.3;

5. A damages claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 et seq;[FN2]

FN2. Plaintiff now concedes that his claims under the Privileges and Immunity Clause of Article IV, under RICO, and his request that the Court declare 37 Pa. Cons.Stat. §§ 71.1(a) and 94.3 unconstitutional all lack merit. (*See* Pl.'s Answer to Original Commonwealth Defs.' Mot. Dismiss Pl.'s Am. Compl. 3, 10.) Therefore, these claims are dismissed as to all the defendants.

6. A series of damages claims under state law, including breach of duty, abuse of authority, abuse of process, malicious prosecution, false arrest, false imprisonment, intentional infliction of mental and emotional distress, defamation, breach of

contract, and conversion.[FN3]

FN3. The Court has interpreted Plaintiff's claims of "destruction of property" and "unauthorized appropriation of funds" as a conversion claim.

7. A request for injunctive relief requiring Defendants to return Plaintiff's lost wages and property; to end Defendants Alvarado's and Casillas's oversight of Plaintiff; and to prevent the defendants from committing "further misconduct, retaliation, racial discrimination, or official abuse." (Am.Compl.8.)

C. THE DEFENDANTS AND THE GROUNDS FOR DISMISSAL

Nineteen Defendants have submitted motions to dismiss under Federal Rule of Civil Procedure Rule 12(b)(6). In some cases, the arguments overlap, and in others, groups of defendants make differing arguments. This section delineates the groups of defendants and their asserted grounds for dismissal.

The first group, referred to as the "Commonwealth Defendants," includes Paul O'Connor, the Director of the Bureau of Community Corrections within the Department of Corrections (DOC); Jose Alvarado, a Parole Agent for the Pennsylvania Board of Probation and Parole (the "Parole Board"); and Elda Casillas, a Parole Supervisor for the Parole Board.

The Commonwealth Defendants assert (1) that Plaintiff fails to state a claim upon which relief may be granted under the Fifth, Eighth, and Fourteenth Amendments, the Privileges and Immunities Clause, and RICO; (2) that Plaintiff's conspiracy claim under section 1985(3) fails because the complaint and amended complaint lack the required specificity; and (3) that sovereign immunity bars Plaintiff's state law claims. In addition, the Commonwealth Defendants assert that there are no cognizable claims whatsoever against O'Connor.[FN4] (*See* Commonwealth Defs.' Mot Dismiss, in Part, Pl.'s Compl.)

FN4. Plaintiff now concedes that his claims against O'Connor lack merit. (*See* Pl.'s Answer to Original Commonwealth Defs.' Mot. Dismiss Pl.'s Am. Compl. 12.) Therefore, all the claims against O'Connor are dismissed.

The second group, referred to as the "Additional Commonwealth Defendants," includes Jeffrey A. Beard and Evans Gary, Officials in the DOC; and Lawrence Murray, Julie Stowitzky, and Thomas Costa, Parole Board employees. These defendants were added in Plaintiff's Amended Complaint. (Am.Compl.¶¶ 5-6.)

The motion to dismiss on behalf of the Additional Commonwealth Defendants is largely the same, with the following additional arguments set forth: (1) that Plaintiff fails to state a claim for which relief may be granted under the First and Fourth Amendments; and (2) that Plaintiff's section 1983 claims fail against the Additional Commonwealth Defendants because they do not state any personal involvement by the Additional Commonwealth Defendants in the alleged constitutional wrongdoing. (*See* Additional Commonwealth Defs.' Mot Dismiss Pl.'s Am. Compl.)

***6** Defendants Lauren Taylor and Mark Carey each submitted their own motions to dismiss. In each case, they set forth the same general arguments, but these parties argue additionally that because there are no allegations of personal involvement, the section 1983 claims must fail. (See Def. Taylor's Mot Dismiss Pl.'s Am. Compl.; Def. Carey's Mot Dismiss Pl.'s Am. Compl.)

The third group, referred to as the "Coleman Defendants," consists of Ronald Morrison, Manny Arroyo, Bernon Lane, Nicole Johnson, Lenora King, Lauren Troppauer, and Junius Russell, all of whom were employed at the Coleman Center during at least some portion of the period of Plaintiff's allegations.

This group has generally asserted the same grounds for dismissal as those above, with the following additions: (1) that Plaintiff failed to pursue and exhaust administrative remedies; (2) to the extent that there are claims stemming from activity prior to July 10, 2004, that Plaintiff failed to timely commence this action under the statute of limitations; and (3) that Plaintiff's intentional infliction of emotional distress claim fails as a matter of law. (*See* Defs. Morrison, Arroyo, Lane, Johnson, King, Troppauer, and Russell Mot. Strike and Mot Dismiss.) The Coleman Defendants have not, however, claimed that Plaintiff's state law claims are barred by sovereign immunity.

This group also now includes Monique Rogers and the Community Education Centers (CEC), who have joined the Coleman Defendants' motion to dismiss. In addition, the CEC argues that, as a municipal organization, it cannot be held liable under section 1983 because Plaintiff does not allege that a decision maker with final authority either instituted or approved others' decision to institute unconstitutional policies. (*See* Joinder Mot. Defs. Rogers and Community Educations Center to Defs. Morrison, Arroyo, Lane, Johnson, King, Troppauer, and Russell Mot. Strike and Mot Dismiss.)

II. LEGAL STANDARD

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The motion "may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." *Maio v. Aetna, Inc.,* 221 F.3d 472, 482 (3d Cir.2000). The defendant bears the burden of persuading the Court that no claim has been stated. *Gould Elecs., Inc. v. United States,* 220 F.3d 169, 178 (3d Cir.2000).

The Court notes that it has an obligation to read a *pro se* litigant's pleadings liberally. *Holley v. Dept. of Veterans Affairs,* 165 F.3d 244, 247-48 (3d Cir.1999) (citing *Haines v. Kerner,* 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)). Courts must apply the applicable law, regardless of whether the *pro se* litigant cited the applicable law or referenced it by name. *Holley,* 165 F.3d at 248. A complaint filed by a *pro se* party should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hughes v. Rowe,* 449 U.S. 5, 10, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980).

III. DISCUSSION

A. STATUTE OF LIMITATIONS

***7** The Coleman Defendants argue that all of Plaintiff's claims arising out of conduct prior to July 10, 2004 should be dismissed for failure to timely commence this action under the statute of limitations. This part of the Coleman Defendants' Motion to Dismiss is denied because, even assuming that the Coleman Defendants' analysis of the statute of limitations is correct, the Court concludes that none of Plaintiff's claims rely on conduct prior to July 10, 2004. The only references to events prior to this date are merely background in nature and as such do not form the basis of any of Plaintiff's claims. (*See* Pl.'s Aff. 1-2.)

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Under the Prison Litigation Reform Act (PLRA), a prisoner who is "confined in any jail, prison, or other correctional facility" may not bring a claim "with respect to prison conditions under section 1983 of this title, or any other Federal law, until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Failure to exhaust administrative remedies is an affirmative defense that the defendants must plead and prove. *Ray v. Kertes,* 285 F.3d 287, 295 (3d Cir.2002). Furthermore, "[t]he PRLA does not require exhaustion of all remedies. Rather, it requires exhaustion of such administrative remedies 'as are available.' " *Brown v. Croak,* 312 F.3d 109, 111 (3d Cir.2002) (quoting 42 U.S.C. § 1997e(a)).

The issue here is whether Plaintiff exhausted his "available" administrative remedies by filing grievances to which he received no response. The Coleman Defendants assert that exhaustion "means completing all available appeals, even if prison officials do not respond." (Mem. Law Supp. Defs. Morrison, Arroyo, Lane, Johnson, King, Troppauer, and Russell Mot. Strike and Mot Dismiss 9.) The cases they cite, however, do not support this proposition.[FN5] The Third Circuit has not answered this question squarely. In *Croak,* the Third Circuit held that a plaintiff had exhausted his remedies where officers misleadingly told him he was not required to file a grievance. In such a circumstance, the court concluded, the plaintiff exhausted his remedies because, in essence, the grievance procedure had not been "available." *Croak,* 312 F.3d at 112-13; *see also Mitchell v. Horn,* 318 F.3d 523, 529 (3d Cir.2003) (concluding that a prisoner lacked an "available" administrative remedy where prison officials refused to provide him with the necessary forms). A number of other circuits have concluded that a plaintiff who files grievances and receives no response has exhausted his or her remedies. *See Carroll v. Gricewich,* No. 1:07-cv-00070, 2007 WL 1521473, at *2 (E.D.Cal. May 22, 2007) (noting that the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have all concluded that administrative remedies are exhausted when grievances receive no reply). This Court concurs with this view.

FN5. The Coleman Defendants cite two cases. In *Davis v. Warman,* the Third Circuit held that simply because language setting forth rules for filing grievances was permissive, the plaintiff was not excused from meeting the PLRA's exhaustion requirements. 49 Fed. Appx. 365, 367 (3d Cir.2002). In *Brown v. Morgan,* a Sixth Circuit case that is not at all relevant here, the Court held that the statute of limitations tolled while the plaintiff exhausted his available administrative remedies. 209 F.3d 595, 596 (6th Cir.2000). Neither case considered whether a plaintiff had exhausted his remedies when after filing an initial grievance he received no response.

Turning to the facts here, Plaintiff has alleged that he repeatedly filed grievances that went unanswered. He repeatedly filed requests that he be transferred; they too went unanswered. Therefore, noting that we are at the motion to dismiss stage and we must accept Plaintiff's allegations as true, the Court will not dismiss any of his claims for failure to exhaust.

C. STATE TORT CLAIMS

1. SOVEREIGN IMMUNITY

***8** All of the defendants except the Coleman Defendants seek to dismiss Plaintiff's state law claims based on sovereign immunity. Under the doctrine of sovereign immunity, plaintiffs are barred from bringing state tort claims against employees of Commonwealth agencies who are acting within the scope of their duties unless the case falls under one of several enumerated exceptions.[FN6] 1 Pa. Cons.Stat. § 2310; 42 Pa. Cons.Stat. § 8522; *McGrath v. Johnson,* 67 F.Supp.2d 499, 511 (E.D.Pa.1999).

FN6. The exceptions are as follows: (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 road conditions; (6) care, custody, or control of animals; (7) liquor store sales; (8) National Guard activities; and (9) toxoids and vaccines. 42 Pa. Cons.Stat. § 8522. It might be argued that the third of these exceptions applies because Plaintiff alleges that the Coleman Center and its employees failed to return his property and took a portion of his earnings. However, these allegations implicate only the Coleman Defendants, who have not raised the sovereign im-

munity defense.

Plaintiff concedes that the Commonwealth Defendants, the Additional Commonwealth Defendants, Mark Carey, and Lauren Taylor are all employees of either the Department of Corrections or the Parole Board. (*See* Amended Compl. ¶ ¶ 5, 6a.) They are thus entitled to the protection afforded by sovereign immunity. *See Maute v. Frank,* 441 Pa.Super. 401, 657 A.2d 985, 986 (Pa.Super.Ct.1995) (applying sovereign immunity defense on behalf of state prison officials); *Wilson v. Marrow,* 917 A.2d 357 (Pa.Commw.Ct.2007) (applying sovereign immunity defense on behalf of parole board officials). Additionally, as set forth in the complaint, the acts for which the defendants are being sued were clearly conducted within the scope of their duties as employees of the Department of Corrections or Parole Board. Plaintiff does not dispute this conclusion.

Plaintiff does, however, make two arguments for why the sovereign immunity defense does not apply here. First, he argues that sovereign immunity does not preclude his state law claims to the extent that they seek damages from defendants in their individual capacities. (Pl.'s Answer to Original Commonwealth Defs.' Mot. Dismiss Pl.'s Am. Compl. 10-12.) This argument is unavailing because, contrary to his contentions, sovereign immunity does "bar [ ] monetary relief claims against state defendants acting in their individual capacity." *Story v. Mechling,* 412 F.Supp.2d 509, 519 (W.D.Pa.2006) (citing *Maute,* 657 A.2d at 986). Second, Plaintiff argues that the defense does not apply because his allegations "constitute a crime, actual fraud, actual malice or willfull misconduct." (Pl.'s Answer to Original Commonwealth Defs. 10-12.) This argument also fails. Commonwealth employees are immune from liability even for intentional torts. *La Frankie v. Miklich,* 152 Pa.Cmwlth. 163, 618 A.2d 1145, 1149 (Pa.Commw.Ct.1992). It is only local agency employees who lose their immunity defense when their actions constitute a crime, actual fraud, actual malice, or willful misconduct. *See Cassidy v. Abington Twp.,* 131 Pa.Cmwlth. 637, 571 A.2d 543 (Pa.Commw.Ct.1990). Here, all the employees asserting the defense of sovereign immunity are Commonwealth employees, not local agency employees, and thus this exception does not apply.

