# IN THE UNITED STATES DISTRICT COURT
# FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| AKTHAM ABUHOURAN,<br>Plaintiff, | : | CIVIL ACTION |
| v. | : | NO. 04-2265 |
| DOUGLAS ACKER, et al.,<br>Defendants. | : | |

## Memorandum and Order

YOHN, J. February __, 2007

Plaintiff Aktham Abuhouran, a federal prison inmate at the Federal Medical Center in Devens, Massachusetts, filed his second amended complaint against defendants Douglas Acker, Thomas Mulvey, Edward Motley, and the United States, alleging violations of his rights under the Fifth and Eighth Amendments of the United States Constitution, and negligence on the part of the staff at the Federal Detention Center in Philadelphia, Pennsylvania ("FDC-Philadelphia"). Defendants have filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and plaintiff has filed a response thereto to which defendants have replied. For the reasons that follow, defendants' motion for summary judgment will be granted in part and denied in part.

### I. Factual History[1]

[1]The account contained in this section is comprised of both undisputed facts and plaintiff's factual allegations. *See Skoczylas v. Atl. Credit & Fin., Inc.*, 2002 U.S. Dist. LEXIS

Plaintiff, a native of Jordan, is a citizen of the United States. In August of 1997, plaintiff was tried and convicted in this district for bank fraud, conspiracy to commit perjury and to make fraudulent statements, conspiracy to commit money laundering, and forfeiture. He was sentenced to 109 months of imprisonment and five years of supervised release. The instant action was prompted by events that occurred approximately between July 2002 and March 2004, while plaintiff was detained at FDC-Philadelphia and awaiting trial on a second indictment for conspiracy to commit bank fraud, wire fraud, obstruction of justice, and perjury. The charges in the second indictment, to which plaintiff eventually pled guilty in 2003, arose out of actions plaintiff took while being prosecuted in the prior indictment. Plaintiff initially filed the instant action against defendants, who were employees of FDC-Philadelphia, in November of 2004. During the relevant time period, Acker was the correctional counselor for one of the housing units to which plaintiff was assigned (Unit 4 South). Mulvey, a unit manager, was Acker's supervisor. Motley was the warden of FDC-Philadelphia.

When plaintiff first arrived at FDC-Philadelphia for processing in July of 2002, he was questioned about his background. (Dep. of Pl. 91:20-93:2, Dec. 27, 2005 ("Dep. of Pl. I").) After plaintiff responded that he was of Jordanian descent, Mulvey stated that was enough to justify assignment to the Special Housing Unit ("SHU"). (*Id*.) However, plaintiff was not immediately placed in SHU. Rather, he was assigned to Unit 5 North. In late August of 2002, plaintiff was reassigned to Unit 4 South. Shortly thereafter, Acker's harassment of plaintiff

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429, at *5 (E.D. Pa. Jan. 15, 2002) ("When considering a motion for summary judgment, a court must view all facts and inferences in a light most favorable to the nonmoving party."); *see also Brown v. Muhlenberg Twp.*, 269 F.3d 205, 208 (3d Cir. 2001) (citing *Beers-Capitol v. Whetzel*, 256 F.3d 120, 130 n.6 (3d Cir. 2001)).

began. Although Acker did not ordinarily search the inmates' cells, he frequently searched plaintiff's cell.[2] (*Id*. at 58:18-65:6; Dep. of Pl. 47:16-19, Dec. 28, 2005 ("Dep. of Pl. II").) Acker also called plaintiff a "little terrorist" and "Saddam" on several occasions (Dep. of Pl. I 50:23-51:7, 54:4-55:16, 79:4-13; Dep. of Pl. II 74:10-23; Ex. 5 to Pl.'s Resp. in Opp'n to Summ. J.; Dep. of Efre Cardona 41:13),[3] and once referred to plaintiff as "hot"[4] in front of Hector Santiago, another inmate. (Dep. of Pl. I 56:20-57:19; Dep. of Pl. II 54:4-22; Ex. 5 to Pl.'s Resp. in Opp'n to Summ. J.)

