Not Reported in F.Supp.2d, 2007 WL 88084 (M.D.Pa.)

(Cite as: 2007 WL 88084 (M.D.Pa.))

C

Only the Westlaw citation is currently available.
United States District Court,

M.D. Pennsylvania.
Ravanna SPENCER, Plaintiff
v.
Donald KELCHNER, et al., Defendants.
No. 3:06-CV-1099.

Jan. 9, 2007.
Ravanna Spencer, Camp Hill, PA, pro se.

MEMORANDUM AND ORDER

EDWIN M. KOSIK, United States District Judge.

***1** AND NOW, THIS 9th DAY OF JANUARY, 2007, IT APPEARING TO THE COURT THAT:

1. Plaintiff, Ravanna Spencer, an inmate confined at the State Correctional Institution at Camp Hill, commenced the instant civil rights action pursuant to 42 U.S.C. § 1983 on May 31, 2006. An amended complaint was filed on August 21, 2006;

2. The matter was assigned to Magistrate Judge Thomas M. Blewitt;

3. On September 7, 2006, the Magistrate Judge filed a thirty-one (31) page Report and Recommendation, wherein he recommended that:

> Based on the foregoing, it is respectfully recommended that Plaintiff's action as against Defendants Kelchner, Beard and Law be dismissed. Specifically, we find that Defendants Kelchner and Beard lack sufficient personal involvement in this case. We find that Defendant Law, by denyi n g Plaintiff's grievance, is not sufficiently involved in the case. We also find no conspiracylaim is stated as to Defendant Law. We find that Plaintiffs Fifth Amendment Due Process claim with respect to his placement in the SMU should be dismissed, and that his Fourteenth Amendment Equal Protection claim as against all Defendants should be dismissed. Further, we find that Plaintiff's claims as against the Defendants in their official capacities should be dismissed to the extent that he seeks money damages. We find that Defendants Southers and Whaling should be dismissed. We find that Plaintiff has stated a First Amendment retaliation claim against Defendant Newton, and that he has stated Eighth Amendment claims against Defendants Newton, Kalsky and Kahn. Finally, it is recommended that this case be remanded to the undersigned for further proceedings.

5. While plaintiff requested an extension of time in which to file objections to the Report and Recommendation, which was granted by the court, no objections were filed to the Report and Recommendation;

AND, IT FURTHER APPEARING THAT:

6. If no objections are filed to a Magistrate Judge's Report and Recommendation, the plaintiff is not statutorily entitled to a *de novo* review of his claims. 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn,* 474 U.S. 140 (1985). Nonetheless, the usual practice of the district court is to give "reasoned consideration" to a Magistrate Judge's report prior to adopting it. *Henderson v. Carlson,* 812 F.2d 874, 878 (3d Cir.1987);

7. We have reviewed the Magistrate Judge's Report and we find the factual and legal analysis to be thorough and accurate. Therefore, we will adopt his recommendations in their entirety.[FN1]

> FN1. We note that subsequent to the filing of the Report and Recommendation several additional filings have been made by the plaintiff. We refer these subsequent filings to the Magistrate Judge for disposition.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The Report and Recommendation of Magistrate

Judge Thomas M. Blewitt dated September 7, 2006 (Document 22) is adopted in its entirety; and

2. The above-captioned action is remanded to the Magistrate Judge for further proceedings.

REPORT AND RECOMMENDATION

THOMAS M. BLEWITT, United States Magistrate Judge.

Plaintiff, Ravanna Spencer, an inmate at the State Correctional Institution at Camp Hill, Pennsylvania, originally filed this § 1983 civil rights action, *pro se,* on May 31, 2006. (Doc. 1). Plaintiff also filed a motion for leave to proceed *in forma pauperis.* (Doc. 8). Plaintiff simultaneously filed a Motion to Appoint Counsel, which the Court denied on June 22, 2006. (Docs. 2 & 11). Plaintiff's original 15-page Complaint named twenty-two (22) Defendants employed in various capacities by the Pennsylvania Department of Corrections. On June 16, 2006, Plaintiff filed a Motion to Amend his Complaint in order to add new defendants and add new claims not contained in his original lengthy Complaint. (Doc. 7).

***2** Upon our initial review of Plaintiff's original Complaint under the Prison Litigation Reform Act of 1995 (the "PLRA"), we found that it contained many unrelated claims against numerous Defendants, in violation of Fed.R.Civ.P. 20(a). We found that Plaintiff's original Complaint did not appear to properly state the personal involvement of each and every named Defendant with the numerous unrelated claims. Nor did we find Plaintiff's original Complaint to be in compliance with Fed.R.Civ.P. 8. We found Plaintiff's original pleading to be completely unmanageable, and it was impossible for Defendants to intelligently respond to it.

Plaintiff claimed, in part, that he received improper medical treatment for his mental health problems (Eight Amendment); that he was improperly placed in the Special Management Unit ("SMU"); that he was deprived of meals; that he was threatened by Corrections Officers ("CO's") and made fun of (Eighth Amendment); that he was denied due process with respect to his grievances (Fifth Amendment); that he was deprived of yard time and showers without due process since his bed was not made; that he was retaliated against for filing grievances (First Amendment); that excessive force was used on him in transporting him to his cell (Eighth Amendment); that he was cut when restraints were put on him; and that he was deprived of his personal property while in a strip cell wearing a suicide smock. Plaintiff's numerous unrelated claims spanned from March 2006 through May 2006. (Doc. 1).

Thus, on June 22, 2006, we directed Plaintiff to file an Amended Complaint in conformity with Rules 8 and 20(a) of the Federal Rules of Civil Procedure. (Doc. 12). We also gave Plaintiff direction as to how to file his amended complaint and specifically directed that Plaintiff's amended complaint should be limited with respect to only defendants and claims that arise out of the same transaction or occurrence or series of transactions or occurrences, and that have questions of law or fact common to all Defendants and claims. We further directed Plaintiff to file separate actions as to any Defendants and claims that do not share common legal and factual questions and that do not arise out of the same transactions or occurrences.

In violation of the Court's June 22, 2006 Order, Plaintiff filed another Motion for Leave to File an Amended Complaint on July 25, 2006. (Doc. 16). Plaintiff's proposed amended complaint named 29 Defendants and, like his original pleading, contained 70 paragraphs of mostly unrelated claims against numerous Defendants spanning a time period from January 2006 to the present. In fact, Plaintiff's proposed amended pleading, instead of narrowing his claims and Defendants to those that were related and arose out of the same transactions or occurrences, added new claims and new Defendants, and covered a longer period of time than his original pleading did. Plaintiff's proposed amended complaint also contained many of the same claims and Defendants as his original Complaint, and it added new claims and new Defendants. As we stated in our prior Order, it simply would not be possible for the 29 Defendants to respond to the myriad of claims against them in the proposed amended complaint, which do not arise out of the same transactions or occurrences. Therefore, we denied Plaintiff's Motion to file an Amended Complaint (Doc. 16), and we directed Plaintiff to file a proper amended compliant in conformance with Rule 8 and Rule 20(a). (Doc. 17).