Therefore, because all of the alleged conduct took place within the scope of the defendants' employment and because none of the enumerated exceptions applies to this case, Plaintiff's state law claims must be dismissed as to the Commonwealth Defendants, the Additional Commonwealth Defendants, Defendant Carey, and Defendant Taylor.

2. PLAINTIFF'S STATE LAW CLAIMS AGAINST THE COLEMAN DEFENDANTS

***9** While the Coleman Defendants do not raise a sovereign immunity defense, they still argue that all of the state law claims should be dismissed. They argue that the "only state law claim that can be attributable to [the] Coleman Defendants is the claim for Intentional Infliction of Emotional Distress." (Mem. Law Supp. Defs. Morrison, Arroyo, Lane, Johnson, King, Troppauer, and Russell Mot. Strike and Mot Dismiss 22 n. 1.) And as to the intentional infliction of emotional distress claim, they argue that the Pennsylvania Supreme Court has not recognized this cause of action, or, in the alternative, that Plaintiff has failed to establish the elements of the claim. (*Id.*)

While it is true that the Pennsylvania Supreme Court has not definitively determined the viability of an intentional infliction of emotional distress claim, the Third Circuit has generally concluded that Pennsylvania law does recognize the tort. *See, e.g., Brown v. Muhlenberg Twp.,* 269 F.3d 205, 218-19; *Cox v. Keystone Carbon Co.,* 861 F.2d 390, 394-95 (3d Cir.1988). The elements of this claim are "(1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe." *Chuy v. Philadelphia Eagles Football Club,* 595 f.2d 1265, 1273 (3d Cir.1979) (citing Restatement (Second) of Torts § 46).

The Coleman Defendants argue that Plaintiff's allegations fail to establish the first and last of these elements. Plaintiff has alleged that he spent one week in a psychiatric ward of a hospital as a result of-at least in part-the Coleman Defendants' conduct. Such allegations, if proved true, could meet the element of severe emotional distress. As to the element of outrageous conduct, under Pennsylvania law, a plaintiff must allege conduct that is " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.' " *Hoy v. Angelone,* 554 Pa. 134, 720 A.2d 745, 754 (Pa.1998) (quoting *Buczek v. First Nat'l Bank of Mifflintown,* 366 Pa.Super. 551, 531 A.2d 1122, 1125 (Pa.Super.Ct.1987)). "As a preliminary matter, it is for the court to determine if the defendant's conduct is so extreme as to permit recovery." *Cox,* 861 f.2d at 395. Third Circuit courts have, for example, refused to dismiss intentional infliction of emotional distress claims brought by prisoners based on allegations that prison officials failed to protect inmates from sexual assaults, *see, e.g., White v. Ottinger,* 442 F.Supp.2d 236, 251 (E.D.Pa.2006); *Belt v. Geo Group, Inc.,* No. 06-1210, 2006 WL 1648971, at *3 (E.D.Pa. June 12, 2006), and failed to take seriously a prisoner's medical problems. *See Rodriguez v. Smith,* No. 03-3675, 2005 WL 1484591, at *9 (E.D.Pa. June 21, 2005). Additionally, "Pennsylvania courts have ... indicated that they will be more receptive [to intentional infliction of emotional distress claims] where there is a continuing course of conduct." *Williams v. Guzzardi,* 875 F.2d 46, 52 (3d Cir.1989). This Court concludes that at this stage of the litigation, where Plaintiff claims that he was continuously prevented from completing the Center program and systematically retaliated against for exercising his rights, the Court cannot dismiss Plaintiff's intentional infliction of emotional distress claim.

***10** The Coleman Defendants' assertion that Plaintiff's other state law claims should be dismissed because they are not attributable to them is without merit. To the extent that Plaintiff states cognizable claims for breach of duty, abuse of authority, abuse of process, false arrest and imprisonment, and conversion,[FN7] the facts clearly implicate at least some of the Coleman Defendants.[FN8] It is the Coleman Defendants who allegedly took twenty percent of Plaintiff's earnings in addition to other property without authorization and the Coleman Defendants who allegedly engineered the scheme to keep Plaintiff incarcerated by falsely accusing him of making threats. Therefore, the state claims against the Coleman Defendants will not be dismissed.

FN7. The Coleman Defendants, it should be noted, do not argue that any of Plaintiffs state law claims, other than the intentional infliction of emotional distress claim, fails as a matter of law. Therefore, the Court will not consider whether Plaintiff has alleged the elements of these claims to the extent that they are cognizable.

FN8. To the extent that Plaintiff makes a claim of defamation, the claim is dismissed against all defendants because sovereign immunity protects all the defendants except the Coleman Defendants, and the Coleman Defendants are not implicated in Plaintiff's defamation claims. To the extent that Plaintiff claims there was a breach of contract, this too is dismissed as to all defendants. A breach of contract claim would be frivolous because Plaintiff has not alleged the formation of a contract.

C. SECTION 1983 CLAIMS

A plaintiff may bring a claim under 42 U.S.C. § 1983 by alleging that a person acting under color of state law deprived him of rights, privileges, or immunities secured by the Constitution. *Kost v. Kozakiewicz,* 1 F.3d 176, 184 (3d Cir.1993). Section 1983 is not itself a source of substantive rights; to establish a claim, a plaintiff must allege a violation of federal rights established "elsewhere in the Constitution or the federal laws." *Kneipp v. Ted-*

der, 95 F.3d 1199, 1204 (3d Cir.1996)

Liability under section 1983 cannot rest solely on respondeat superior. A defendant must have personal involvement in the alleged constitutional violation to be held liable. *Rode v. Dellarciprete,* 845 F.2d 1195, 1209 (3d Cir.1988). However, " '[a]ctual knowledge and acquiescence' suffices for supervisory liability because it can be equated with 'personal direction' and 'direct [action] by the supervisor.' " *Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1294 (3d Cir.1997), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co.,* --- U.S. ----, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) (quoting *Andrews v. City of Phila.,* 895 F.2d 1469, 1478 (3d Cir.1990)).

Plaintiff claims that the defendants violated his First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights. Plaintiff alleges the same facts as the bases for each of these claims and has failed to explain in detail how the defendants' conduct deprived each individual right. The Court has examined each claim and has applied the most relevant law based on Plaintiff's allegations. Plaintiff has withdrawn his claim under the Fifth Amendment. (*See* Pl.'s Answer to Original Commonwealth Defs.' Mot. Dismiss 3.) The others are considered in turn.

1. FIRST AMENDMENT

The only viable First Amendment claim by Plaintiff appears to be that he was retaliated against for making constitutionally protected statements. The elements for a retaliation claim under the First Amendment are as follows:

> (1) constitutionally protected conduct, (2) an adverse action by prison officials 'sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights,' and (3) 'a causal link between the exercise of his constitutional rights and the adverse action taken against him.'

***11** *Mitchell v. Horn,* 318 F.3d 523, 530 (3d Cir.2003) (quoting *Rauser v. Horn,* 241 F.3d 330, 333 (3d Cir.2001)). Plaintiff alleges that he filed grievances and, aside from receiving no response, the Defendants retaliated against him by, among other things, arresting him for parole violations, forcing him to start over within the Coleman Center's program, refusing to perform home studies, and otherwise preventing him from completing his sentence.

The Coleman Defendants argue that Plaintiff did not engage in constitutionally protected conduct. However, the Third Circuit has clearly held that when prisoners file complaints or grievances they are engaging in constitutionally protected activity. *See Robinson v. Taylor,* 204 Fed. Appx. 155, 157 (3d Cir.2006) ("[Plaintiff's] filing of a grievance to complain about [Defendant's] behavior is constitutionally protected conduct."); *Mitchell v. Horn,* 318 F.3d 523, 530 (3d Cir.2003) ("[Plaintiff's] allegation that he was falsely charged with misconduct in retaliation for filing complaints against Officer Wilson implicates conduct protected by the First Amendment."); *Smith v. Mensinger,* 293 F.3d 641, 653 (3d Cir.2002) ("We have ... held that falsifying misconduct reports in retaliation for an inmate's resort to legal process is a violation of the First Amendment's guarantee of free access to the courts.").

Plaintiff's allegations also establish the second element-that the defendants took adverse action. Specifically, Plaintiff has alleged that he was arrested three times, twice being sent back to prison and once being confined in PennCapp. As the Third Circuit has stated, "several months in disciplinary confinement would deter a reasonably firm prisoner from exercising his First Amendment rights." *Mitchell,* 318 F.3d at 530. Moreover, this Court concludes that by forcing Plaintiff to start over at "phase one," and refusing to do a "home study," defendants may have taken further adverse acts. It is not entirely clear what it means to have to start from phase one, but there is at least an issue of fact that by starting the program from the start, Plaintiff's overall confinement was lengthened significantly because he had to proceed through the

stages that he had already completed. Similarly, when the Defendants refused to perform a home study, it appears that they contributed to Plaintiff's continued confinement. The Court makes no finding here as to whether these are in fact adverse acts, only that at the motion to dismiss stage it is disputable that they would deter a reasonably firm prisoner from exercising his First Amendment rights.

Plaintiff's allegations have also established the final element of a retaliation claim-a causal nexus between the constitutionally protected activity and the adverse action. In *Mitchell,* a case that reversed a district court's finding that the plaintiff's claims were frivolous, the Third Circuit determined "that the word 'retaliation' in [Plaintiff's] complaint sufficiently implies a causal link between his complaints and the misconduct charges filed against him." *Id.* The court noted that it would have "prefer [red] that [Plaintiff's] complaint be more detailed, [but] we take seriously our charge to construe *pro se* complaints nonrestrictively." *Id.* Here, not only does Plaintiff state the word retaliation, but he makes allegations that various defendants warned him not to make grievances; that he was told that certain defendants were angry with him for his grievances; and that other residents were treated differently, suggesting that the defendants may have targeted Plaintiff specifically.

***12** While Plaintiff has alleged a cause of action for retaliation in violation of his First Amendment rights, he has not alleged "personal involvement" on the part of all the defendants. The first alleged retaliatory act occurred on September 1, 2004 when Plaintiff was arrested and as a result was sent back to prison for several months. Plaintiff's allegations implicate only Alvarado and Casillas. On his return to the Center, Plaintiff had to start again at phase one. The allegations indicate that defendants King and Arroyo were involved in making this decision. The second alleged arrest again implicates Alvarado and Casillas, but also implicates King, whom Plaintiff alleges manufactured the story of a cell phone found in Plaintiff's possession. The decision to force Plaintiff to start from phase one of the program again appears to have been made by Lane and Troppauer this time. The final alleged arrest, made January 11, 2006, implicates several more defendants. Plaintiff alleges that Morrison, Russell, Alvarado, and Casillas conspired to retaliate against plaintiff for filing a grievance concerning Russell's search of Plaintiff.

Because Plaintiff does not allege personal involvement, either directly or by showing direct knowledge or acquiescence, the First Amendment claim is dismissed as to Taylor and Carey; all of the Additional Commonwealth Defendants; the CEC; and Johnson and Rogers of the Coleman Defendants.

2. FOURTH AMENDMENT

Plaintiff's allegations conceivably implicate the Fourth Amendment in a few ways. The Fourth Amendment generally prohibits unreasonable searches. Defendant Russell searched Plaintiff on January 9, 2006. However, a prisoner does not have the same expectation of privacy as free individuals and therefore "the Fourth Amendment proscription against unreasonable searches does not apply." *Hudson v. Palmer,* 468 U.S. 517, 526, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). To promote the security of a prison and the safety of inmates, random searches of inmates are considered necessary. *Id.* at 529. The reasoning of this rule applies equally to halfway houses. Plaintiff does not allege that the search was conducted unreasonably other than asserting that Russell was unprofessional and rude. Therefore, this search does not provide a basis for relief under the Fourth Amendment.

Plaintiff also alleges that his three "arrests" were not supported by probable cause. To the extent that Plaintiff brings a Fourth Amendment malicious prosecution claim, this claim must be dismissed because he has not alleged the necessary element that there was a " 'termination of [a] prior criminal proceeding in favor of the accused.' " *Donahue v. Gavin,* 280 F.3d 371, 383 (3d Cir.2002) (quoting *Heck v. Humphrey,* 512 U.S. 477, 484, 114

S.Ct. 2364, 129 L.Ed.2d 383 (1994)). Additionally, Plaintiff's "arrests" occurred while he was in the state prison system. He was serving a portion of his sentence in one facility-the Coleman Center. He was then charged three times with technical violations, which resulted in removal from the Coleman Center to another facility. This type of "arrest" is not a seizure for Fourth Amendment malicious prosecution purposes. *See Rauso v. Romero,* No. 03-5810, 2005 WL 1320132, at *2 (E.D.Pa. June 2, 2005) ("[P]laintiff did not sustain a 'deprivation of liberty consistent with the concept of a seizure' in connection with the hearing or the rescission of parole [from a Community Corrections Center,] since he was already in prison at the time." (quoting *Donohue v. Gavin,* 280 F.3d 371, 380 (3d Cir.2002)); *see also Holmes v. Grant,* No. 03 Civ. 3426, 2006 WL 851753, at * 14 (S.D.N.Y. Mar. 26, 2006) ("An inmate already incarcerated has not suffered any unconstitutional deprivation of liberty as a result of being charged with new criminal offenses and being forced to appear in court to defend himself.").