In addition, Acker confiscated plaintiff's prescription medication[5] more than ten times (Dep. of Pl. I 80:19-25, 83:13-84:20; Ex. 10 to Pl.'s Resp. in Opp'n to Summ. J.), and failed on several occasions to return plaintiff's medication before he left FDC-Philadelphia after a work-shift, which caused plaintiff to miss several dosages of his medication (Dep. of Pl. I 79:20-80:21; Ex. 10 to Pl.'s Resp. in Opp'n of Summ. J). Acker did not confiscate the medication of other inmates. (Dep. of Pl. I 82:13-15.) As an immediate result, plaintiff suffered extreme fatigue, joint swelling, and frequent impulses to urinate. (Second Am. Compl. ¶ 4; Dep. of Cardona 69:20-73:12.) In addition, plaintiff believes his internal organs were damaged. (Dep. of Pl. II 67:21-68:7.) However, any harm that plaintiff may have suffered as a result of going without his

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[2]Plaintiff also testified that Mulvey, on one occasion, entered his cell "out of nowhere, ripped everything and put it on the floor." (Dep. of Pl. I 95:10-17.)

[3]Efre Cardona was an inmate at FDC-Philadelphia during the relevant time period. (Ex. 4 to Pl.'s Resp. in Opp'n to Summ. J.)

[4]Plaintiff explained that "hot" is prison slang for being a government informant or "snitch." (Dep. of Pl. I 56:20-57:4.)

[5]Plaintiff suffered from diabetes and was prescribed Metformin, which was to be taken three times a day. (Dep. of Pl. I 78:11-17; Ex. 11 to Pl.'s Resp. in Opp'n to Summ. J.)

medication was not documented because plaintiff's condition was intentionally and falsely recorded as normal when he was examined by the medical staff at FDC-Philadelphia, which occurred about once a month.[6] (*Id*. at 69:15-70:3, 73:8-12.)[7] In addition to inspecting plaintiff's cell, Acker, sometimes accompanied by Mulvey, on three or four occasions, "raided" the library while it plaintiff was using it. (Dep. of Pl. I 43:3-4, 85:5-86:25.) During the "raid," Acker and Motley would peruse through plaintiff's documents and books before throwing them on the floor. (*Id*.) After the last "raid," Acker directed plaintiff to clean the prison law library but plaintiff refused because, as a pre-trial detainee, he believed he was not required to do such tasks. (*Id*. at 87:10-89:14.) As a result of plaintiff's noncompliance, Acker filed an incident report against plaintiff. (*Id*.)

In March of 2003, Acker attempted to assign Donald Woodson, another inmate, to plaintiff's cell, which had a single set of bunk-beds. (*Id*. at 66:14-68:17.) Acker refused to reassign plaintiff even though both Woodson and plaintiff required the use of the bottom bunk-bed for medical reasons.[8] (*Id*.) As such, plaintiff attempted to speak with a lieutenant, who is

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[6]The parties agree that the medical staff at FDC-Philadelphia examined plaintiff approximately eighteen times. (Def.'s Undisputed Facts ¶ 7; Pl.'s Resp. to Def.'s Undisputed Facts ¶ 7.)

[7]Plaintiff was hospitalized in December of 2002 after complaining of chest pains. (Dep. of Pl. II 68:7-69:9.) Although test results for a heart attack were negative (Ex. 11 to Pl.'s Resp. in Opp'n to Summ. J.), plaintiff did apparently have high blood pressure (Dep. of Pl. II 68:12-24). However, plaintiff did not testify that his hospitalization was related to the missed dosages of Metformin nor has he proffered any evidence suggesting such a relationship. (*See id*. at 68:7-69:9.)

[8]Plaintiff testified that he informed Acker of his medical condition upon arriving at Unit 4 South, and that his medical records showed he required the use of the bottom bunk. (Dep. of Pl. I 45:4-21.) Although Acker attempted to assign Woodson and plaintiff to the same cell, the inmates never actually bunked together. (Def.'s Mot. Summ. J. 3 n.4.)

unnamed by the parties. (*Id*. at 70:13-71:15.) When plaintiff arrived at the lieutenant's office, Acker was leaving it. (*Id*.) Upon entering the office, the lieutenant ordered plaintiff into SHU, without explanation. (*Id*.) Plaintiff remained in SHU for approximately two weeks. (*Id*.) After returning from SHU, plaintiff spoke to Mulvey, who promised plaintiff that he would direct Acker to stop mistreating plaintiff. (*Id*. at 72:20-73:23.) In light of Mulvey's promise, plaintiff did not immediately file a formal administrative grievance. (*Id*.)