***3** Plaintiff filed a second Motion for Leave to File an Amended Complaint on August 21, 2006. (**Doc.18**). Plaintiff also filed a Memorandum of Law. (Doc. 19). Attached to Plaintiff's Memorandum are exhibits related to grievances Plaintiff filed with the prison. Plaintiff's Motion for Leave to Amend is essentially his amended complaint. We shall grant Plaintiff's Motion for Leave to File an Amended Complaint by separate Order, and direct that the Motion be docketed as his amended complaint. (Doc. 18).[FN1] We shall also direct the Clerk of Court to change the caption to *Plaintiff v. Donald Kelchner,* since Sgt. Maxwell is not named in the Plaintiff's amended complaint. We shall also direct the Clerk of Court to remove the names of all Defendants that were named in Plaintiff's original Complaint (Doc. 1), but who were not named in Plaintiff's Amended Complaint. (Doc. 18).

FN1. We note that attached to the Motion for Leave to File an Amended Complaint is an Order to Show Cause for an Injunction and /or a TRO. (Doc. 18). Plaintiff also attached to his Motion an explanation of his supporting exhibits that are attached to his Memorandum. If Plaintiff wishes to file an injunction motion with this Court, he must file it in conformity with Local Rule 7.1, M.D. Pa., along with a supporting brief under Rule 7.5

We now screen Plaintiff's amended pleading under the PLRA.

II. Allegations of Amended Complaint.

In the present case, Plaintiff alleges that on January 11, 2006, he was transferred from another prison to SCI-Camp Hill. Plaintiff states that Defendants Jeffery Beard, Secretary of Pennsylvania Department of Corrections ("DOC"); Donald Kelchner, Superintendent at SCI-Camp Hill; Counselor Whaling; Richard Southers, Unit Manager; Andrew Newton, Psychiatrist; Muhammed Khan, Psychiatrist; and Edward Kalsky, psychologist, were aware that he was supposed to go to a Special Need Unit ("SNU") at the prison.[FN2] However, Plaintiff indicates that he was placed in the SMU (Special Management Unit) instead of the SNU. (Doc. 18, ¶ 13.). Plaintiff states that "on January 13, 2006 I mistakenly signed a "SNU" Special Needs Unit treatment plan when this is not a "SNU" but rather a(SMU) Special Management Unit which is a control unit and is not suitable for a mentally disabled person such as myself...." Plaintiff states that on January 13, 2006, he filed a grievance and that he was denied "his remedy to exhaust." (*Id.*). Thus, Plaintiff indicates that he has not exhausted his administrative remedies, seemingly based on futility. (*Id.,* ¶'s 13., 21.).[FN3]

FN2. All of the Defendants except for Beard are employed at SCICamp Hill.

FN3. It is well-settled that the Plaintiff must exhaust his administrative remedies prior to filing a civil rights suit. *Id.* at 230. In *Porter v. Nussle,* 534 U.S. 516, 532 (2002), the Supreme Court reiterated that the exhaustion requirement under § 1997e(a) applies to all actions regarding prisons conditions, including § 1983 actions or actions brought pursuant to any other federal law. The *Porter* Court held that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Id.* However, Defendants have the burden to plead exhaustion as an affirmative defense. *See Ray v. Kertes,* 285 F.3d 287, 295 (3d Cir.2002).

Plaintiff avers that a few days afer his grievance, Defendant Dr. Newton took him off of his medication as retaliation for his grievance, and that because he was not weaned off of his medication he suffered "excessive bowel movement I couldn't sleep my body was hurting," and that he suffered other physical and mental pain. (*Id.,* ¶ 14.). Plaintiff states that he then filed another grievance against Defendant Newton. We find that Plaintiff has stated a First Amendment retaliation claim against Defendant Newton for allegedly improperly taking him off of his medication due to his grievance.

Plaintiff states that Defendant Dr. Khan saw him for his monthly review on March 8, 2006, and alleges that Dr. Kahn put his mental health history on the "tier." Plaintiff seemingly claims that Dr. Kahn made his mental health

history known to the other inmates on Plaintiff's cell block. Plaintiff states that he pleaded with Dr. Kahn to stop and states that the doctor could have taken him into a room for privacy, but the doctor did not. As a result, Plaintiff states that "everybody on the block humiliated me even the guards which eventually led up to me trying to commit suicide...." Plaintiff states that this conduct by Dr. Kahn also caused him to feel emotional pain and humiliated, embarrassed and depressed. Plaintiff filed a grievance on March 22, 2006 against Dr. Kahn, and states that after he tired to commit suicide, "they took all of my property they took the grievance and I never got it back...." (*Id.,* ¶ 15.).

***4** Plaintiff avers that Defendant Dr. Newton again took him off of his medication and states that he tired to file another grievance. Plaintiff states that it was rejected since he was told that he already had filed one on that issue. Plaintiff states that they took his grievance "because as a result of Doctor Newton neglect I tried to commit suicide again." (*Id.,* ¶ 16.).

Plaintiff claims that in April 2006, Dr. Newton and Defendant Psychologist Kalsky came to his door and similar to Dr. Kahn's conduct, they "put my mental health history out there so the whole pod could hear and the same process happened people began to humiliate me again...." Plaintiff states that he filed another grievance over this incident. (*Id.,* ¶ 17.).

Plaintiff states that Defendant Teresa M. Law, medical grievance coordinator at SCI-Camp Hill, denied his mental health grievance "saying that I don't have any mental health issues after she already had her signature on a response that said I was diagnose with a anti-social personality disorder." Plaintiff concludes that Defendant Law "was in concert with the mental health department in denying me mental health treatment." (*Id.,* ¶ 18.).

Plaintiff claims that Defendant Kelchner denied his grievance and said he did not have a mental health issue. (*Id.,* ¶ 19.).

As to Defendant Beard, Plaintiff only states that he violated his Constitutional rights because he knew of the treatment Plaintiff was receiving and he refused to stop his officers. (*Id.,* ¶ 22.). Plaintiff states that he made Defendant Kelchner and Beard aware of his situation when they came to the SMU on May 22, 2006. (*Id.,* ¶ 23.).

Plaintiff sues all of the Defendants in their individual and official capacities. (*Id.,* ¶ 11.). As relief, Plaintiff seeks compensatory and punitive damages as well as injunctive relief. (*Id.,* ¶ 's 35.-41.).