***13** Plaintiff may also be bringing a false arrest claim in connection with these three arrests. "[W]here the police lack probable cause to make an arrest, the arrestee has a claim under § 1983 for false imprisonment based on a detention pursuant to that arrest." *Groman v. Twp. of Manalapan,* 47 F.3d 628, 636 (3d Cir.1995). However, if an arrest within the prison system does not constitute a seizure for purposes of malicious prosecution, the logic extends to a false arrest claim as well. Therefore, both the malicious prosecution and false arrest claims are without merit.

Accordingly, Plaintiff's Fourth Amendment claims are dismissed as to all Defendants.

3. EIGHTH AMENDMENT

The Eighth Amendment, which prohibits cruel and unusual punishment, imposes a duty on prison officials to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmate." *Farmer v. Brennan,* 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (internal quotation marks omitted). To state a claim under the Eighth Amendment, there are two elements: (1) an objective element-"whether the constitutional deprivation was sufficiently serious;" and (2) a subjective element-"whether the official had a 'sufficiently culpable state of mind.' " *McGrath v. Johnson,* 67 F.Supp.2d 499, 513 (E.D.Pa.1999) (quoting *Young v. Quinlan,* 960 F.2d 351, 360 (3d Cir.1993)). To be a sufficiently serious deprivation, the conditions must fail to meet "the minimal civilized measure of life's necessities." *Farmer v. Brennan,* 511 U.S. 825, 834-35, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (quoting *Rhodes v. Chapman,* 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)). As to the question of what is a sufficiently culpable state of mind, "the named defendants in a case [must] have, and disregard, actual knowledge of a serious risk of harm" to the inmates. *Kemp v. Hatcher,* No. 96-7, 1996 WL 612834, at *2 (E.D.Pa. Oct.25, 1996).

Plaintiff appears to argue that the conditions at the Coleman Center were unsanitary and inhumane as evidenced by the fact that he was twice bitten by spiders, once when going to the bathroom outside the kitchen, and another time while in his sleeping quarters. He alleges that the spider bites caused him injuries requiring hospital treatment. He further alleges that he made complaints about the spiders after each incident, yet no action was taken

Plaintiff's allegations are not sufficiently serious to withstand a motion to dismiss. Plaintiff volunteered as a kitchen worker and knew that there were no restroom facilities. Because he was not forced to be in the kitchen, the conditions there do not constitute cruel and unusual punishment. *See Holmes v. Sheldon-Kloss,* No. 07-cv-00740, 2007 WL 2753173, at *1 (E.D.Pa. Sept.20, 2007) (concluding that an injury caused by voluntary janitorial work did not constitute cruel and unusual punishment); *see also Ward v. Lamanna,* No. 04-11, 2007 WL 791130, at *8 (W.D.Pa. Mar.14,

2007) (noting some disagreement among other courts as to whether voluntarily engaging in an activity forecloses a cruel and unusual punishment claim and concluding in that case that it did). One spider bite in Plaintiff's sleeping quarters also does not constitute a sufficient deprivation in and of itself. Even if it did, there are no allegations that any of the Defendants had actual knowledge of an infestation in the sleeping quarters of the Coleman Center prior to Plaintiff being bitten. Therefore, Plaintiff's Eighth Amendment claim is dismissed as to all Defendants.

4. FOURTEENTH AMENDMENT

***14** Plaintiff also raises claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. To establish a procedural Due Process claim [FN9] a plaintiff must allege (1) the existence of a protected liberty interest that has been interfered with by the state and (2) procedures related to the deprivation that were constitutionally insufficient. *Sample v. Diecks,* 885 F.2d 1099, 1113 (3d Cir.1989). As to the first of these elements, "[s]uch a 'liberty interest' may be derived from one of two sources: The interest may be of such a fundamental nature that it inheres in the Constitution itself or it may be created by state law." *McGrath,* 67 F.Supp.2d at 514.

> FN9. To the extent that Plaintiff raises a substantive due process claim, it is without merit. The only specific substantive due process right cited by Plaintiff is access to the courts. (Pl.'s Answer to Original Commonwealth Defs.' Mot. Dismiss Pl.'s Am. Compl. 6.) But Plaintiff does not allege anywhere in his pleadings that he was denied access to the courts. To the extent that his other claims might rest on substantive rights guaranteed by the Due Process Clause, they are better considered under other provisions of the Bill of Rights and state law, such as the First Amendment and Eighth Amendment, considered above. *See Goldhaber v. Higgins,* No. 06-134J, 2007 WL 2907209, at *31 (W.D.Pa. Sept.28, 2007) ("The generalized, imprecise notion of 'substantive due process' is inapplicable where a particular provision of the Bill of Rights is directly applicable to a claim." (citing *Albright v. Oliver,* 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994)).

Here, Plaintiff has alleged that he was deprived of a liberty interest when on three occasions his parole status in a halfway house was revoked.[FN10] Courts in the Third Circuit, following the Supreme Court, have held that "[t]he conditional freedom of a parolee is a liberty interest protected by the due process clause of the Fourteenth Amendment." *See, e.g., Hawkins v. Pa. Bd. of Prob. and Parole,* No. 07-0552, 2007 WL 1852822, at *4 (E.D.Pa. June 26, 2007) (citing *Morrissey v. Brewer,* 408 U.S. 471, 482-88, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). However, the Third Circuit, again applying Supreme Court precedent, has stated that a "prisoner does not have a liberty interest in remaining in a preferred facility within a state's prison system." *See Asquith v. Dep't of Corr.,* 186 F.3d 407, 411 (3d Cir.1999) (citing *Montanye v. Haymes,* 427 U.S. 236, 242, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976)). The Third Circuit has concluded that living in a halfway house aligns more closely with being in prison because it "amount[s] to institutional confinement," and "while a prisoner remains in institutional confinement, the Due Process Clause does not protect his interest in remaining in a particular facility." *Id.* Thus Plaintiff has alleged no liberty interest that inheres in the Constitution. Nor is there a viable state law-created right implicating the due process clause. *See Ogrod v. United States,* No. 06-5496, 2007 WL 2319766, at *3 (E.D.Pa. August 10, 2007) (concluding that there could be no state-created due process right involving revocation of parole status from a halfway house because a decision to revoke was not an " 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life' " (quoting *Sandin v. Conner,* 515 U.S. 472, 484, 115 S.Ct. 2293, 132

L.Ed.2d 418 (1995))). Therefore, Plaintiff's procedural due process claim is dismissed as to all Defendants because he has not alleged the deprivation of a liberty interest.

> FN10. To the extent that Plaintiff is arguing that his missing property constitutes a deprivation under the Due Process Clause, this too fails. Where there exists an applicable state tort remedy-in this case conversion-a claim brought under the Due Process Clause is inappropriate. *See Meyer v. Dep't of Corr.,* No. 06-117, 2006 WL 890917, at *1 (D.Del. Mar.27, 2006) (concluding that because Plaintiff "has available to her the option of filing a common law claim for conversion of property," she "cannot maintain a cause of action pursuant to § 1983." (citing *Hudson v. Palmer,* 468 U.S. 517, 535, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)).

Plaintiff's Fourteenth Amendment equal protection claim, however, will not be dismissed. The Equal Protection Clause "prohibits selective enforcement of the law based on considerations such as race." *Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). To successfully allege an equal protection claim, a plaintiff must show the following:

> (1) the complaining person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person.

***15** *Sabatini v. Reinstein,* No. 99-2393, 1999 WL 636667, at *2 (E.D.Pa. Aug.20, 1999). Here, Plaintiff has alleged that he and others were treated differently because they were African American. Plaintiff alleges that others who were not African American were treated more favorably with respect to providing case conferences when there was a problem and performing home visits to more quickly transition them out of the Coleman Center. Plaintiff also alleges that some of the defendants arrested him and others in part based on racial animus. These allegations sufficiently state a claim under the Equal Protection Clause. *Compare Thomas v. Independence Twp.,* 463 F.3d 285, 297-98 (3d Cir.2006) (concluding that Plaintiff stated a cognizable equal protection claim where the complaint averred that defendants "engaged in ... misconduct 'solely based upon Mr. Thomas' race and ancestry,' and that plaintiffs are 'subject to the exercise of police and official power and actions to which similarly situated persons are not subject' " (quoting the complaint)), *with Williams v. Wickiser,* 2007 WL 3125019, at * 9 (M.D.Pa.2007) (dismissing an equal protection claim where Plaintiff did not allege either that "he was being treated differently than other similarly situated inmates ... [or] that Defendants treated him differently ... based on his race, gender, or nationality").

Plaintiff alleges the personal involvement of Alvarado, Casillas, King, Arroyo, Lane, Morrison, Russell, and Troppauer only-the same group that he alleged retaliated against him. Therefore, Plaintiff's equal protection claim is dismissed against Taylor and Carey; all of the Additional Commonwealth Defendants; the CEC; and Johnson and Rogers of the Coleman Defendants.

D. SECTION 1985(3) CONSPIRACY CLAIM

To state a claim under section 1985(3), a plaintiff must allege four things: (1) a conspiracy; (2) motivated by a racial or class-based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons of the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States. *Herring v. Chichester Sch. Dist.,* No. 06-5525, 2007 WL 3287400, at *8 (E.D.Pa. Nov.6, 2007). The Supreme Court has stated "that there must be some racial, or perhaps

otherwise class-based, invidiously discriminatory animus behind the conspirators' action" to state a claim under section 1985. *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). As discussed above with respect to Plaintiff's equal protection claim, Plaintiff has sufficiently alleged that certain defendants were racially motivated in taking adverse actions against him.

The focus of the various defendants' arguments is that Plaintiff fails to plead with particularity, as required in a section 1985(3) claim. "To plead conspiracy under Section 1985(3), a complaint must allege specific facts suggesting there was a mutual understanding among the conspirators to take actions directed toward an unconstitutional end." *Lamb Found. v. North Wales Borough,* No. 01-950, 2001 WL 1468401, at *15 (E.D.Pa. Nov.16, 2001). The Court concludes that Plaintiff has alleged sufficient facts to satisfy section 1985(3)'s pleading requirements. He has alleged that people of other races were treated differently, that groups of defendants at various times threatened him for filing grievances, and he has further alleged that he was told that certain defendants had conspired to have him removed from the Center back to prison. At this stage, these allegations provide enough detail to support a conspiracy claim under section 1985(3) .

***16** This claim implicates the same defendants as the equal protection claim-Alvarado, Casillas, King, Arroyo, Lane, Morrison, Russell, and Troppauer. Therefore, the section 1985(3) claim is dismissed as to Taylor and Carey; all of the Additional Commonwealth Defendants; the CEC; and Johnson and Rogers of the Coleman Defendants.

IV. CONCLUSION

For the reasons stated above, the Court grants Defendants' Motions to Dismiss in part, and denies the Motions in part. An Order consistent with this Memorandum follows.