Even after Mulvey's promise, Acker continued to search plaintiff's cell with frequency and intensity that were disproportionate to the searches of other inmates' cells. (Second Am. Compl. ¶ 34.) Many of these searches went undocumented. (*Id*. at ¶ 35.) Plaintiff filed an Inmate Request to Staff–an informal document used by prisoners to file grievances–to stop the searches. (*Id*. at ¶ 36; Ex. 9 to Pl.'s Resp. in Opp'n to Summ. J.) Thereafter, Acker refused to unlock plaintiff's cell for lunch for approximately twenty to thirty minutes. (Second Am. Compl ¶ 37.) Upon releasing plaintiff, Acker laughed at plaintiff and made references to plaintiff's Inmate Request to Staff. (*Id*.) As a result, beginning in the summer of 2003, plaintiff began filing a series of formal requests for administrative relief from Acker's harassment. (Def.'s Undisputed Facts ¶ 6.) Several of these requests were directed to Motley, who initiated an investigation. (Ex. 5 & 6 to Pl.'s Resp. in Opp'n to Summ. J.; Dep. of Pl. II 43:3-48:16, 58:1-3.) The investigation did not result in any change with regard to Acker's misconduct. (Ex. 5 & 6 to Pl.'s Resp. in Opp'n to Summ. J.; Dep. of Pl. II 43:3-48:16, 58:1-3.) Plaintiff also requested relief from Mulvey, verbally and in writing. (*See* Ex. 10 to Pl.'s Resp. in Opp'n to Summ. J.) All of plaintiff's requests were either denied or unanswered. (Def.'s Undisputed Facts ¶ 6; Pl.'s Resp. to Def.'s Undisputed Facts ¶ 6; Ex. 8 & 9 to Pl.'s Resp. in Opp'n to Summ. J.) In August

of 2003, Mulvey did reassign plaintiff to Unit 5 South after plaintiff submitted another Inmate Request to Staff wherein he complained again about Acker's harassment. (Ex. 8 to Pl.'s Resp. in Opp'n to Summ. J.) However, even with this reassignment, plaintiff still encountered Acker whenever he needed documents notarized. (Second Am. Compl. ¶ 45; Ex. 6 to Pl.'s Resp. in Opp'n to Summ. J.)

In April of 2004, plaintiff filed an administrative tort claim with the Federal Bureau of Prisons alleging negligence on the part of the staff at FDC-Philadelphia. (Pl.'s Admin. Tort Claim, April 14, 2004; Ex. 7 to Pl.'s Resp. in Opp'n to Summ. J.) Specifically, plaintiff alleged that the medical staff failed to provide "appropriate medical care, causing [him] damage to [his] kidneys and nerve system, increased damages to [his] heart, high blood pressure, poor blood circulation, increased risk of blood clots and heart attacks, loss of memory and damage to [his] vision." (Ex. 7 to Pl.'s Resp. in Opp'n to Summ. J.; *see also* Dep. of Pl. II 67:18-76:24.) Plaintiff further alleged that the staff had denied him his medication by losing his prescription. (Pl.'s Admin. Tort Claim ¶¶ 7, 9.) Plaintiff sought compensatory damages in the amount of $5 million. (*Id*. at ¶ 11.) Plaintiff's claim was denied by a letter dated January 6, 2005. (Ex. 7 to Pl.'s Resp. in Opp'n to Summ. J.) The legal department at FDC-Philadelphia received the denial letter on January 14, 2005 (Ex. 7 to Pl.'s Resp. in Opp'n to Summ. J.), and plaintiff was served with the letter on January 27, 2005 (Pl.'s Mot. to Amend Compl.). The letter found plaintiff's claim was without merit and notified plaintiff that he could appeal within six months of the date of the letter. (*Id*.)

**II. Procedural History**

Plaintiff filed his initial complaint, *pro se*, with this court on May 25, 2004, alleging defendants[9] violated his rights under the First, Fifth, and Eighth Amendments. Defendants filed a motion to dismiss, or in the alternative, for summary judgment. On June 30, 2005, this court, treating the defendants' motion as a motion to dismiss, granted it in part and denied it in part. More specifically, I granted defendants' motion to dismiss plaintiff's claims under the First and Eighth Amendments, and denied defendants' motion to dismiss plaintiff's claims under the Fifth Amendment. On July 14, 2005, plaintiff filed a motion to amend his complaint to include an action under the Federal Tort Claims Act ("FTCA") and to add the United States as a defendant. That motion was granted on August 4, 2005.