Plaintiff cannot recover monetary damages against Defendants in their official capacities.[FN4] Also, to the extent that Plaintiff seeks compensatory and punitive damages, each in the sum of "$1,000,000 to $3,000,000," such amounts should be stricken.[FN5]

FN4. Insofar as Plaintiff's attempt to sue the Defendants in their official capacities seeking monetary damages, he cannot do so. The Amended Complaint, to the extent it is against all of the Defendants in their official capacities (Doc. 18, p. 3, ¶ 11.), and to the extent that it seeks monetary damages, should be dismissed on the grounds that such an action is barred by the Eleventh Amendment. The Eleventh Amendment applies to claims asserted in federal court under 42 U.S.C. § 1983. *Quern v. Jordan,* 440 U.S. 332, 342 (1979). It prohibits suits brought in federal court against a state or where the state or its agency is the real party in interest, and in which the relief sought has an impact directly on the state itself. *Pennhurst State Schools and Hospital v. Halderman,* 465 U.S. 89 (1984); *Allegheny County Sanitary Authority v. United States Environmental Protection Agency,* 732 F.2d 1167 (3d Cir.1984). Based on the above, the Plaintiff's Amended Complaint against the Pennsylvania Department of Corrections Defendants, to the extent it names them in their official capacities, seeking monetary relief is barred by the Eleventh Amendment and, thus, this claim is subject to dismissal.

As stated, to the extent that the Plaintiffs seek monetary damages, the Defendants are immune under the Eleventh Amendment in their official capacities. *Will v. Michigan Dept.*

of State Police, 491 U.S. 58, 71 (1991); *Howlett v. Rose,* 496 U.S. 356, 365 (1990). We believe that payment of any money judgment rendered against the Defendants, who are indisputably employees working for a prison within the Pennsylvania DOC (Doc. 18, pp. 2-3), would have to be paid out of the Pennsylvania State Treasury. Further, the Pennsylvania DOC, which employs the Defendants, receives its funding from the state and does not enjoy any measure of autonomy. *See Bolden v. Southeastern Pennsylvania Transp. Auth.,* 953 F.2d 807, 818 (3d Cir.1991).

FN5. Plaintiff's request for a specific amount of monetary damages should be stricken. Since Plaintiff seeks unliquidated damages, he cannot claim a specific sum of relief. Pursuant to Local Rule 8.1, M.D. Pa., Plaintiff's request for specific monetary damages of $1 million to $3 million should be stricken from his Amended Complaint. *See Stuckey v. Ross,* Civil No. 05-2354, M.D. Pa., 1-9-06 Order, J. McClure.

We find that Defendants Beard, Kelchner and Law should be dismissed and that Plaintiff's Fourteenth Amendment Equal Protection claim should be dismissed. We find that Defendants Southers and Whaling should be dismissed. We find that Plaintiff's claim that his due process rights were violated since he was placed in the SMU without a hearing should be dismissed. We find that Plaintiff has stated a First Amendment retaliation claim against Defendant Newton, as well as Eighth Amendment claims against Defendants Newton, Kalsky and Kahn.

With respect to the two (2) named supervisory Defendants in the Amended Complaint, *i.e.,* Superintendent Kelchner and DOC Secretary Beard, we find that Plaintiff does not sufficiently allege their personal involvement and that their alleged conduct does not amount to a constitutional violation. Plaintiff merely alleges that these supervisory Defendants refused to address his complaints that he was not getting the proper treatment, and that Kelchner denied his grievance and said that Plaintiff did not have a mental health issue. (*Id.,* ¶ 's 19. & 22.-23.). Plaintiff avers that the supervisory Defendants were aware of his improper treatment, and by failing to take corrective action they violated his due process and equal protection rights. (*Id.*). We find that the stated two supervisory Defendants should be dismissed since their personal involvement is lacking in the retaliation Plaintiff alleges Defendant Newton took in taking him off of his medication. Nor does Plaintiff allege that either of the supervisory Defendants participated in any decision to place him in the SMU, or to reveal his mental health issues to other inmates in his pod. Plaintiff does not allege that these two Defendants personally deprived him medical care or that they caused him to suffer any emotional or physical problems. Further, during all relevant times, Plaintiff was being treated by the prison psychiatric medical staff, and the two supervisory Defendants, who are non-physicians, cannot be held liable for the doctors' findings that Plaintiff did not have a mental health problem requiring medication.

III. PLRA.

***5** As stated, the Plaintiff has filed an application to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. (Doc. 8). The Prison Litigation Reform Act of 1995,[FN6] (the "Act"), obligates the Court to engage in a screening process when a prisoner wishes to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915.[FN7] Specifically, Section 1915(e)(2), which was created by § 805(a)(5) of the Act, provides:

FN6. Pub.L. No. 104-134, 110 Stat. 1321 (April 26, 1996).

FN7. The Plaintiff completed an application to proceed *in forma pauperis* and authorization to have funds deducted from his prison account. The court then issued an administrative order directing the warden to commence deduction of the full filing fee due the court from the Plaintiff's prison trust fund account.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that (A) the allegation of poverty is untrue; or (B) the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks

monetary relief against a defendant who is immune from such relief.

In reviewing the Complaint under 28 U.S.C. § 1915(e)(2)(B), we have determined that the Plaintiff is unable to maintain his action as against Defendants Kelchner and Beard. Specifically, we find that Defendants Kelchner and Beard lack sufficient personal involvement in this case. We find that Defendant Law by denying Plaintiff's grievance is not sufficiently involved in this case. We also find no conspiracy claim is stated as to Defendant Law. We find that Plaintiff's Fifth Amendment Due Process claim with respect to his placement in the SMU should be dismissed, and that his Fourteenth Amendment Equal Protection claim should be dismissed. Further, we find that Plaintiff's claims as against all of the Defendants in their official capacities should be dismissed to the extent that he seeks money damages. We find that Defendants Southers and Whaling should be dismissed. We find that Plaintiff has stated a First Amendment retaliation claim against Defendant Newton, and Eighth Amendment claims against Defendants Newton, Kalsky and Kahn.

IV. Motion to Dismiss Standard.

In considering whether a pleading states an actionable claim, the court must accept all material allegations of the complaint as true and construe all inferences in the light most favorable to the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). A complaint should not be dismissed for failure to state a claim 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." *Conley v. Gibson,* 355 U.S. 41, 44-46 (1957); *Ransom v. Marrazzo,* 848 F.2d 398, 401 (3d Cir.1988). A complaint that sets out facts which affirmatively demonstrate that the plaintiff has no right to recover is properly dismissed without leave to amend. *Estelle v. Gamble,* 429 U.S. 97, 107-108 (1976).