ORDER

AND NOW, this 28th day of November, 2007, upon consideration of Defendants O'Connor, Alvarado, and Casillas's Motion to Dismiss, in part, pursuant to Fed.R.Civ.P. 12(b)(6) (Docket No. 41), Plaintiff's Answer thereto (Docket No. 46), and Defendants O'Connor, Alvarado, and Casillas's Reply to Plaintiff's Answer (Docket No. 47); Defendants King, Troppauer, Russell, Morrison, Arroyo, Lane, and Johnson's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b) (6) and Motion to Strike the Amended Complaint pursuant to Fed.R.Civ.P. 12(f) (Docket No. 55), and Plaintiff's Declaration in Opposition (Docket No. 70); Defendants Costa, Murray, Stowitzky, Beard, and Gary's Motion to Dismiss pursuant to Fed R. Civ. P. 12(b) (6) (Docket No. 56) and Plaintiff's Declaration in Opposition (Docket No. 69); Defendant Taylor's Motion to Dismiss pursuant to Fed R. Civ. P. 12(b)(6) (Docket No. 57) and Plaintiff's Declaration in Opposition (Docket No. 67); Defendant Carey's Motion to Dismiss pursuant to Fed R. Civ. P. 12(b)(6) (Docket No. 61) and Plaintiff's Declaration in Opposition (Docket No. 68); Defendants Community Education Centers and Monique Rogers's Motion for Joinder of Defendants King, Troppauer, Russell, Morrison, Arroyo, Lane, and Johnson's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and Motion to Strike the Amended Complaint pursuant to Fed.R.Civ.P. 12(f), it is hereby **ORDERED:**

1. The Motion to Strike the Amended Complaint (Docket No. 55) is **DENIED;**

2. Defendant Taylor's Motion to Dismiss (Docket No. 57) is **GRANTED** as to all of Plaintiff's claims;

3. Defendant Carey's Motion to Dismiss (Docket No. 61) is **GRANTED** as to all of Plaintiff's claims;

4. Defendants Costa, Murray, Stowitzky, Beard, and Gary's Motion to Dismiss (Docket No. 56) is **GRANTED** as to all of Plaintiff's claims;

5. Defendant O'Connor's Motion to Dismiss

(Docket 41) is **GRANTED** as to all of Plaintiff's claims;

6. Defendants Alvarado and Casillas's Motion to Dismiss (Docket No. 41) is **DENIED** as to Plaintiff's claims brought under 42 U.S.C. § 1983 and the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment; and Plaintiff's claim brought under 42 U.S.C. § 1985(3). As to all of Plaintiff's other claims, Defendants Alvarado and Casillas's Motion to Dismiss is **GRANTED.**

7. Defendants Morrison, Arroyo, Lane, Troppauer, King, and Russell's Motion to Dismiss (Docket No. 55) is **DENIED** as to all of Plaintiff's state law claims other than his Defamation and Contract claims; Plaintiffs section 1983 claims brought pursuant to the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment; and Plaintiff's claim brought under 42 U.S.C. § 1985(3). As to all of Plaintiff's other claims-including his Defamation and Contract claims-Defendants Morrison, Arroyo, Lane, Troppauer, King, and Russell's Motion to Dismiss is **GRANTED.**

***17** 8. Defendant Johnson's Motion to Dismiss (Docket No. 55) is **DENIED** as to all of Plaintiff's state law claims other than his Defamation and Contract claims. As to all of Plaintiff's other claims-including his Defamation and Contract claims-Defendant Johnson's Motion to Dismiss is **GRANTED.**

9. Defendants Rogers and the Community Education Center's Motion to Dismiss (Docket Nos. 55, 68) is **DENIED** as to all of Plaintiff's state law claims other than his Defamation and Contract claims. As to all of Plaintiff's other claims-including his Defamation and Contract claims-Defendants Rogers and the Community Education Center's Motion to Dismiss is **GRANTED.**

E.D.Pa.,2007.
Carter v. Morrison

Not Reported in F.Supp.2d, 2007 WL 4233500 (E.D.Pa.)

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Not Reported in F.Supp.2d, 2000 WL 1522855 (E.D.Pa.)
(Cite as: 2000 WL 1522855 (E.D.Pa.))

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Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.
Maxcell CLARK, Jr.,
v.
Dr. John DOE, MD, et al.

No. CIV. A. 99-5616.
Oct. 13, 2000.

MEMORANDUM

O'NEILL.

***1** Plaintiff Maxcell Clark, an inmate at SCI-Somerset, has brought this pro se action under 42 U.S.C. § 1983 alleging violations of his civil rights under the Eighth Amendment to the United States Constitution. Plaintiff also asserts a number of state law negligence and medical malpractice claims. Clark has hepatitis C and the human immunodeficiency virus (HIV) and makes a number of allegations concerning his treatment for these illnesses, mostly involving a failure to properly administer medication. Defendants Dr. John Doe, M.D., Stacey Miles, R.N., Irwin Goldberg, Cynthia Ward, R.N., Joanne Cranston, R.N., and Jane Doe # 1, # 2, and # 3 have moved to dismiss plaintiff's complaint pursuant to Fed. R. of Civ. P. 12(b)(6) or in the alternative for a more definite statement under Fed.R.Civ.P. 12(e). Plaintiff has moved pursuant to Fed.R.Civ.P. 15(a) for leave to file an amended complaint and has requested the appointment of legal counsel. My attempts to obtain legal counsel for plaintiff have not been successful.

I. STANDARD OF REVIEW

In resolving a motion to dismiss all well-plead factual allegations in the complaint are presumed to be true and all reasonable inferences are to be drawn in favor of the non-moving party. *See H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 249-50, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). A court should not dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gobson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Additionally, pro se complaints must be liberally construed. *See Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

II. BACKGROUND

Plaintiff commenced this action on November 9, 1999, and leave to proceed in forma pauperis was granted on December 16, 1999. Plaintiff's complaint contained 180 paragraphs asserting a series of incidents involving alleged medical misconduct between June, 1997 and May 1999, all of which took place at Wackenhut Corrections Corporation Delaware County Prison ("Wackenhut"). FN1

FN1. While it is not clear from plaintiff's complaint it appears that Clark has been temporarily housed at the Wackenhut facility on a number of separate occasions. The incidents Clark alleges occurred at Wackenhut cover the following time periods: May 14-27, 1999; January 24-February 12, 1999; May 25-June 23, 1998; January 14-30, 1998; June 25-August 4, 1997.

Plaintiff's allegations include a number of incidents where his requests for a medical examination were delayed. For example, on June 25, 1997 plaintiff asked to see a physician. He was told an appointment had been made but he was never examined. On July 6 plaintiff renewed his request and received a response the next day asking for a more detailed explanation of his medical problem. On July 13, plaintiff submitted a more specific request and was seen by a physician on or around July 15, 1997. (Pl.'s Comp. ¶¶ 155-165).

Mr. Clark also objects to the manner and course of his treatment while an inmate at Wackenhut. Specifically, plaintiff alleges that double portion meals were required by his condition and were improperly denied by prison authorities. (¶ 167).

When Clark complained to prison officials he was told that double meals would be reinstated if after re-evaluating his lab reports and weight the doctor thought it advisable. (¶¶ 169, 173). Clark also understood that many of his medications were not to be taken on an empty stomach and therefore milk, rather than water, would be provided when the drugs were administered. (¶¶ 59, 111, 132, 167). On a number of occasions milk was not provided. (¶¶ 60-65, 133-154). After notifying prison authorities Clark was told that the drug administration schedule could not revolve around one inmate; however, a "keep on person" privilege might be extended to him so that Clark could carry pills with him and take them at meal times. (¶ 115). Plaintiff maintains his medications must be taken at specific times of the day, some of which are not at meal times. (¶ 72). Plaintiff also requested certain drugs to relieve headaches, back pain, sore muscles, colds, and fevers. In response plaintiff was told that Tylenol and other similar medicines were available at the prison commissary. (¶¶ 175-179).

A number of plaintiff's allegations revolve around changes in treatment when he was temporarily transferred from SCI-Camp Hill to Wackenhut from May 14, 1999 to May 27, 1999. Clark alleges he received no medical treatment at all for the first forty-eight hours after his arrival. (¶ 22). At Camp Hill Clark received 800 milligrams of ibuprofen but Wackenhut officials refused to provide such medication. When he complained a nurse told Clark that his prescription had expired. (¶ 36). Another nurse suggested he take four Advil instead. (¶ 12). Plaintiff alleges that other medications necessary to treat his illnesses were discontinued as well. This change in treatment took place following a medical examination by Wackenhut officials on May 19 (¶¶ 4,9). Clark put in a request for these additional drugs and received a written response stating that Wackenhut prison officials had verified his medications with Camp Hill medical personnel who stated that such drugs were not part of his course of treatment. (¶ 28). Plaintiff also alleges he received two unnecessary injections; one a test for tuberculosis. (¶ 17). Lastly, Clark states that the nursing staff at Wackenhut treated his "oral thrush" [FN2] with alcohol swabs instead of the medication plaintiff had understood the doctor had prescribed. (¶ 19).

FN2. Described as open blisters on plaintiff's gums and throat.

III. DISCUSSION

***2** Clark asserts claims against defendants for damages and injunctive relief under 42 U.S.C. § 1983, alleging violations of the Eighth Amendment's prohibition on cruel and unusual punishment. It is well settled that inmates are entitled to reasonable medical care and may hold prison officials liable under the Eighth Amendment if such care is inadequate. *See Estelle v. Gamble,* 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). However, in order to establish that his treatment rose to the level of a constitutional violation, plaintiff must demonstrate that defendants exhibited "deliberate indifference to [his] serious medical needs." *Petrichko v. Kurtz,* 52 F.Supp.2d 506, 507 (E.D.Pa.1999). Clark's HIV-positive status is without question a medically "serious" one. *See, e.g., Freed v. Horn,* No. 95-CV-2824, 1995 WL 710529 (E.D.Pa. Dec.1, 1995); *Taylor v. Barnett,* 105 F.Supp.2d 483 (E.D.Va.2000); *Walker v. Peters,* 989 F.Supp. 971 (N.D.Ill.1997). However, I hold that plaintiff's allegations, if proved, do not amount to deliberate indifference to his condition.

In *Estelle* the Supreme Court established a framework for evaluating the viability of inmate claims alleging inadequate medical care. The *Estelle* Court noted:

[I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional viola-

tion merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Estelle, at 106-07. In applying this standard courts have consistently rejected Eighth Amendment claims where an inmate has received some level of medical care. *See Wilkins v. Owens,* Civ. A. No. 87-0954, 1987 WL 11940 (E.D.Pa. May 29,1987). Inmates' disagreements with prison medical personnel about the kind of treatment received have also generally have not been held to violate the Eighth Amendment. *See Wright v. Collins,* 766 F.2d 841, 849 (4th Cir.1985). The required "deliberate indifference" may be demonstrated by either actual intent or reckless disregard on the part of defendants. *See Miltier v. Beorn,* 896 F.2d 848, 851 (4th Cir.1990). However plaintiff must demonstrate that defendants' acts or omissions were "[s]o grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Id.* I recognize that a pro se complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers," *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); but accepting all Clark's allegations as true there is nothing in his compliant to indicate that defendants' acts or omissions rose to the level of "deliberate indifference" required under *Estelle.*

***3** Most of Clark's allegations center around differences of opinion as to the proper course of his treatment. Clark believed that certain medications should not have been discontinued when he arrived at Wackenhut; prison officials disagreed. Even if this change in medication seriously threatened plaintiffs health-a conclusion not supported by the complaint-Clark still must establish that the defendants were sufficiently deliberately indifferent. *See Nolley v. County of Erie,* 776 F.Supp. 715, 740 (W.D.N.Y.1991) (holding that the occasional failure of a correctional facility to provide an HIV-positive inmate with her AZT medication was due to a negligent medication delivery system and did not violate the Eighth Amendment). Clark maintains that the double sized meals he had received at Camp Hill prison were improperly denied by Wackenhutt officials. Wackenhutt medical personnel agreed to reinstate larger portion meals if they felt that it was necessary following an examination. Similarly, Clark expected the sores in his mouth to be treated with medication prescribed by a doctor. Instead alcohol swabs were used. Although Clark does not agree with the medical staff about the kind of treatment he received such "disagreement does not give rise to a claim for deliberate indifference to serious medical needs." *Perkins v. Kansas Dept. of Corrections,* 165 F.3d 803, 811 (10th Cir.1999).

Further, it appears that prison officials considered and acted upon almost all of Clark's complaints and requests, even if he was not satisfied with the answers he received. When he wanted higher doses of ibuprofen he was told that his prescription had run out and that he could take smaller more frequent doses of Advil. When he requested medical attention he generally was seen in a reasonable amount of time. When he complained about not having milk with his medications he was told to take them at meal times. When he requested that he be given his medication at different times he was told the schedule could not be altered for one inmate. While this was not what he wanted Clark can hardly be said to have been deprived of "the minimal civilized measures of life's necessities" required to establish a violation of the Eighth Amendment. *Rhodes v. Chapman,* 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59.

***4** Finally, even if Clark received inadequate medical treatment he must actually suffer some degree of harm in order to allege he has been the victim of cruel and unusual punishment. In affirming that the plaintiff had not established a constitutional violation for unreasonable medical care the Fifth

Circuit in *Mayweather v. Foti,* 958 F.2d 91 (5th Cir.1992), stated: "[plaintiff's] [t]reatment may not have been the best that money could buy, and occasionally a dose of medication may have been forgotten, but these deficiencies were minimal, they do not show an unreasonable standard of care, and they fall far short of establishing deliberate indifference by the prison authorities." *Id.* Clark is similarly unable to establish deliberate indifference on the part of defendants. The only injuries that Clark alleges are sporadic "pain and sitting posture difficulty" after he was denied 800 hundred milligrams of ibuprofen (Pl.'s Comp. ¶ 20, ¶ 37) and a general concern that his "health [was] in danger because [he was] not getting the medical treatment [he] deserve[d]." (¶ 179). Such injuries are insufficient to establish a constitutional violation. *See Burton v. Cameron, Tex.,* 884 F.Supp. 234, 238-39 (rejecting a prisoner with AID's claim that medical personnel's erratic treatment increased his risk of injury after a doctor testified that the delays in getting medication did not effect his physical or mental heath).