On July 31, 2005,[10] plaintiff filed an amended complaint, adding a claim for medical malpractice under the FTCA against the United States. Thereafter, plaintiff was appointed counsel, and on April 20, 2006, plaintiff's counsel filed the second amended complaint. In this most recent complaint, plaintiff asserts claims for violations of his rights under the Fifth[11] and

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[9]In the initial complaint, plaintiff asserted claims against defendants D. Scott Dodrill, Motley, Mulvey, and Acker, in their official and personal capacities. Although plaintiff filed the initial complaint pursuant to 42 U.S.C. § 1983, the court, in light of plaintiff's *pro se* status, treated the case as one brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[10]Plaintiff signed and submitted his first amended complaint–wherein he asserted a claim for negligence under the FTCA–to the prison mailing system on July 31, 2005. (First Am. Compl. 31.) The first amended complaint was filed with this court on August 9, 2005. (Docket No. 32.) Affording plaintiff the benefit of the prison mailbox rule, I will use July 31, 2005 as the date of filing. *See Longenette v. Krusing*, 322 F.3d 758, 761 (3d Cir. 2003) (discussing *Houston v. Lack*, 487 U.S. 266 (1988)).

[11]Although the original complaint asserted due process and equal protection claims under the Fifth Amendment, the second amended complaint only asserts an equal protection claim. (*See* Second Am. Compl. ¶¶ 56-62.)

Eighth Amendments against Acker, Mulvey, and Motley (Second Am. Compl. ¶¶ 48-62), and a claim for negligence under the FTCA against the United States (*id*. at ¶¶ 63-68). After discovery was completed, defendants filed a motion for summary judgment. Plaintiff filed a response, to which defendants have filed a reply.

**III. Legal Standard**

Either party to a lawsuit may file a motion for summary judgment, and it will be granted only "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 showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, the nonmoving party must present "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Ideal Dairy Farms, Inc. v. John Lebatt, Ltd.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). The non-movant must present concrete evidence supporting each essential element of its claim. *Celotex*, 477 U.S. at 322-23.

When a court evaluates a motion for summary judgment, "[t]he evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Furthermore, "[a]ll justifiable inferences are to be drawn in [the non-movant's] favor." *Id*.

"Summary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed." *Ideal Dairy*, 90 F.3d at 744 (citation omitted). However, "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The non-movant must show more than "[t]he mere existence of a scintilla of evidence" for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citations omitted).

**IV. Discussion**

Plaintiff asserts two constitutional claims against Acker, Mulvey, and Motley under *Bivens*, 403 U.S. 388. Plaintiff alleges that these defendants violated his right to equal protection under the Fifth Amendment and right to be free from cruel and unusual punishment under the Eighth Amendment. In addition, plaintiff asserts a claim for negligence against the United States under the FTCA. Acker, Mulvey, and Motley argue that they are entitled to summary judgment as to plaintiff's constitutional claims because the undisputed facts show that no constitutional violation occurred. In the alternative, these defendants assert that they are entitled to qualified immunity. With regard to plaintiff's FTCA claim, the government contends that judgment must be entered in its favor because plaintiff has failed to present expert testimony as required under Pennsylvania law and, in the alternative, because the claim is untimely. For the following reasons, I will grant the motion for summary judgment as to plaintiff's Eighth Amendment claim

against Motley and negligence claim under the FTCA against the government, and will deny the balance of the motion.

**A. Fifth Amendment Claim**

While imprisonment entails the necessary limitation of many rights, federal inmates nevertheless have a constitutional right under the Fifth Amendment[12] to be free from discrimination based on suspect classifications, such as race, alienage or country of origin. *See Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338 (3d Cir. 2004); *Bentley v. Beck*, 625 F.2d 70, 70-71 (5th Cir. 1980). To establish an equal protection claim, a plaintiff must show purposeful discrimination on the basis of plaintiff's membership in a suspect class. *See Bradley v. United States*, 299 F.3d 197, 205 (3d Cir. 2002) (citing *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264-66 (1977)); *Williams v. Bramer*, 180 F.3d 699, 705 (5th Cir. 1999). Although derogatory language in reference to plaintiff's race or ethnicity is strong evidence that the conduct in question is racially or ethnically motivated, it alone cannot support an equal protection claim. *Dewalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000) ("The use of racially derogatory language, while unprofessional and deplorable, does not violate the Constitution."); *Williams*, 180 F.3d at 707 ("The mere utterance of a racial epithet is not enough by itself to amount to an equal protection violation."). Rather, a plaintiff must show racially or ethnically derogatory language coupled with harassment or some other specific conduct to establish an equal protection claim. *Dewalt*, 224 F.3d at 612 ("Standing alone, simple verbal harassment does not . . . deny a prisoner equal protection of the laws."); *Williams*, 180 F.3d at 706 (stating "that an officer's use