V. Section 1983 Standard.

In a § 1983 civil rights action, the Plaintiff must prove the following two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct complained of deprived the Plaintiff of rights, privileges or immunities secured by the law or the Constitution of the United States. *Parratt v. Taylor,* 451 U.S. 527 (1981); *Kost v. Kozakiewicz,* 1 F.3d 176, 184 (3d Cir.1993).[FN8]

FN8. Section 1983 is not a source of substantive rights. Rather, it is a means to redress violations of federal law by state actors. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 284-85 (2002).

***6** Named as Defendants are eight (8) DOC individuals, seven (7) of whom are employed at SCI-Camp Hill. Since Defendants that are individually named in Plaintiff's Complaint have been stated above, we shall not reiterate their names.

It is well established that personal liability under section 1983 cannot be imposed upon a state official based on a theory of *respondeat superior. See, e.g., Rizzo v. Goode,* 423 U.S. 362 (1976); *Hampton v. Holmesburg Prison Officials,* 1546 F.2d 1077, 1082 (3d Cir.1976); *Parratt, supra.* It is well settled in the Third Circuit that personal involvement of defendants in alleged constitutional deprivations is a requirement in a § 1983 case and that a complaint must allege such personal involvement. *Id.* Each named defendant must be shown, through the complaint's allegations, to have been personally involved in the events or occurrences upon which Plaintiff's claims are based. *Id.* As the Court stated in *Rode v. Dellarciprete,* 845 F.2d 1195, 1207 (3d Cir.1998):

> A defendant in a civil rights action must have personal involvement in the alleged wrongs.... [P]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity. (Citations omitted).

A civil rights complaint must state time, place, and responsible persons. *Id.* Courts have also held that an allegation seeking to impose liability on a defendant based on supervisory status, without more, will not subject the official to section 1983 liability. *See Rode,* 845 F.2d at 1208; *Ayers v. Coughlin,* 780 F.2d 205, 210 (2d Cir.1985) (per curiam) (a mere "linkage in the prison chain of command" is not sufficient to demonstrate personal involvement for purposes of section 1983).

VI. Discussion.

A. Defendants Beard, Kelchner and Law

As discussed, we do not find any Constitutional claims that the Plaintiff has asserted against the two supervisory Defendants, Beard and Kelchner, and against the medical grievance coordinator, Defendant Law.

These Defendants are not alleged to have personally violated any of the Plaintiff's constitutional rights. Plaintiff only mentions these Defendants as failing to take corrective action to stop the abuses he alleges were committed by the other Defendants. Plaintiff does not state that Defendants Kelchner and Beard placed him in the SMU, failed to give him his medication, and denied him medical care. There are no allegations which create any personal liability as to the stated Defendants. These Defendants are not alleged to have participated in any violations of Plaintiff's rights. Since there is insufficient personal involvement alleged on the part of these three Defendants in any constitutional violation, they should also be dismissed. *Rizzo, supra; Parratt, supra.* Pursuant to *Rizzo, supra,* the supervisory Defendants cannot be held liable based on *respondeat superior* in this case. Thus, Defendants Beard, Kelchner and Law should be dismissed from this case.

***7** Moreover, a prison official's response or lack thereof to an inmate's Administrative remedies is not sufficient alone to hold the official liable in a civil rights action. The law is well-settled that there is no constitutional right to a grievance procedure. *See* *Jones v. North Carolina Prisoners' Labor Union, Inc.* 433 U.S. 119, 137-138 (1977). This very Court has also recognized that grievance procedures are not constitutionally mandated. *See Chimenti v. Kimber,* Civil No. 3:CV01-0273, slip op. at p. 18 n. 8 (March 15, 2002) (Vanaskie, C.J.), reversed in part, C.A. No. 03-2056 (3d Cir. June 8, 2005) (Non-Precedential). Even if the prison provides for a grievance procedure, as the DOC does, violations of those procedures do not amount to a civil rights cause of action. *Mann v. Adams,* 855 F.2d 639, 640 (9th Cir1988), *cert denied,* 488 U.S. 898 (1988); *Hoover v. Watson,* 886 F.Supp. 410, 418 (D.Del.1995), aff'd 74 F.3d 1226 (3d Cir.1995). *See also Burnside v. Moser,* Civil No. 04-2485, 12-16-04 Order, p. 3, J. Muir, M.D. Pa. (Even "[i]f the state elects to provide a grievance mechanism, violations of its procedures do not ... give rise to a [constitutional] claim.") (citations omitted). Thus, even if the prison official allegedly failed to process the prisoner's grievances, no constitutional claim is stated. *Burnside, supra.*

As the Court stated in *Ayers v. Coughlin,* 780 F.2d 205, 210 (2d Cir.1985) (per curiam) a mere "linkage in the prison chain of command" is not sufficient to demonstrate personal involvement for purposes of section 1983. Permitting supervisory liability where a defendant, after being informed of the violation through the filing of grievances, reports or appeals, failed to take action to remedy the alleged wrong is not enough to show that the defendant has the necessary personal involvement. *Rizzo, supra.* Allowing only a letter sent to an official to be sufficient to impose supervisory liability would permit an inmate to subject defendants to potential liability in any case in which the prisoner merely transmitted correspondence to the official. *Id.* Thus, several courts have held that "it is well-established that an allegation that an official ignored a prisoner's letter of protest and request for an investigation of allegations made therein is insufficient to hold that official liable for the alleged violations." *Greenwaldt v. Coughlin,* 1995 WL 232736, at *4 (S.D.N.Y.Apr.19, 1995) (citations omitted); *accord* *Rivera v. Goord,* 119 F.Supp.2d 327, 344 (S.D.N.Y.2000) (allegations that inmate wrote to prison officials and was ignored insufficient to hold those officials liable under section 1983); *Woods v. Goord,* 1998 WL 740782, at *6 (S.D.N.Y. Oct. 23, 1998) ("Receiving letters or complaints ... does not render [prison officials] personally liable under § 1983."); *Watson v. McGinnis,* 964 F.Supp. 127, 130 (S.D.N.Y.1997) ("The law is clear that allegations that an official ignored a prisoner's letter are insufficient to establish liability.") (citations omitted). The Second Circuit Court has stated that "if mere receipt of a letter or similar complaint were enough, without more, to constitute personal involvement, it would result in liability merely for being a supervisor, which is contrary to the black-letter law that § 1983 does not impose respondeat superior liability." *Walker v. Pataro,* 2002 WL 664040, at *12 (S.D.N.Y. Apr. 23, 2002).