With respect to plaintiff's motion for leave to amend his complaint, the Federal Rules of Civil Procedure provide that leave to amend "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). The Supreme Court has held that in the absence of any apparent reason not to, "this mandate is to be heeded." *Forman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). A court may however, justify the denial of a motion to amend where the amendment would be futile. *See In Re Burlington Coat Factory,* 114 F.3d 1410 (3d Cir.1997). In making this determination a court "applies the same standard of legal sufficiency as applies under Fed.R.Civ.P. 12(b)(6)," taking all facts in the complaint as true and viewing them in the light most favorable to the plaintiff. *Id.* at 1434. As discussed above, Clark's complaint alleges no facts that might raise defendants' conduct to the level of deliberate indifference required to bring a claim of cruel and unusual punishment under the Eighth Amendment. Any amendment to his complaint would be futile.[FN3]

FN3. In his motion for leave to file an amended complaint, filed March 14, 2000, Clark includes a proposed amended complaint that is simply a list of the various causes of action under which he intends to proceed, and refers to his lack of legal training and in forma pauperis status. It is clear that plaintiff is attempting to respond to defendants' motion to dismiss or in the alternative for a more definite statement, filed February 12, 2000. While Clark's complaint is repetitive and not listed in any sort of chronological order his allegations concerning his medical treatment are sufficiently clear for me to conclude that they are well below the standard for deliberate indifference established in *Estelle.* Allowing plaintiff to more precisely plead these allegations in an amended complaint would be futile.

I recognize the serious nature of plaintiff's condition and do not condone a number of the actions attributed to defendants. Plaintiff should not have gone without medical attention for forty-eight hours from May 14 to May 16. Plaintiff should also not have been forced to make repeated requests for medical examinations and I am concerned over Clark's allegations that at times his pain medication was inadequate. Even when taken in the light most favorable to the plaintiff however, Clark's allegations at best suggest nothing more than negligence on the part of defendants.[FN4] They simply may not be construed to constitute the "deliberate indifference" to plaintiff's health or the "unnecessary and wanton infliction of pain" so as to be "repugnant to the consciousness of mankind" required under *Estelle.* Defendant's motion to dismiss will therefore be granted.

FN4. I agree with the court in *Walker* however, which noted the possible distinction between a failure to treat a prisoner with back pain (as in *Estelle*) and a failure

> to treat a prisoner who is HIV positive. 989 F.Supp. at 976 n. 3. A failure to treat an HIV positive inmate will almost certainly shorten that inmate's life. Like the court in *Walker* I do not hold that there is no qualitative difference between HIV and other illnesses, and I acknowledge that a complete refusal to treat an HIV positive inmate might rise beyond the level of mere negligence or medical malpractice. *Id.*

***5** An appropriate Order follows.

ORDER

AND NOW, this _____ day of October, 2000, in consideration of defendants' motion to dismiss, plaintiff's response thereto, and plaintiff's motion to file an amended complaint, it is ORDERED that:

1. Plaintiff's motion for leave to amend the complaint is DENIED.

2. Defendants' motion to DISMISS the complaint is GRANTED and the complaint is DISMISSED WITH PREJUDICE.

E.D.Pa.,2000.
Clark v. Doe
Not Reported in F.Supp.2d, 2000 WL 1522855 (E.D.Pa.)

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269 Fed.Appx. 149, 2008 WL 683933 (C.A.3 (Pa.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 269 Fed.Appx. 149, 2008 WL 683933 (C.A.3 (Pa.)))

H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)

United States Court of Appeals,
Third Circuit.
Jackie HAM, Appellant
v.
Gary F. GREER; Dr. Clark; Gregory K. Baker.

No. 07-4834.
Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
March 6, 2008.
Filed: March 14, 2008.

Background: Federal prisoner brought *Bivens* action against dentists asserting violations of his constitutional rights under Eighth Amendment. The United States District Court for the Western District of Pennsylvania, Terrence F. McVerry, J., 2007 WL 4248490, summarily dismissed action. Prisoner appealed.

Holding: The Court of Appeals held that dentists did not exhibit deliberate indifference to prisoner's serious medical needs by not rendering kind or quality of treatment that prisoner would have preferred.

Summarily affirmed.

West Headnotes

Prisons 310 ⚿193

310 Prisons
310II Prisoners and Inmates
310II(D) Health and Medical Care
310k191 Particular Conditions and Treatments
310k193 k. Dental Conditions and Treatment. Most Cited Cases
(Formerly 310k17(2))

Sentencing and Punishment 350H ⚿1546

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(H) Conditions of Confinement
350Hk1546 k. Medical Care and Treatment. Most Cited Cases

Dentists did not exhibit deliberate indifference to prisoner's serious medical needs, as required for Eighth Amendment cruel and unusual punishment civil rights claim, by not rendering kind or quality of treatment that prisoner would have preferred; even if dentists were negligent in services they provided, prisoner consistently received prompt medical attention, except in those instances where prisoner himself declined treatment. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

***149** On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. Civil No. 2:06-cv-1692), District Judge: Honorable Terrence F. McVerry.

Before: AMBRO, FUENTES and JORDAN, Circuit Judges.

OPINION

PER CURIAM.

****1** Jackie Ham appeals from the order of the United States District Court for the ***150** Western District of Pennsylvania granting Appellees' motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Appellees have filed motions for summary affirmance of the District Court's order. Because Ham's appeal does not present a substantial question, we will grant the

269 Fed.Appx. 149, 2008 WL 683933 (C.A.3 (Pa.))
(Not Selected for publication in the Federal Reporter)
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pending motions and summarily affirm the judgment of the District Court. *See* 3d Cir. L.A.R. 27.4; I.O.P. 10.6.

I.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review of the District Court's dismissal for failure to state a claim. *Angstadt v. Midd-West Sch. Dist.,* 377 F.3d 338, 342 (3d Cir.2004). Because we are reviewing the District Court's dismissal of his claims, we take the allegations of Ham's Amended Complaint as true. *See Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007); *Estelle v. Gamble,* 429 U.S. 97, 99, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

Ham is a prisoner at the Federal Corrections Institute McKean ("FCI McKean"). Greer, a dental officer for FCI McKean, conducted a routine dental exam for Ham on April 28, 2006. At that time, Greer advised that Ham required an extraction and a filling, and Greer scheduled a follow-up procedure to take place in May.

On May 16, 2006, Greer performed the extraction but not the filling. During the extraction procedure, Greer left two of three roots behind and chipped a different tooth. The next day, after complaints of pain and bleeding, Clark examined Ham and informed him that two roots remained behind. That same day, Clark performed a procedure that removed one of the two remaining roots.

Beginning in June 2006, Ham began to experience symptoms relating to the chipped tooth. Dental staff informed Ham that Greer would perform treatment, and Ham requested an alternate dentist. The request was denied, and Ham declined treatment from Greer on several occasions throughout June and July 2006. After repeated complaints from Ham, FCI McKean's alternate dentist, Baker, examined Ham on August 7, 2006. The next day, Baker performed procedures to remove the third root of the previously extracted tooth and to extract the chipped tooth.

Based upon this series of events, Ham, proceeding pro se, brought a civil action against Greer, Clark and Baker in the United States District Court for the Western District of Pennsylvania. He asserted violations of his constitutional rights under the Eighth Amendment, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and raised state law negligence claims by invoking the District Court's supplemental jurisdiction.

II.

Defendants Greer, Clark, and Baker each filed Motions to Dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). On November 2, 2007, Magistrate Judge Caiazza reviewed the motions and responses and issued a Report and Recommendation that the District Court dismiss Ham's *Bivens* claims for failure to state a claim upon which relief can be granted. The Magistrate Judge also recommended that the District Court decline to exercise discretionary jurisdiction over Ham's state law negligence claims. Judge McVerry conducted a *de novo* review of the pleadings, together with the Magistrate's Report and Recommendation and the parties' objections and ***151** responses thereto. On December 3, 2007, 2007 WL 4248490, Judge McVerry entered an Order adopting the Report and Recommendation as the opinion of the District Court, dismissing Ham's claims, and closing the case. Ham timely appealed from the District Court's final judgment.

III.

****2** The Eighth Amendment's prohibition on "cruel and unusual punishments" proscribes deliberate indifference to prisoners' serious medical needs. *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Therefore, to state a claim against a prison official under the Eighth Amendment, the prisoner must allege both (1) the existence of serious medical needs; and (2) the official's deliberate indifference to those needs. *See Rouse v. Plantier,* 182 F.3d 192, 197 (3d Cir.1999). Because the District Court determined,

and we agree, that Ham alleged a sufficiently serious medical need, our primary focus is on the deliberate indifference aspect of Ham's Eighth Amendment claim.

A prison official demonstrates deliberate indifference if he knows of and disregards an excessive risk to the inmate's health or safety. *See Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). This requires showing a sufficiently culpable state of mind, such as reckless disregard to a substantial risk of serious harm. *Id.* at 836, 114 S.Ct. 1970. In contrast, allegations of simple negligence or medical malpractice-without an associated culpable state of mind-do not constitute deliberate indifference, and therefore do not rise to the level of an Eighth Amendment violation. *Rouse v. Plantier,* 182 F.3d 192, 197 (3d Cir.1999).

Applying this standard, the District Court properly dismissed Ham's Eighth Amendment claims. The District Court held, and we agree, that although Ham may have properly raised claims of negligence against one or more of the defendants, Ham failed to allege facts that, if proved, would be sufficient to permit the Court to infer that any of the three Defendants exhibited deliberate indifference to Ham's serious medical needs.

To the contrary, the Amended Complaint establishes that Ham consistently received prompt medical attention, except in those instances where Ham himself declined treatment. Ham's primary dispute, in essence, is that he did not receive the kind or quality of treatment that he would have preferred. This simply does not rise to the level of a violation of a constitutionally protected right. *See, e.g., Inmates of Allegheny Jail v. Pierce,* 612 F.2d 754, 762 (3d Cir.1979) ("Courts will 'disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment ... (which) remains a question of sound professional judgment.' " (quoting *Bowring v. Godwin,* 551 F.2d 44, 48 (4th Cir.1977)).

IV.

Because the District Court appropriately dismissed Ham's *Bivens* claims, no independent basis for federal jurisdiction remains. In addition, the District Court did not abuse its discretion in declining to address the state law negligence claims. 28 U.S.C. § 1367(c)(3); *see United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Tully v. Mott Supermkts., Inc.,* 540 F.2d 187, 196 (3d Cir.1976).

Accordingly, we agree with the District Court that Ham's claims should be dismissed. We therefore grant the motions for summary affirmance and summarily affirm the judgment of the District Court.

C.A.3 (Pa.),2008.
Ham v. Greer
269 Fed.Appx. 149, 2008 WL 683933 (C.A.3 (Pa.))

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Not Reported in F.Supp.2d, 2007 WL 3033865 (M.D.Pa.)
(Cite as: 2007 WL 3033865 (M.D.Pa.))

United States District Court,
M.D. Pennsylvania.
Purcell BRONSON, Plaintiff,
v.
David G. WHITE, DDS; Robert J. Marsh; and David E. Patton, Defendants.

No. 1:05-CV-2150.
Oct. 15, 2007.

Purcell Bronson, Camp Hill, PA, pro se.

Raymond W. Dorian, Office of Chief Counsel, Camp Hill, PA, for Defendants.

MEMORANDUM

A. RICHARD CAPUTO, United States District Judge.

***1** Presently before the Court is Magistrate Judge J. Andrew Smyser's Report and Recommendation (Doc. 66), and Plaintiff's Objections to the August 10, 2007 Report and Recommendation. (Doc. 67.) The Magistrate Judge recommended that the Court grant Defendants' motion for summary judgment and decline to exercise jurisdiction over the Plaintiff's state law claims. For the reasons set forth below, Plaintiff's Objections to the Magistrate Judge's Report and Recommendation will be overruled, the Court will adopt the Report and Recommendation, and grant Defendants' motion for summary judgment. (Doc. 47.)