[12]"Fifth Amendment equal protection claims are examined under the same principles that apply to such claims under the Fourteenth Amendment." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 317 (3d Cir. 2001) (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995)).

of a racial epithet, without harassment or some other conduct that deprives the victim of established rights, does not amount to an equal protection violation").

**1. Fifth Amendment Claim Against Acker**

Plaintiff claims that Acker violated his right to equal protection by harassing him based on his Jordanian descent. Acker argues that even if plaintiff's allegations are true, they do not demonstrate that an equal protection violation has occurred. I disagree. Plaintiff and another inmate, Efre Cardona, both testified that Acker called plaintiff a "little terrorist," in reference to his Jordanian descent, and "Saddam" on several occasions. (Dep. of Pl. I 54:4-55:16, 79:4-13; Dep. of Pl. II 74:10-23; Dep. of Efre Cardona 41:13.) As stated above, such ethnically derogatory language is strong evidence that Acker's alleged mistreatment of plaintiff was motivated by plaintiff's Jordanian descent. Further, plaintiff has coupled his allegations of ethnically derogatory statements made by Acker with allegations of harassment and specific discriminatory treatment.

Plaintiff testified that Acker, who did not normally search the cells of inmates (Dep. of Pl. I 62:23-65:5), searched his cell on numerous occasions (*id*. at 63:13-18). These searches were more frequent and intense than the searches of other inmates' cells. (*Id*. at 62:23-65:5.) Approximately ten or more times during these searches, Acker confiscated plaintiff's prescription medication for diabetes. (*Id*. at 83:13-84:20.) Acker did not confiscate the medication of any other inmate. (*Id*. at 82:13-15.) In addition, plaintiff testified that Acker, sometimes accompanied by Mulvey, "raided" the library while it was being used by plaintiff, perused through plaintiff's documents, and afterward, threw plaintiff's books and documents on the floor. (*Id*. at 65:5-86:25.) While this court is mindful of, and therefore deferential to, a prison official's

responsibilities "for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody," *Procunier v. Martinez*, 416 U.S. 396, 404 (1974), Acker has not pointed to any non-discriminatory reason for his alleged unequal treatment of plaintiff. Thus, because I conclude that a reasonable jury could find that Acker violated plaintiff's right to equal protection under the law, summary judgment is inappropriate as to plaintiff's equal protection claim against Acker.

**2. Fifth Amendment Claim Against Mulvey and Motley**

Plaintiff seeks to hold Mulvey and Motley–Acker's supervisors–liable for Acker's alleged misconduct toward him. While the Supreme Court has not decided whether vicarious liability is available in a *Bivens* action, it has decided that vicarious liability is not available in a § 1983 action. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) (citing *Monell v. NYC Dep't of Soc. Servs.*, 436 U.S. 658 (1978)); *see also Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988) (stating a "defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior"). Although the Third Circuit has declined to address the issue of the availability of vicarious liability in a *Bivens* action, *see Young v. Quinlan*, 960 F.2d 351, 358 n.14 (3d Cir. 1992), the majority of circuits have held that vicarious liability is unavailable, s*ee, e.g.*, *Simpkins v. D.C. Gov't*, 108 F.3d 366 (D.C. Cir. 1997); *Abella v. Rubino*, 63 F.3d 1063 (11th Cir. 1995).

However, a supervisory official may be held liable if he or she had personal involvement in the alleged violation or actual knowledge of and acquiesced in the alleged violation. *See*

*Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997) (citing *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190-91 (3d Cir. 1995)); *Rode*, 845 F.2d at 1208 (stating "[p]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence"). "Where a supervisor with authority over a subordinate knows that the subordinate is violating someone's rights but fails to act to stop the subordinate from doing so, the factfinder may usually infer that the supervisor 'acquiesced' in (i.e., tacitly assented to or accepted) the subordinate's conduct." *Robinson*, 120 F.3d at 1293; *see also Rode*, 845 F.2d at 1208. However, "where actual supervisory authority is lacking, mere inaction, in most circumstances, does not reasonably give rise to a similar inference." *Robinson*, 120 F.3d at 1293.