***8** Nor has Plaintiff stated a First Amendment retaliation claim against Defendants Beard, Kelchner and Law. Plaintiff only alleges that Defendant Dr. Newton retaliated against him by taking him off of his medication due to his grievance about being placed in the SMU which is not suitable for a mentally disabled person. In *Rauser v.. Horn,* 241 F.3d 330, 333 (3d Cir.2001), the Court stated that "a prisoner litigating a retaliation claim must show that he suffered some 'adverse action' at the hands of the prison officials." To establish a retaliation claim, the Plaintiff must also show that there exists a causal nexus between the Plaintiff's constitutionally protected conduct and the adverse action. *Graham v. Henderson,* 89 F.3d 75, 79 (2d Cir.1996). We find that this nexus does not exist with respect to our two supervisory Defendants and with respect to Defendant Law.

Plaintiff alleges that Defendant Law somehow conspired with the prison mental health department to deny him mental health treatment. (*Id.,* p. 4, ¶ 18.). [FN9] Plaintiff fails to state a conspiracy claim against Defendant Law.

> FN9. Since we again recommend that Plaintiff's Eighth Amendment improper medical care claim against Defendants Newton, Kahn and Kalsky proceed, we shall not detail Plaintiff's allegations in his Amended Complaint against them.

The Third Circuit in *Jones v. Maher,* Appeal No. 04-3993 (3d Cir.2005), slip op. p. 5, stated that broad and conclusory allegations in a conspiracy claim are insufficient to state a viable claim. (Citation omitted). Also, the United States District Court for the Middle District of Pennsylvania, in *Flanagan v. Shively,* 783 F.Supp. 922, 928-29 (M.D.Pa.1992), aff'd. 980 F.2d 722 (3d Cir.1992), *cert. denied* 510 U.S. 829 (1993), stated as follows:

> Bare conclusory allegations of "conspiracy" or "concerted action" will not suffice to allege a conspiracy. The plaintiff must expressly allege an agreement or make averments of communication, consultation, cooperation, or command from which such an agreement can be inferred. In *Waller v. Butkovich,* 584 F.Supp. 909, 931 (D.C.N.C.1984), the district court outlined the pleading requirements in a conspiracy action.
>
> In most cases, a bare conclusory allegation of 'conspiracy' or 'concerted action' will not suffice. The plaintiffs must expressly allege an agreement or make averments of 'communication, consultation, cooperation, or command' from which such an agreement can be inferred ...
>
> (Citation omitted.) ... Allegations that the defendants' actions combined to injure the plaintiffs are not a sufficient basis from which to imply a conspiracy ... (Citation omitted.)
>
> Additionally, the plaintiffs must make 'specific factual allegations connecting the defendant to the injury' ... (Citations omitted.) ...

The Plaintiff fails to state a conspiracy claim against Defendant Law, in that he does not allege an agreement between her and the remaining psychiatrist and psychologist Defendants to deliberately treat his mental health ailments improperly. There is no allegation that Defendant Law played any role in the decision to remove Plaintiff from his medication or to treat his mental health problems improperly. We find that Plaintiff's bare conclusory allegations of conspiracy against Defendant Law are inadequate to allege a conspiracy claim. *See Flanagan, supra.*

***9** Further, since the Plaintiff was being treated by the prison medical staff, Dr. Newton, Dr. Kahn and Psychologist Kalsky, Defendants Beard, Kelchner and Law, non-physicians, cannot be held liable under *Durmer v. O'Carroll,* 991 F.2d. 64, 69 (3d Cir.1993).

Specifically, Plaintiff alleges that Defendants psychiatrist and psychologist violated his Eighth Amendment rights by not properly treating his mental health problems and by taking him off of his medication. Plaintiff indicates that he disputes the Defendant doctors' finding that he did not have a mental health problem requiring medication. The Plaintiff has failed to state a viable claim against Defendants Beard, Kelchner and Law, since they were not physicians, and he was receiving his medical treatment from the prison psychiatrists and psychologist, even

though he disagreed with the treatment rendered and felt that his mental health problems were not being adequately treated.

Any claim that Defendants Beard, Kelchner and Law were deliberately indifferent to the Plaintiff's serious medical needs must fail. The stated Defendants, non-physicians, cannot be found deliberately indifferent to the Plaintiff's serious medical needs, as the Plaintiff acknowledges that he was under the care of the mental health doctors. *Durmer,* 991 F.2d. at 69 (3d. Cir.1993). The decisions how to treat Plaintiff and with what medication were made by the treating Defendant doctors. We recognize that in the case of *Devern v. SCI-Graterford,* 2004 WL 1552000 * 1 (E.D.Pa.), the Court limited *Durmer* and held that a "non-physician supervisor may be liable under § 1983 if he had knowledge or reason to know of medical mistreatment." In our case, the Plaintiff does not assert that Defendants Beard, Kelchner and Law were involved with the decisions how to treat Plaintiff and with what medication. Nor is it alleged that these Defendants knew that Plaintiff's treatment by the medical staff was improper or inadequate. Further, it is not alleged that these Defendants knew that the finding of the medical staff that Plaintiff did not have a mental health problem was improper or rendered to deny him medication.

Plaintiff attempts to make the stated Defendant responsible for the conduct of the treating doctors whom he admits was providing him with care. Liability in a § 1983 case may only be based on the Defendant's personal involvement in conduct amounting to a constitutional violation. *Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077 (3d Cir.1976); *Rizzo v. Goode,* 423 U .S. 362 (1976). There is no claim that Defendants Beard, Kelchner and Law had any direct involvement in Plaintiff's denial of medical treatment claim or that they had knowledge of any medical mistreatment. As stated, all of the actions taken with respect to Plaintiff's mental health care were performed by the Defendant doctors. Beard, Kelchner and Law are not alleged to have been involved in prescribing Plaintiff any medication or in taking him off of it. Nor are they alleged to have played any role in diagnosing Plaintiff with a mental disorder and later finding that he did not have one. Plaintiff cannot hold the non-physician Defendants liable on the basis of *respondeat superior,* as he tries to do in this case. *Id.*

***10** Our conclusion is supported by this very Court's decision in *Chimenti v. Kimber,* Civil No. 01-0273 (M.D.Pa.2002), aff'd. in part Third Circuit Appeal No. 03-2056 (6-8-05). In *Chimenti,* as in this case, the Plaintiff was under the care of the prison's medical staff and the Commonwealth Defendants were not physicians, nor were they involved in his care. The Court held that under *Durmer,* there was no basis for an Eighth Amendment claim against any of the Commonwealth Defendants. *Id.* at pp. 17-18.

B. Defendants Southers and Whaling

Plaintiff alleges that Defendant Southers, as unit manager of the SMU, was responsible for the welfare of inmates in the SMU, and that Defendant Whaling, as the SMU counselor, was to make sure the inmates in the SMU received proper counseling. (Doc. 18, p. 3, ¶ 's 7.-8.). Plaintiff vaguely alleges that these Defendants mistreated him by not making sure he received the proper treatment and counseling in the SMU. Based on the above discussion, insofar as Plaintiff was being treated by the prison medical staff for his mental health problems, we find that there is no Eighth Amendment claim stated as against Defendants Southers and Whaling under *Durmer.*[FN10]

> FN10. Indeed, Plaintiff's claim against Defendants Southers and Whaling is contingent on his claim that the Defendant doctors misdiagnosed him as not having a mental health problem and as not requiring medication.