BACKGROUND

Plaintiff Purcell Bronson is a prisoner incarcerated at the State Correctional Institution at Camp Hill ("SCI-Camp Hill"). (Defs.' Statement of Undisputed Material Facts in Supp. of Mot. for Summ. J. ¶ 1, Doc. 50.) FN1 From June 23, 2004 until October 13, 2006, Plaintiff was housed in the Special Management Unit ("SMU") at SCI-Camp Hill. (*Id.* ¶ 15.) Since October 13, 2006, Plaintiff has been housed in the Restricted Housing United ("RHU") at SCI-Camp Hill. (*Id.* ¶ 3.) The Defendants are David G. White, a dentist employed by the Pennsylvania Department of Corrections at SCI-Camp Hill; Robert J. Marsh, a Unit Manager employed at the SMU at SCI-Camp Hill; and David E. Patton, a Deputy Superintendent for Centralized Services employed at SCI-Camp Hill. (*Id.* ¶ 2.)

FN1. Although Plaintiff has denied certain paragraphs of the Defendants' Statement of Material Undisputed Facts, he has not pointed to record evidence to support such denials. Therefore, pursuant to Local Rule 56.1, those material facts are deemed to be admitted.

On June 23, 2004, Plaintiff was transferred from the State Correctional Institution at Fayette ("SCI-Fayette") to the SMU at SCI-Camp Hill. (*Id.* ¶ 3.) Prior to being housed at SCI-Fayette, the Plaintiff was housed at the State Correctional Institute at Pittsburgh ("SCI-Pittsburgh"). While housed at SCI-Pittsburgh, Plaintiff saw a dentist approximately twice a year, and received a cleaning at least once a year. (*Id.*) Plaintiff periodically reveived x-rays of his teeth at SCI-Pittsburgh. (*Id.* ¶ 4.) While at SCI-Pittsburgh, the dental staff told the Plaintiff that his teeth were going bad due to improper care. (*Id.* ¶ 3.) The dental staff also told him that he should floss and brush his teeth more often. (*Id.*) However, Plaintiff was not permitted to have dental floss while in the RHU at SCI-Pittsburgh. (*Id.*) While at SCI-Pittsburgh, Plaintiff did not have any cavities. (*Id.* ¶ 4.)

Plaintiff was only housed at SCI-Fayette for six (6) months. (*Id.*) While Plaintiff was there, he was given a toothbrush, which he used. (*Id.*) He was not permitted to have dental floss at SCI-Fayette. (*Id.*)

When Plaintiff arrived at the SMU in SCI-Camp Hill, he received a toothbrush with a short handle. (*Id.* ¶ 5.) Plaintiff used the toothbrush ap-

proximately twice per day, but was not permitted to have dental floss. (*Id.*)

Defendant White provides dental care to inmates at SCI-Camp Hill in his capacity as the dentist in that facility. (*Id.* ¶ 15.) As part of his duties, Defendant White is familiar with Plaintiff Bronson, and treated Plaintiff during his time in the SMU at SCI-Camp Hill from June 23, 2004 until October 13, 2006. (*Id.* ¶ 15.) Defendant White treated Plaintiff numerous times in 2005 and 2006. (*Id.* ¶ 16.)

***2** On February 16, 2005, Defendant White treated Plaintiff and diagnosed him with a periodontal abscess and generalized moderate periodontis. (*Id.* ¶ 17.) Periodontal disease affects the area surrounding the teeth, including the gums. (*Id.*) The gums become inflamed due to a buildup of plaque. (*Id.*) This is usually the result of poor dental hygiene, such as lack of regular brushing and flossing. (*Id.*) Defendant White prescribed penicillin and advised Plaintiff to brush and floss when floss was available to him. (*Id.*)

On subsequent visits, Defendant White noted that the swelling in Plaintiff's gums had subsided after improved dental hygiene by the Plaintiff. (*Id.* ¶ 18.) On December 9, 2005, Defendant White saw Plaintiff, at which time the Plaintiff requested dentures. (*Id.* ¶ 19.) Defendant White advised the Plaintiff that he was not eligible for dentures under the Department of Corrections policy. (*Id.*) Under the Department's Access to Health Care Procedures Manual, inmates are eligible for dentures based upon the number and type of missing teeth. (*Id.*) Plaintiff has two missing teeth on his upper right side and a missing wisdom tooth on his lower right side, which Defendant White stated did not qualify him for dentures. (*Id.*) The dentist at SCI-Pittsburgh told Plaintiff the same thing. (*Id.* ¶ 11.) Defendant White further advised Plaintiff that, in his experience, dentures tend to worsen periodontal disease, which Plaintiff had been diagnosed with several months earlier. (*Id.* ¶ 18.)

The SMU is a specialized housing unit within SCI-Camp Hill which houses disruptive and violent inmates. (*Id.* ¶ 25.) There are five phases in the SMU. (*Id.* ¶ 26.) Each inmate begins his tenure in the SMU at the most restrictive phase, but can progress to a less restrictive phase of housing based upon behavior. (*Id.*) As inmates progress through the phases, their access to privileges and services is increased. (*Id.*)

All SMU inmates are provided with a modified toothbrush for dental hygiene. (*Id.* ¶ 27.) However, until recently, all SMU inmates were denied the use of dental floss for security purposes. (*Id.*) It was determined at that time that dental floss could be used to fashion weapons, garrote staff and other inmates, and interfere with locking mechanisms. (*Id.*) As of approximately January 2007, SMU inmates have been permitted to have short dental floss strips due to a revision in Department policy. (*Id.*)

As the Unit Manger assigned to the SMU at SCI-Camp Hill during the relevant time period, Defendant Marsh was responsible for unit security and treatment programs within the SMU. (*Id.* ¶ 25.) On or about March 20, 2005, Plaintiff submitted a request to Defendant Marsh to be permitted dental floss in his cell. (*Id.* ¶ 29.) On April 13, 2005, Marsh responded that dental floss was a security concern, and therefore his request would be denied. (*Id.*) Defendant Marsh does not recall any conversations with Plaintiff on this matter. (*Id.*) This was the extent of Defendant Marsh's interaction with the Plaintiff.

***3** While working as Deputy Superintendent for Centralized Services at SCI-Camp Hill, Defendant Patton had managerial responsibilities for certain services at the institution, including medical services. (*Id.* ¶ 33.) On or about July 7, 2005, the Plaintiff wrote to Defendant Patton seeking permission to use dental floss in the SMU. (*Id.* ¶ 34.) Defendant Patton also declined this request, stating “I do not approve dental items for inmates. Dental floss is not on the approved items for the SMU. I suggest that you improve your behavior to the point

that you can be released to general population." (*Id.*) This was the extent of Defendant Patton's interaction with the Plaintiff. (*Id.*)

Defendant Patton's understanding was that dental floss was not permitted to SMU inmates at that time for security reasons, as the floss could be used as a weapon, or in malfunctioning electronic components such as locks on the cell doors. (*Id.* ¶ 35.)

On October 21, 2005, Plaintiff filed his Complaint, claiming violations of the Eighth Amendment of the United States Constitution and state law. (Doc. 1.) On January 20, 2006, the Defendants filed a motion to dismiss the Complaint. (Doc. 16.) Magistrate Judge Smyser issued a Report and Recommendation (Doc. 20) on April 25, 2006, in which he recommended denying the Defendants' motion to dismiss. By Order dated August 2, 2006, the Court adopted the April 25, 2006 Report and Recommendation, thereby denying Defendants' motion.

Defendants thereafter filed an Answer to the Complaint (Doc. 28) and a motion for summary judgment. (Doc. 47.) On August 10, 2007, Magistrate Judge Smyser issued the present Report and Recommendation ("the R & R") (Doc. 66), recommending that the Defendants' motion for summary judgment be granted. Plaintiff filed an objection to the R & R on August 30, 2007. (Doc. 67.) Defendants did not file an objection to the R & R.

The summary judgment motion is fully briefed and ripe for disposition. The Report and Recommendation is likewise ripe for disposition.

LEGAL STANDARDS

I. Review of a Magistrate Judge's Report and Recommendation

Where objections to the magistrate judge's report are filed, the Court must conduct a *de novo* review of the contested portions of the report, *Sample v. Diecks,* 885 F.2d 1099, 1106 n. 3 (3d Cir.1989) (citing 28 U.S.C. § 636(b)(1)(c)), provided the objections are both timely and specific, *Goney v. Clark,* 749 F.2d 5, 6-7 (3d Cir.1984). In making its *de novo* review, the Court may accept, reject, or modify, in whole or in part, the factual findings or legal conclusions of the magistrate judge. *See* 28 U.S.C. § 636(b)(1); *Owens v. Beard,* 829 F.Supp. 736, 738 (M.D.Pa.1993). Although the review is *de novo,* the statute permits the Court to rely on the recommendations of the magistrate judge to the extent it deems proper. *See United States v. Raddatz,* 447 U.S. 667, 675-76, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980); *Goney,* 749 F.2d at 7; *Ball v. United States Parole Comm'n,* 849 F.Supp. 328, 330 (M.D.Pa.1994). Uncontested portions of the report may be reviewed at a standard determined by the district court. *See Thomas v. Arn,* 474 U.S. 140, 154, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Goney,* 749 F.2d at 7. At the very least, the Court should review uncontested portions for clear error or manifest injustice. *See, e.g., Cruz v. Chater,* 990 F.Supp. 375, 376-77 (M.D.Pa.1998).

II. Summary Judgment Standard

***4** 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). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *See id.* at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id.*

Where there is a material fact in dispute, the moving party has the initial burden of proving that:

(1) there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (2d ed.1983). The moving party may present its own evidence or, where the nonmoving party has the burden of proof, simply point out to the Court that "the nonmoving party has failed to make a sufficient showing of an essential element of her case ...." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. *See White v. Westinghouse Elec. Co.,* 862 F.2d 56, 59 (3d Cir.1988). Once the moving party has satisfied its initial burden, the burden shifts to the nonmoving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. *See Liberty Lobby,* 477 U.S. at 256-57.

The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby,* 477 U.S. at 249.

DISCUSSION

I. Eighth Amendment Claims

The Supreme Court has held that the government has an "obligation to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). For Plaintiff to establish an Eighth Amendment violation, he must establish that the Defendants acted with deliberate indifference to his serious medical needs. *Id.* Plaintiff has alleged that his Eighth Amendment rights were violated based upon his failure to receive dentures as part of his dental treatment. He has further alleged that his Eighth Amendment rights were violated when his request for dental floss was rejected by prison officials at the SMU.

A. Request for Dentures

***5** In order to establish an Eighth Amendment violation, the Plaintiff must first demonstrate evidence that the Defendants acted with deliberate indifference. Deliberate indifference may be manifested by "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed ." *Estelle,* 429 U.S. at 104-05. Mere negligence does not violate the Eighth Amendment. *Id.* at 106. Even an act constituting medical malpractice may be insufficient to establish an Eighth Amendment violation. *Id.* If the prison medical staff relating to the exercise of professional judgment, even if they constitute medical malpractice, are not necessarily violative of the Eighth Amendment. *Id.* at 107.

"[M]ere disagreement as to the proper medical treatment" is likewise insufficient to establish an Eighth Amendment violation. *Monmouth County Corr. Institutional Inmates v. Lanzaro,* 834 F.2d 326, 346 (3d Cir.1987) (citing *Bowring v. Godwin,* 551 F.2d 44, 48 (4th Cir.1977)). Rather, grossly negligent behavior constitutes deliberate indifference, as can a doctor's choice for " 'an easier and less efficacious treatment' of the inmate's condition ." *Id.* at 347 (quoting *West v. Keve,* 571 F.2d 158, 162 (3d Cir.1978)). The Third Circuit has specifically found deliberate indifference to exist when: (1) a prison official knows of the prisoner's need for treatment but intentionally refuses to provide it; (2) the prison official delays necessary medical treatment for non-medical reasons; or (3) the prison official prevents a prisoner from receiving needed or recommended treatment. *Rouse v. Plaintier,* 182 F.3d 192, 197 (3d Cir.1999) (citations omitted).

In this case, Plaintiff has merely alleged a difference in personal opinion as to the proper treat-

ment regarding his missing teeth. This fails to establish deliberate indifference. In *James v. Pennsylvania Dep't of Corr.,* 230 Fed. App'x 195 (3d Cir.2007), an inmate at a Pennsylvania corrections institute brought a § 1983 claim regarding the dental care he received for an abscessed tooth. The Appellant inmate's complaint alleged that extraction of the abscessed tooth should not have been employed, and that the dentist should have used an alternative method. *Id.* at 196. The dentist noted that antibiotics were not a viable alternative, and that the only possible procedure to save the tooth would have been a root canal, but noted that the particular type of root canal necessary was not permitted by the Department of Corrections policy. *Id.* 196-97. The Third Circuit Court of Appeals upheld the dismissal of this complaint, noting that "[the appellant's] preference alone cannot establish deliberate indifference as such second-guessing is not the province of the courts." *Id.* at 197.