C. Due Process Claim

Further, to the extent that Plaintiff claims that Defendants Beard, Kelchner, Southers and Whaling violated his due process rights by not giving him a hearing prior to placing him in the SMU upon his transfer to SCI-Camp Hill, we find that this Court has repeatedly found no liberty interest with respect to such claims. (Doc. 18, p. 5, ¶ 28.).

We conclude that, based on this Court's recent cases, including *Francis v. Dodrill,* 2005 WL 2216582 (M.D.Pa.) and *Stotts v. Dodrill,* Civil No. 04-0043

(M.D.Pa.), Petitioner's placement in the SMU does not implicate his due process rights. Therefore, we shall recommend that this claim be dismissed as against Defendants Beard, Kelchner, Southers and Whaling.

Plaintiff states that he is challenging his placement in the Special Management Unit at SCI-Camp Hill. Plaintiff claims that the SMU is not suitable for an inmate such as he, i.e., "a mentally disabled person." (Doc. 18, p. 3, ¶ 13.). Plaintiff states that on January 13, 2006, he was supposed to go to the SNU and not the SMU due to his mental health issues. However, Plaintiff states that he was placed in the SMU, which is a control unit and not suitable for him. Plaintiff alleges that the stated Defendants violated his due process rights by placing him in the SMU without first being given a hearing. (Doc. 18, pp. 5-6, ¶ 28.). This Court has consistently held that placement in the Special Management Unit does not give rise to atypical and significant hardships and does not implicate due process of law.

Thus, Plaintiff claims that he has been made to suffer atypical hardship without due process due to his immediate placement in the SMU upon his transfer to SCI-Camp Hill in January 2006, since he was deprived of his liberty in the SMU without a hearing. (*Id.*). Plaintiff seems to claim that the procedural safeguards of *Wolff v. McDonnell,* 418 U.S. 539 (1974), were not followed in his case. (*Id.*). Plaintiff seems to claim that his placement in the SMU constitutes an atypical and significant hardship and implicates his due process rights. (*Id.*).

***11** We find that this Court, in the stated cases, has considered similar claims and has found that an inmate's placement in the SMU does not implicate his due process rights. *See Franics, supra* at * 3.

Based on this Court's decisions in *Francis v. Dodrill,* 2005 WL 2216582 (M.D.Pa.), and *Stotts v. Dodrill,* Civ. No. 04-0043, M .D. Pa.,[FN11] we find that our Plaintiff's placement in the SMU does not implicate his due process rights. As this Court in *Francis* stated:

> FN11. In *Stotts,* this Court found that federal inmates' placement in the SMU following a riot incident did not violate their due process rights, that inmates' placement in the SMU was not punitive in nature, and that inmates were not entitled to the procedural safeguards.

The defendants also argue that Francis' placement in the SMU does not implicate his due process rights. We agree. A due process liberty interest "in avoiding particular conditions of confinement may arise from state policies or regulations." *Wilkinson v. Austin,* 545 U.S. 209, ----, 125 S.Ct. 2384, 2393, 162 L.Ed.2d 174 (2005). The Due Process Clause protects a prisoner's right to "freedom from restraint, which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship in relation to the ordinary incidents of prison life." *Id.* at 2394 (quoting *Sandin v. Connor,* 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995)).

The proper focus for determining whether prison conditions give rise to a due process liberty interest is the nature of the conditions, not mandatory language in prison regulations. *Sandin,* 515 U.S. at 484. In *Sandin,* an inmate was charged with violating prison regulations. *Id.* at 475. At a hearing, the hearing committee refused the inmate's request to present witnesses. *Id.* The committee found the inmate guilty and sentenced him to disciplinary segregation. *Id.* The inmate sought review, and a deputy administrator found some of the charges unfounded and expunged his disciplinary record. *Id.* at 476. Thereafter, the inmate filed suit pursuant to 42 U.S.C. § 1983 for a deprivation of procedural due process during the disciplinary hearing. *Id.* The Tenth Circuit found that he had a protected liberty interest because it interpreted the prison regulations to require that the committee find substantial evidence of misconduct before imposing segregation. *Id.* at 477. The Supreme Court reversed, finding no liberty interest. *Id.* at 484. In doing so, it rejected an approach that focused on whether the prison regulations "went beyond issuing mere procedural guidelines and has used 'language of an unmistakably mandatory character' such that the incursion on liberty would not occur 'absent specified substantive predicates.' " *Id.* at 480 (quoting *Hewitt v. Helms,* 459 U.S. 460, 471-72, 103 S.Ct. 864, 74

L.Ed.2d 675 (1983)). The Court found this approach undesirable because it created a disincentive for prison administrators to codify prison management procedures and because it "led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Id.* at 482. Thus, the Court held liberty interests "will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force ... nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. In applying this test, the Court observed, "[discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law." *Id.* at 485. The Court then found that the inmate's disciplinary segregation "did not present a dramatic departure from the basic conditions of Conner's indeterminate sentence" because the conditions of disciplinary segregation were similar to those faced in administrative and protective custody. *Id.* at 486.

***12** In *Wilkinson v. Austin,* 545 U.S. 209, ----, 125 S.Ct. 2384, 2393,

162 L.Ed.2d 174 (2005), the Court applied the *Sandin* test and found that the plaintiff's due process rights were implicated when he was placed in a program where:

almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room ... [P]lacement ... is indefinite and, after an initial 30 day review, is reviewed just annually.... [P]lacement disqualifies an otherwise eligible inmate for parole consideration.

Id. at 2394-95.

The court found that these harsh conditions "give rise to a liberty interest in their avoidance."

Id. at 2395.

Fraise v. Terhune, 283 F.2d 506 (3d Cir.2002) applied the Sandin test and found that avoiding placement in the Security Threat Group Management Unit (STGMU) in the New Jersey prison system is not a protected liberty interest. Inmates who the prison deemed members of groups that posed a security threat were placed in the STGMU. *Id.* at 509. "An inmate assigned to the STGMU remains in maximum custody until the inmate successfully completes a three-phase behavior modification program." *Id.* at 511. The Court found that despite the additional restrictions, prisoners have no liberty interest in avoiding placement in the STGMU. *Id.; see also Griffin v. Vaughn,* 112 F.3d 703, 706 (3d Cir.1997) (finding that additional restrictions in administrative custody for a period of fifteen months does not deprive prisoners of protected liberty interests).

We find that the conditions in the [USP-Lewisburg] SMU do not remotely approach the severity of the conditions *Wilkinson* found to give rise to a protected liberty interest, and are comparable to the conditions in cases such as *Sandin, Fraise,* and *Griffin,* which found no protected liberty interest.

Id., pp. *3-*4.

The *Francis* Court concluded that the restrictions in the SMU in federal prison were no greater than the restrictions placed on the inmate in *Griffin. Id.* * 5. In our case, Plaintiff does not allege any greater restrictions in the SMU at SCI-Camp Hill than were placed on the inmates in *Francis.*

The *Francis* Court then stated:

Inmates have no due process right to a facility of their choosing. *Young v. Quinlan,* 960 F.2d 351, 358 n. 16 (3d Cir.1992). The Bureau of Prisons retains sole discretion over where to place an inmate. 18 U.S.C. § 3621. Inmates do, however, have a liberty interest in avoiding transfer to facilities where the conditions impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin,* 515 U.S. at 484. This is not such a transfer. We

> find that these conditions and the conditions overall in the SMU are reasonable and proportionate to those in other prisons in the federal system and across the country and do not impose an atypical and significant hardship in relation to the ordinary incidents of prison life. Using restrictions to promote prosocial behavior falls within the parameters of a sentence imposed by a court of law. While Francis clearly would prefer not to be housed in the SMU, his preference is not a liberty interest protected by the Due Process Clause.
>
> ***13** *Id.*

Further, the Court in *Griffin v. Vaughn,* 112 F.3d 703, 706 (3d Cir.1997), stated:

> Applying the precepts of *Sandin* to the circumstances before us, we conclude that the conditions experienced by Griffin in administrative custody did not impose on him "atypical and significant hardship," that he was thus deprived of no state created liberty interest, and that he failure to give him a hearing prior to his transfer to administrative custody was not a violation of the procedural due process guaranteed by the United States Constitution.

The *Griffin* Court concluded that, considering the reasons to transfer inmates from general population to administrative custody, such as inmates deemed to be security risks, stays in administrative custody for many months (*i.e.* as long as 15 months) are not uncommon. *Id.* at p. 708. Thus, the *Griffin* Court held that the inmate Griffin's transfer to and confinement in administrative custody "did not deprive him of a liberty interest, and that he was not entitled to procedural due process protection." *Id.*

Moreover, this Court in *Francis, supra at* * 2, stated that "A violation of the Due Process Clause involves the following three elements: '1) the claimant must be 'deprived of a protectable interest; 2) that deprivation must be due to some governmental action; and 3) the deprivation must be without due process.' " (citation omitted). The *Francis* Court, as stated, found that placement of its Plaintiff, a federal inmate at USP-Lewisburg, in the SMU did not implicate his due process rights. *Id.* * 3. Based on *Griffin* and *Francis,* our Plaintiff's placement in the SMU for eight (8) months does not give rise to a protected liberty interest.

D. Fourteenth Amendment Equal Protection Claim

Plaintiff asserts that his Fourteenth Amendment right to equal protection was violated by Defendants since he was not being given the proper treatment due to his mental disability. (Doc. 18, pp. 5-6). Plaintiff avers that Defendants treated him differently than similarly situated inmates who did not have mental health problems. We find that the § 1983 Equal Protection claims should be dismissed because the Plaintiff has failed to allege that Defendants purposely discriminated against him on the basis of his race, gender, or nationality. There is no claim that Defendants were motivated by a discriminatory intent with respect to Plaintiff's allegations. In fact, Plaintiff alleges that he was taken off of his medication at the outset by Defendant Dr. Newton because this Defendant was retaliating against Plaintiff for his complaint that the prison staff should not have placed him the SMU since it was not suitable for him. (Doc. 18, ¶ 's 13.-14). Plaintiff clearly did not claim a discriminatory motive for Dr. Newton's alleged conduct. Additionally, we do not find that Plaintiff has properly stated that he and any other inmates were similarly situated for purposes of an equal protection claim.

***14** The elements of a § 1983 Equal Protection claim require Plaintiff to state Defendants intended to discriminate against him, and later to prove this by either direct or circumstantial evidence. *See Pa. v. Flaherty,* 983 F.2d 1267 (3d Cir.1993) (Intent is a *prima facie* element of a § 1983 equal protection claim of discrimination) (citing *Washington v. Davis,* 426 U.S. 229 (1976). *See also Williams v. Pa. State Police,* 108 F.Supp.2d 460, 471 (E.D.Pa.2000) ("to prevail on a § 1983 claim, a plaintiff must prove that the Defendant intended to discriminate") (citation omitted).

The Equal Protection Clause does not require that all persons be treated alike, but instead, a plaintiff must show that the differential treatment to those similarly situated was unreasonable, or involved a fundamental interest or individual discrimination. *Tigner v. Texas,* 310 U.S. 141, 147 (1940); *Price v. Cohen,* 715 F.2d 87, 91 (3d

Cir.1983), *cert. denied,* 465 U.S. 1032 (1984). It is well-settled that a litigant, in order to establish a viable equal protection claim, must show an intentional or purposeful discrimination. *Snowden v. Hughes,* 321 U.S. 1, 8 (1944); *Wilson v. Schillinger,* 761 F.2d 921, 929 (3d Cir.1985), *cert. denied,* 475 U.S. 1096 (1986); *E & T Realty v. Strickland,* 830 F.2d 1107, 1113-14 (11th Cir.1987), *cert. denied* 485 U.S. 961 (1988). This "state of mind" requirement applies equally to claims involving (1) discrimination on the basis of race, religion, gender, alienage or national origin, (2) the violation of fundamental rights, and (3) classifications based on social or economic factors. *See, e.g., Britton v. City of Erie,* 933 F.Supp. 1261, 1266 (W.D.Pa.1995), *aff'd,* 100 F.3d 946 (3d Cir.1996); *Adams v. McAllister,* 798 F.Supp. 242, 245 (M.D.Pa.), *aff'd.* 972 F.2d 1330 (3d Cir.1992).

As the Court in *Barnes Foundation v. Township of Lower Merion,* 942 F.Supp. 970, 983 (E.D.Pa.1997), stated:

> The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Equal Protection Clause announces the "fundamental principle" that "the State must govern impartially," *New York City Transit Auth. v. Beazer,* 440 U.S. 568, 587, 99 S.Ct. 1355, 1367, 59 L.Ed.2d 587 (1979), and "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985).

Plaintiff has failed to allege any facts from which it can be concluded that our Defendants engaged in intentional or purposeful discrimination or that he was treated differently by Defendants than similarly situated persons on the basis of his race, nationality or gender. In short, Plaintiff does not allege any discrimination with respect to his placement in the SMU or with respect to his treatment he received there. There is no cognizable equal protection claim stated. Plaintiff has failed to allege any facts from which it can be concluded that Defendants engaged in intentional or purposeful discrimination or that he was treated differently than similarly situated individuals on the basis of his race, religion, gender, alienage, or national origin.