In this case, Plaintiff has demonstrated only that he has a preference for dentures, and not that he was treated with deliberate indifference when he failed to receive them. As in *James,* there is no indication that Defendant White acted with an ulterior motive beyond routine patient care within the confines of the Department of Corrections' policies regarding dentures. *Id.* at 198. Although Plaintiff disagrees with Defendant White about the proper course of treatment, such disagreement is not tantamount to a constitutional violation.

***6** Plaintiff has similarly failed to demonstrate evidence regarding the deliberate indifference of Defendants Marsh and Patton. Non-medical prison officials cannot be charged with deliberate indifference to a serious medical need by a prisoner being treated by medical personnel absent " 'reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner.' " *Id.* (quoting *Spruill v. Gillis,* 372 F.3d 218, 236 (3d Cir.2004)). As Plaintiff was not being mistreated, Defendants cannot be charged with deliberate indifference on this claim.

Therefore, no reasonable juror could find that Defendants acted with deliberate indifference to Plaintiff's dental needs with respect to his request for dentures. As Plaintiff has failed to demonstrate a deliberate indifference on the part of the Defendants, the question of whether there was a serious medical need will not be addressed.

B. Prison Regulation Regarding Dental Floss

Plaintiff further alleges that his Eighth Amendment rights were violated by the failure of prison officials to provide him with dental floss. The prison officials refused to provide him with dental floss based upon a security regulation in force at the time of the request.

In *Turner v. Safley,* 482 U.S. 78, 107, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), the Court held that "a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." In determining reasonableness, the court should look to: (1) the rational relationship between the regulation and the government interest put forth to justify it; (2) the existence of alternative means to exercise the asserted right; (3) the impact on prison resources of accommodating the asserted right; and (4) the existence of "ready alternatives' to accommodate the asserted right at "de minimus" cost to valid penological interests. *Id.*

The first *Turner* factor requires the Court to look at the rational relationship between the banning of dental floss and the government's justification based upon security interests. There is clearly a rational relationship between the banning of dental floss and security. The government has alleged that dental floss could be used to fashion weapons or pick locks. An inmate in the SMU is placed in that housing based upon violent and disruptive tendencies. Therefore, the government has an interest in banning instruments in the SMU that could be used in a violent manner.

The second *Turner* factor requires the Court to determine if the prison has provided inmates with

alternative avenues. In this case, the Plaintiff was supplied with a modified toothbrush for his dental needs. The Plaintiff was also provided with access to a dentist when necessary. Therefore, the Plaintiff did have alternative means of dental care available to him, although he was not permitted dental floss.

Under the third *Turner* factor, the Court must consider how accommodating the Plaintiff would impact guards and other inmates. If the Plaintiff were given dental floss, this could have a severe impact on the guards and other inmates. Other inmates could try to steal or borrow the floss to use as a weapon or to pick locks. Because of this possibility, the guards would have to be on constant vigilance for the use of the floss in this manner. Even permitting one person to have dental floss could lead to a security concern for the rest of the inmates and the guards.

***7** The final factor is whether there is an absence of "ready alternatives" to the regulation. At this time, the inmates are now permitted to have dental floss in short strips, which is a ready alternative to long strings of floss. Although such an alternative presently exists, this alternative was not available at the time the Plaintiff requested dental floss.

In balancing the four factors of the *Turner* test, the Plaintiff has failed to show that the ban on dental floss was not reasonably related to legitimate penological interests. Inmates were provided other alternative measures for their dental hygiene. Furthermore, there were legitimate security concerns regarding the use of traditional dental floss as a weapon or means to disrupt the prison locks. *See Burke v. Webb,* No. Civ. A. 707-CV-00017, 2007 WL 419565 (W.D.Va. Feb.1, 2007) (holding that "[i]n light of the potential security threat the presence of dental floss presents to institutional staff and other inmates ... the prison's policy [is reasonable]."). Although short strips of dental floss are now available to inmates at the SMU, this alone does not outweigh all other factors in determining whether the ban on dental floss was reasonably related to legitimate penological interests.

Furthermore, the Plaintiff has failed to demonstrate evidence that the failure to provide dental floss was due to deliberate indifference to a serious medical need. First, Plaintiff has demonstrated no facts regarding Defendant White's role in the refusal to provide dental floss. Defendant White's role encompassed diagnosing and treating the Plaintiff, and no evidence is demonstrated that Defendant White ever had any role in the provision of dental floss.

Plaintiff has also failed to demonstrate any evidence regarding the deliberate indifference of Defendants Marsh and Patton. Non-medical personnel cannot be held to be deliberately indifferently merely because they fail to respond to the complaints of an inmate who is already being treated by prison medical staff. *Gusman v. Bureau of Prisons,* 231 Fed. App'x 179, 181 n. 1 (3d Cir.2007). But, non-medical prison officials can be charged with deliberate indifference to a serious medical need by a prisoner being treated by medical personnel if there is " 'reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner.' " *James.,* 230 Fed. App'x at 198 (quoting *Spruill v. Gillis,* 372 F.3d 218, 236 (3d Cir.2004)). Furthermore, once a prison grievance examiner becomes aware of the treatment, the Eighth Amendment only requires that the official " 'review[ ] ... [the prisoner's] complaints and verif[y] with the medical officials that [the prisoner] was receiving treatment." *Id.* (quoting *Greeno v. Daley,* 414 F.3d 645, 655 (7th Cir.2005) (citing *Spruill,* 372 F.3d at 236)). Therefore, "[i]f a prisoner is under the care of medical experts ... a non-medical prison official will generally be justified in believing the prisoner is in capable hands." *Spruill,* 372 F.2d at 236.

***8** In this case, Defendants Marsh and Patton received requests from Plaintiff for dental floss based upon his dental treatment. Plaintiff's first request to Defendant Marsh stated that "the dentist has recommended that I use dental floss to properly

clean my teeth or I will end up losing my teeth." (Doc. 48 at 31.) Defendant Patton then received another request, which asked for dental floss based on "medical grounds." (Doc. 48 at 32.) These requests were both denied. However, these requests were not denied based upon deliberate indifference to the serious medical needs of the Plaintiff. Rather, these requests were denied based upon the security risk to the other inmates and staff in the SMU. *See Perez-Gutierrez v. Lampert,* No. Civ. 00-1689-HA, 2002 WL 31689536, at *9 (D.Or. Sept.30, 2002) (finding that there was no deliberate indifference to the serious medical needs of an inmate when a prison official removed excess dental floss from a cell based upon security interests of the facility).

There is no evidence provided that dental floss was ever ordered by any dentist as a medical necessity. *See id.* at *10 (noting that the plaintiff was authorized to receive dental floss pursuant to a physician's order). Furthermore, Defendant White's report of December 9, 2005 notes that "[Plaintiff] was advised that he needs to brush up and down and floss when the floss is available to him to help slow down the periodontal disease." (Doc. 48 at 50.) Defendant White made no notation that dental floss was to be a requirement for Plaintiff's dental needs-rather, he should floss "when the floss is available to him."

The Plaintiff did receive treatment from Dr. White. The Defendants were justified in believing that the Plaintiff was in capable hands. They had no order from Defendant White to permit Plaintiff to have special access to dental floss. Therefore, the Defendants were justified in their actions.

For these reasons, summary judgment will be granted for Defendants White, Patton, and Marsh on the Eighth Amendment claims.

II. State Law Claims

In his Complaint, the Plaintiff alleges that his claims are also based on state law. The Defendants have not addressed any state law claims. The Court agrees with Magistrate Judge Smyser that, as the Court will grant summary judgment on all of the Plaintiff's federal claims, the Court will decline to exercise supplemental jurisdiction over the Plaintiff's state law claims. 28 U.S.C. § 1367(c)(3).

CONCLUSION

For the reasons stated above, Magistrate Judge J. Andrew Smyser's Report and Recommendation will be adopted. Plaintiff's Objections will be overruled. Defendants' motion for summary judgment will be granted and the Court will decline to exercise supplemental jurisdiction over the Plaintiff's state law claims.

An appropriate Order follows.

ORDER

NOW, this *15th* day of October, 2007, upon review of Magistrate Judge J. Andrew Smyser's Report and Recommendation (Doc. 66), **IT IS HEREBY ORDERED** that:

***9** 1. The Report and Recommendation (Doc. 66) is **ADOPTED.**

2. Defendants' motion for summary judgment (Doc. 47) is **GRANTED .**

3. The Clerk of the Court shall mark this case **CLOSED.**

REPORT AND RECOMMENDATION

J. ANDREW SMYSER, Magistrate Judge.

The plaintiff, a prisoner proceeding *pro se,* commenced this action by filing a complaint on October 21, 2005. The defendants are a dentist, a deputy superintendent and a unit manager at the State Correctional Institution at Camp Hill (SCI-Camp Hill). The plaintiff claims that the defendants violated the Eighth Amendment of the United States Constitution and state law by denying him dentures and dental floss.

On September 14, 2006, the defendants filed an answer to the complaint.

On March 8, 2007, the defendants filed a mo-

tion for summary judgment. That motion has been briefed, is ripe for decision and is addressed in this Report and Recommendation.

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 judgment as a matter of law." Fed.R.Civ.P. 56(c). "The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact, though the non-moving party must make a showing sufficient to establish the existence of each element of his case on which he will bear the burden of proof at trial." *Huang v. BP Amoco Corp.,* F.3d 560, 564 (3d Cir.2001); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

"A factual dispute is material if it bears on an essential element of the plaintiff's claim, and is genuine if a reasonable jury could find in favor of the nonmoving party." *Natale v. Camden County Correctional Facility,* 318 F.3d 575, 580 (3d Cir.2003). In determining whether an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. *White v. Westinghouse Electric Co.,* 862 F.2d 56, 59 (3d Cir.1988). "Our function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Federal Home Loan Mortgage Corp. v. Scottsdale Ins. Co.,* 316 F.3d 431, 443 (3d Cir.2003).

Unless noted otherwise, the following facts are not in dispute.

At all times material hereto, the plaintiff was an inmate incarcerated in the Special Management Unit (SMU) at SCI-Camp Hill, defendant White was a dentist employed by the Pennsylvania Department of Corrections at SCI-Camp Hill, defendant Marsh was employed as the Unit Manager of the SMU at SCI-Camp Hill, and defendant Patton was employed as the Deputy Superintendent for Centralized Services at SCI-Camp Hill. *Defendants' Statement of Material Facts at ¶¶ 1 & 2 and the Plaintiff's Response to Defendants' Statement of Material Facts at ¶¶ 1 & 2.*[FN1]

FN1. We note that although the plaintiff has denied certain paragraphs of the defendants' statement of material facts he has not pointed to record evidence to support such denials. Pursuant to Local Rule 56.1, the material facts set forth in the defendants' statement of material facts are deemed to be admitted.

***10** On June 23, 2004, the plaintiff was transferred from the State Correctional Institution at Fayette (SCI-Fayette) to the SMU at SCI-Camp Hill. *Id. at ¶ 3.* Prior to being housed at SCI-Fayette, the plaintiff was housed at the State Correctional Institution at Pittsburgh (SCI-Pittsburgh). *Id.* While at SCI-Pittsburgh, the plaintiff saw a dentist approximately twice a year and the dental staff there told the plaintiff that his teeth were going bad due to improper care. *Id.* They also told him that he should floss and brush his teeth more often. *Id.* However, the plaintiff did not have any cavities while at SCI-Pittsburgh. *Id. at ¶* 4. The plaintiff was not permitted to have dental floss while in the Restricted Housing Unit at SCI-Pittsburgh. *Id. at ¶* 3.

The plaintiff was only at SCI-Fayette for six months. *Id. at ¶* 4. While there, he was given a toothbrush. *Id.* The plaintiff was not allowed dental floss at SCI-Fayette. *Id.*

When the plaintiff arrived in the SMU, he received a toothbrush with a short handle. *Id. at ¶* 5. He used the toothbrush to brush his teeth approximately twice a day. *Id.*

As part of his duties as the dentist at SCI-Camp Hill, defendant White is familiar with the plaintiff, who was housed in the SMU at SCI-Camp Hill from June 23, 2004 until October 13, 2006. *Id. at ¶*

15. Defendant White has examined and treated the plaintiff on a number of occasions since his arrival at SCI-Camp Hill. *Id. at* ¶ 16.