***15** Additionally, the Plaintiff has not stated any specific acts taken by Defendants to show any discriminatory animus attributable to the stated Defendants. Thus, we shall recommend that Plaintiff's Fourteenth Amendment claims as against all Defendants be dismissed.

F. Defendants Newton, Khan and Kalsky

We find that Plaintiff has stated a First Amendment retaliation claim against Defendant Dr. Newton, and that he has stated Eighth Amendment claims against Defendants Newton, Khan and Kalsky.

"A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan,* 511 U.S. 825 (1994) *citing Helling v. McKinney,* 509 U.S. 25 (1993); *Wilson v. Seiter,* 501 U.S. 294 (1991); *Estelle v. Gamble,* 429 U.S. 97 (1976). An inadequate medical care claim, as we have here, requires allegations that the prison official acted with "deliberate indifference to serious medical needs" of the plaintiff, while a prisoner. *Estelle,* 429 U.S. at 104 (1976); *Unterberg v. Correctional Medical Systems, Inc.,* 799 F.Supp. 490, 494-95 (E.D.Pa.1992). The official must know of and disregard an excessive risk to inmate health or safety. *Farmer,* 511 U.S. at 837. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* "The question ... is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health.' " *Farmer,* 511 U.S. at 843.

In order to state a viable Eighth Amendment claim, a prisoner must demonstrate that the Defendant was deliberately indifferent to his medical needs and that those needs were serious. *Estelle,* 429 U.S. at 106.

Mere disagreement as to the proper medical treatment does not support a claim of an Eighth Amendment violation. *Monmouth County Correctional Institution Inmates v. Lensaro,* 834 F.2d 326 (3d Cir.1987), *cert. denied,* 486 U.S. 1006 (1988); *see also Durmer v. O'Carroll,* 991 F.2d 64, 67 (3d Cir.1993) ('[T]he law is

clear that simple medical malpractice is insufficient to present a constitutional violation."). As such, "[a] distinction must be made between a case in which the prisoner claims a complete denial of medical treatment and one where the prisoner has received some medical attention and the dispute is over the adequacy of the treatment." *Nottingham v. Peoria,* 709 F.Supp. 542, 547 (M.D.Pa.1988) *citing United States ex. rel. Walker v. Fayette County,* 549 F.2d 573, 575 n. 2 (3d Cir.1979).[FN12]

> FN12. We note that, to an extent, our Plaintiff disputes the Defendant doctors' finding that he did not have a mental health issue despite being diagnosed at his previous prison before his transfer to SCI-Camp Hill that he had a mental health diagnosis, *i .e.* anti-social personality disorder, and required medication. (Doc. 18, p. 4). Insofar as Plaintiff disputes the doctors' diagnosis of his mental condition and the doctors' medical decision that he did not require medication, this is not an actionable Eighth Amendment claim.

In the case of *Monmouth County Correctional Institutional Inmates v. Lanzaro,* 834 F.2d 326, 347 (3d Cir.1987), the court addressed whether the Plaintiff's alleged injuries rose to the level of being sufficiently serious for the purpose of establishing an Eighth Amendment violation. The *Monmouth County* case stated that:

> ***16** "A medical need is 'serious,' in satisfaction of the second prong of the *Estelle* test, if it is 'one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Pace v. Fauver,* 479 F.Supp. 456, 458 (D.N.J.1979), *aff'd,* 649 F.2d 860 (3d Cir.1981); *accord Laaman v. Helgemoe,* 437 F.Supp. 269, 311 (D.N.H.1977). The seriousness of an inmate's medical need may also be determined by reference to the effect of denying the particular treatment. For instance, *Estelle* makes clear that if 'unnecessary and wanton infliction of pain,' 429 U.S. at 103, 97 S.Ct. at 290, results as a consequence of denial or delay in the provision of adequate medical care, the medical need is of the serious nature contemplated by the eighth amendment. *See Id,* at 105, 97 S.Ct. at 291. In addition, where denial or delay causes an inmate to suffer a life-long handicap or permanent loss, the medical need is considered serious. (*Citations omitted*)."
>
> *Monmouth County,* 834 F.2d at 347(3d Cir.1987).

We find that Plaintiff has met the first hurdle of *Estelle, i.e .,* Defendants were deliberately indifferent to his medical needs, as he alleges that Defendants Newton, Kahn and Kalsky denied him required medical care and that they placed him in jeopardy amongst his fellow inmates by disclosing his mental health condition to them.

In *Monmouth, supra,* 834, F.2d at 347, the Court said that a medical need is serious if the delay or denial of health care results in "wanton infliction of pain, lifelong handicap or permanent loss." Here Plaintiff alleges sufficient physical and emotional suffering, and he claims that it was as a result of any of our Defendants' non-treatment. Taking all of the allegations of Plaintiff as true, as we must at this juncture, he states legally sufficient Eighth Amendment claims against Defendants Newton, Kahn and Kalsky in this case. Thus, we shall recommend that this case proceed with respect to these three Defendants since the Plaintiff has alleged deliberate indifference to his serious medical condition under the Eighth Amendment as against them. Therefore, we shall recommend that Plaintiff's Eighth Amendment claims against Defendants Newton, Kahn and Kalsky proceed.

V. Recommendation.

Based on the foregoing, it is respectfully recommended that Plaintiff's action as against Defendants Kelchner, Beard and Law be dismissed. Specifically, we find that Defendants Kelchner and Beard lack sufficient personal involvement in this case. We find that Defendant Law, by denying Plaintiff's grievance, is not sufficiently involved in this case. We also find no conspiracy claim is stated as to Defendant Law. We find that Plaintiff's Fifth Amendment Due Process claim with respect to his placement in the SMU should be dismissed, and that his Fourteenth Amendment Equal Protection claim as against all Defendants should be dismissed. Further, we find that Plaintiff's claims as against the Defendants in their official

capacities should be dismissed to the extent that he seeks money damages. We find that Defendants Southers and Whaling should be dismissed. We find that Plaintiff has stated a First Amendment retaliation claim against Defendant Newton, and that he has stated Eighth Amendment claims against Defendants Newton, Kalsky and Kahn. Finally, it is recommended that this case be remanded to the undersigned for further proceedings.

NOTICE

***17 NOTICE IS HEREBY GIVEN** that the undersigned has entered the foregoing **Report and Recommendation** dated **September 7, 2006.**

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

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 ten (10) 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.

M.D.Pa.,2007.

Spencer v. Kelchner
Not Reported in F.Supp.2d, 2007 WL 88084 (M.D.Pa.)
END OF DOCUMENT