On February 16, 2005, defendant White saw the plaintiff and diagnosed him with periodontal abscess and generalized 5 moderate periodontitis. *Id. at* ¶ *17.* Periodontal disease is a disease of the area surrounding the teeth including the gums. *Id.* The gums become inflamed due to the buildup of plaque. *Id.* It is normally the result of poor dental hygiene, such as lack of regular brushing and flossing. *Id.* Defendant White prescribed penicillin for the plaintiff and advised him to brush and floss when floss was available to him in order to slow down the periodontal disease. *Id.*

On subsequent visits, defendant White noted that the swelling in the plaintiff's gums had subsided. *Id. at* ¶ 18. This was due in part to improved dental hygiene on the plaintiff's part. *Id.*

On December 9, 2005, defendant White saw the plaintiff again. *Id. at* ¶ 19. At that time, the plaintiff stated that nothing was bothering him right now but that he wanted dentures. *Id.* Defendant White advised the plaintiff that he was not eligible for dentures under Department of Corrections policy. *Id.* Defendant White further advised the plaintiff that it was White's opinion that dentures would not improve the plaintiff's periodontal disease but that, in his experience, dentures tend to worsen periodontal disease. *Id. at* ¶ *20.* On the other hand, chewing stimulates the gums and is good for them. *Id.*

The plaintiff believes that he needs dentures, because he is missing two teeth on the right side of this mouth. *Id. at* ¶ 6. The plaintiff believes that dentures would relieve stress on the left side of his mouth. *Id. at* ¶ 8. Defendant White has informed the plaintiff that he is not a proper candidate for dentures. *Id. at* ¶ 11. He told the plaintiff that he did not meet the criteria for dentures and that he had to have a certain number of teeth missing and in a certain arrangement. *Id.* The dentist at SCI-Pittsburgh had told the plaintiff the same thing. *Id.* Defendant White also told the plaintiff that the dentures could aggravate his gums. *Id.* No dentist has told the plaintiff that he needs or should have dentures. *Id. at* ¶¶ *6* & 8.

***11** In his capacity as the former SMU Unit Manager, defendant Marsh was responsible for unit security and treatment programs within the SMU. *Id. at* ¶ *25.* The SMU is a specialized housing unit within SCI-Camp Hill which houses disruptive and violent inmates during their incarceration. *Id.* The SMU houses both Administrative Custody (AC) and Disciplinary Custody (DC) inmates. *Id.*

The SMU consists of five phases or levels. *Id. at* ¶ 26. All inmates entering the SMU who have DC sanctions levied by a hearing examiner start out at Phase V, which is the most restrictive custody level. *Id.* Inmates received on AC status start in Phase IV. *Id.* Long Term Segregation Unit (LTSU) graduates begin on Phase III. *Id.* Depending on his behavior, an inmate can progress out of his initial reception phase to less restrictive phases. *Id.* There are restrictions on privileges and possession of property in the SMU. *Id.* As an inmate progresses through the phases, his access to privileges and services is increased. *Id.* The purpose of the restrictions is to modify inmate behavior. *Id.* Inmates in Phases IV and V have limited commissary privileges. *Id. at* ¶ *27.* They are permitted to purchase only writing supplies. *Id.* All SMU inmates are supplied with a modified toothbrush for their dental hygiene. *Id.*

Until recently, all SMU inmates were denied the use of dental floss for security reasons. *Id.* It was felt that dental floss could be used to fashion weapons, to garrote staff and other inmates or to interfere with locking mechanisms. *Id.* As of approximately January 2007, inmates in the SMU have been permitted to have short dental floss strips, due to a revision in Department policy. *Id.*

As part of his former duties as the SMU Unit Manager, defendant Marsh is familiar with the

plaintiff. *Id. at* ¶ 28. The plaintiff initially started in Phase III of the SMU as an LTSU graduate. *Id.* However, he quickly received a misconduct which resulted in DC sanctions levied by the hearing examiner and his placement on Phase V. *Id.* The plaintiff then vacillated between Phases V and IV before being declared a failure of the SMU program. *Id.*

On or about March 20, 2005, the plaintiff submitted a request to staff member form to defendant Marsh in which he asked to be permitted to have dental floss in his cell. *Id. at* ¶ 29. On April 13, 2005, defendant Marsh responded to the plaintiff's request by indicating that dental floss was a security concern and that he was not allowed to retain it in his cell in the SMU. *Id.* This is the extent of defendant Marsh's interaction with the plaintiff on this issue. *Id. at* ¶ 30.

Defendant Patton is also familiar with the plaintiff. *Id. at* ¶ 34. On or about July 7, 2005, the plaintiff wrote to him seeking permission to use dental floss in the SMU. *Id.* Defendant Patton declined the plaintiff's request on security grounds. *Id.* In his reply to the plaintiff, defendant Patton wrote: "I do not approve dental items for inmates. Dental floss is not on the approved items for the SMU. I suggest that you improve your behavior to the point that you can be released to general population ." *Id.* This was the extent of defendant Patton's involvement with the plaintiff on this issue. *Id.*

***12** Defendant Patton understood that dental floss was not permitted to SMU inmates at that time for security reasons. *Id. at* ¶ 35. It was felt that dental floss could be used as a weapon/instrument to garrote staff, themselves, or another inmate. *Id.* In addition, the floss can be used to cause malfunctioning of electronic components such as locks on the cell doors. *Id.* SMU inmates are inmates who have been determined to be security risks prior to their placement in the SMU. *Id.*

In order for the plaintiff to establish an Eighth Amendment violation he must establish that the defendants acted with deliberate indifference to his serious medical needs. *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

The concept of serious medical need has two components, one relating to the consequences of a failure to treat and the other relating to the obviousness of those consequences. *Colburn v. Upper Darby Twp.,* 946 F.2d 1017, 1023 (3d Cir.1991). The condition must be such that a failure to treat can be expected to lead to substantial and unnecessary suffering, injury or death. *Id.* Also, the condition must be one that has been diagnosed by a doctor as requiring treatment or one that is so obvious that a lay person would easily recognize the need for a doctor's attention. *Id.*

Mere medical malpractice does not give rise to a violation of the Eighth Amendment. *White v. Napoleon,* 897 F.2d 103, 108 (3d Cir.1990). "While the distinction between deliberate indifference and malpractice can be subtle, it is well established that as long as a physician exercises professional judgment his behavior will not violate a prisoner's constitutional rights." *Brown v. Borough of Chambersburg,* 903 F.2d 274, 278 (3d Cir.1990). The Third Circuit has "found 'deliberate indifference' in a variety of circumstances, including where the prison official (1) knows of a prisoner's need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment based on a non-medical reason; or (3) prevents a prisoner from receiving needed or recommended medical treatment." *Rouse v. Plantier,* 182 F.3d 192, 197 (3d Cir.1999). The Third Circuit has also "found 'deliberate indifference' to exist when the prison official persists in a particular course of treatment 'in the face of resultant pain and risk of permanent injury.' " *Id.* (quoting *White v. Napoleon,* 897 F.2d 103, 109 (3d Cir.1990)). Prison medical authorities are given considerable latitude in the diagnosis and treatment of medical problems of inmates and courts will "disavow any attempt to second guess the propriety or adequacy of a particular course of treatment ... which remains a question of sound pro-

fessional judgment." *Little v. Lycoming County,* 912 F.Supp. 809, 815 (M.D.Pa.1996) (quoting *Inmates of Allegheny County Jail v. Pierce,* 612 F.2d 754, 762 (3d Cir.1979)). Mere disagreement as to the proper medical treatment does not support an Eighth Amendment claim. *Monmouth County Correctional Institutional Inmates v. Lanzaro,* 834 F.2d 326, 346 (3d Cir.1987) ("Courts, determining what constitutes deliberate indifference, have consistently held that mere allegations of malpractice do not raise issues of constitutional import.... Nor does mere disagreement as to the proper medical treatment support a claim of an eighth amendment violation."); *White, supra,* 897 F.2d at 110 (mere disagreement over proper treatment does not state a claim upon which relief can be granted).

***13** Since no dentist has told the plaintiff that he needs or should have dentures, and since there is no evidence in the record of any professional opinion that the plaintiff needs dentures, the plaintiff has not established that he had a serious medical need for dentures. In light of defendant White's opinion that the plaintiff did not meet the criteria for dentures and that dentures could actually aggravate the plaintiff's gums, no reasonable trier of fact could conclude that defendant White was deliberately indifferent to the plaintiff's dental needs.

The recent change in policy to allow SMU inmates access to short pieces of dental floss indicates that there were ways to address the security concerns presented by SMU inmates' possession of dental floss. Nevertheless, given the security concerns associated with dental floss for disruptive inmates and the fact that the plaintiff had a toothbrush to maintain his dental health, we conclude that a reasonable trier of fact could not conclude that the defendants' refusal to provide the plaintiff with dental floss while in the SMU amounted to deliberate indifference to his dental needs.

The defendants are entitled to summary judgment on the plaintiff's Eighth Amendment claims.

In his complaint, the plaintiff indicates that his claims are also based on state law. The defendants have not addressed any state law claims. However, since we will recommend that the defendants be granted summary judgment on the plaintiff's federal claims, we will also recommend that the court decline to exercise supplemental jurisdiction over the plaintiff's state law claims. 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-... the district court has dismissed all claims over which it has original jurisdiction."); *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (holding that when federal causes of action are dismissed, federal courts should not separately entertain pendent state claims).

Based on the foregoing, it is recommended that the defendants' motion (doc. 47) for summary judgment be granted, that the court decline to exercise supplemental jurisdiction over the plaintiff's state law claims and that the case file be closed.

M.D.Pa.,2007.
Bronson v. White
Not Reported in F.Supp.2d, 2007 WL 3033865 (M.D.Pa.)

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36 Fed.Appx. 228, 2002 WL 1273649 (C.A.8 (Ark.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 36 Fed.Appx. 228, 2002 WL 1273649 (C.A.8 (Ark.)))

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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eighth Circuit Rules 28A, 32.1A. (Find CTA8 Rule 28A and Find CTA8 Rule 32.1A)

United States Court of Appeals,
Eighth Circuit.
Arthur Dale TAYLOR, Appellant,
v.
Larry NORRIS, Director, Arkansas Department of Correction; Max Mobley, Deputy Director, Arkansas Department of Correction; Grant Harris, Warden, Pine Bluff Unit, ADC; Maggie Capel, Assistant Warden, Pine Bluff Unit, ADC; Rebekah Davis, Site Administrator, Infirmary, Pine Bluff Unit, ADC; Wendy Maglothin, R.N., Director of Nursing, Pine Bluff Unit, ADC, Appellees.

No. 02-1846.
Submitted May 21, 2002.
Filed June 10, 2002.

Appeal from the United States District Court for the Eastern District of Arkansas.

Before McMILLIAN, RICHARD S. ARNOLD, and BYE, Circuit Judges.

[UNPUBLISHED]

PER CURIAM.

****1** Arthur Dale Taylor, an Arkansas inmate, appeals from the district court's [FN1] adverse grant of summary judgment in his 42 U.S.C. § 1983 action. Taylor moves for preparation of a transcript at government expense and for permission to proceed in forma pauperis (IFP) on appeal. We deny him the transcript; grant him leave to appeal IFP, leaving the fee-collection details to the district court in accordance with 28 U.S.C. § 1915(b); and affirm the judgment of the district court.

FN1. The Honorable Jerry W. Cavaneau, United States Magistrate Judge for the Eastern District of Arkansas, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. § 636(c).

We review the grant of summary judgment de novo, *see Cooper v. Olin Corp.,* 246 F.3d 1083, 1087 (8th Cir.2001), and we may affirm the judgment on any ground supported by the record, *see Miller v. Benson,* 51 F.3d 166, 170 (8th Cir.1995). After thoroughly reviewing the record, we conclude that there were no genuine issues of material fact concerning defendants' liability. Taylor's claims against defendants Nurse Wendy Maglothin and Infirmary Administrator Rebekah Davis boil down to a disagreement as to the recommended treatment for his hernias and with Nurse Maglothin's decision not to schedule him for a doctor's appointment. *See Vaughan v. Lacey,* 49 F.3d 1344, 1346 (8th Cir.1995) (disagreement as to proper course of treatment is not actionable under Eighth Amendment). Further, there was no proof that the remaining defendants were involved in the medical treatment decisions. *See Keeper v. King,* 130 F.3d 1309, 1314 (8th Cir.1997) (prison official not involved in treatment decisions made by medical unit's staff cannot be liable for medical staff's diagnostic decisions).

Accordingly, we affirm. *See* 8th Cir. R. 47A(a).

C.A.8 (Ark.),2002.
Taylor v. Norris
36 Fed.Appx. 228, 2002 WL 1273649 (C.A.8 (Ark.))

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N O T I C E

Any party may obtain a review of the magistrate judge's above proposed determination pursuant to Rule **72.3**, M.D.PA, which provides:

72.3 REVIEW OF REPORTS AND RECOMMENDATIONS OF MAGISTRATE JUDGES ADDRESSING CASE DISPOSITIVE MOTIONS

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within **fourteen (14) days** after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.