In light of plaintiff's allegations, which I must accept as true for purposes of this motion, I conclude that a reasonable jury could find that both Mulvey and Motley had knowledge of and acquiesced in Acker's alleged discriminatory treatment of plaintiff. With regard to Mulvey, plaintiff testified that he notified Mulvey of the alleged mistreatment, both verbally and in writing. (Dep. of Pl. I 73:8-20; Ex. 10 to Pl.'s Resp. in Opp'n to Summ. J.) Plaintiff alleged that he refrained from filing a formal grievance because Mulvey promised that he would put an end to Acker's alleged discriminatory treatment. (*Id*.) Further, plaintiff testified that when Mulvey did not fulfill this promise, he filed a formal request for administrative relief in which he stated: "Mr. D. Acker has a history of racial discrimination against me, and he was threatening me for the past year of giving me incident reports and sending me to the (hall) for no reason." (Ex. 8 to Pl.'s Resp. in Opp'n of Summ. J.) In addition, the document complained of Acker's "retaliation" and "harassment" due to "personal hate and prejudice" toward plaintiff. (*Id*.) In response to this request, Mulvey assigned plaintiff to another unit. (Second Am. Compl. ¶ 45.) In another

written complaint addressed to Mulvey, plaintiff stated that Acker was wrongfully depriving him of his medication and wanted to harm him physically. (Ex. 10 to Pl.'s Resp. in Opp'n to Summ. J.) Plaintiff has also testified that not only did Mulvey fail to put an end to Acker's alleged discriminatory treatment, he also assisted Acker in mistreating plaintiff on several occassions. (Dep. of Pl. I 73:10-23, 85:5-86:25, 95:10-17; Dep. of Pl. II 102:13-104:22.) Thus, a reasonable jury could find that Mulvey knew of and acquiesced in Acker's alleged discriminatory treatment of plaintiff.

Plaintiff has also testified that he notified Motley several times–both verbally and in writing–of Acker's discriminatory conduct towards him. (Dep. of Pl. II 43:3-48:16. 58:1-3; Second Am. Compl. ¶ 36.) In support of this assertion, plaintiff has submitted as exhibits copies of forms he allegedly submitted to Motley. (Ex. 5, 6 to Pl.'s Resp. in Opp'n of Summ. J.) The forms complain of and request relief from Acker's discriminatory remarks and treatment towards plaintiff. (*Id*.) More specifically, the forms complain of Acker's reference to plaintiff as a "terrorist" and of Acker's increasing "harassment" of plaintiff. (*Id*.) Plaintiff also testified that he notified Motley about Acker's references to him as a "terrorist." (Dep. of Pl. II 47:15-19.) Plaintiff further testified that Motley failed to respond to his complaints, and thereby acquiesced in Acker's discriminatory treatment of plaintiff. (*Id*. at 43:3-48:16; Pl.'s Resp. in Opp'n to Summ. J. 13-14.) Therefore, accepting plaintiff's allegations as true and viewing the evidence in the light most favorable to him, which I must for purposes of this motion, I conclude that a reasonable jury could find that both Mulvey and Motley had knowledge of and acquiesced in Acker's alleged discriminatory treatment of plaintiff.

**B. Eighth Amendment Claim**[13]

To establish a prima facie Eighth Amendment claim for cruel and unusual punishment based on the denial of medication, "a plaintiff must establish that defendants acted 'with deliberate indifference to his or her serious medical needs.'" *Montgomery v. Pinchak*, 294 F.3d 492, 499 (3d Cir. 2002) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)); *see also Durmer v. O'Carroll*, 991 F.2d 64, 67 (3d Cir. 1993). To meet this burden, a plaintiff must make: (1) "an 'objective' showing that the deprivation was 'sufficiently serious,' or that the result of defendant's denial was sufficiently serious;" and (2) "a 'subjective' showing that defendant acted with 'a sufficiently culpable state of mind.'" *Montgomery*, 294 F.3d at 499 (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). "A medical need is 'serious' . . . 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.'" *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (quoting *Pace v. Fauver*, 479 F. Supp. 456, 458 (D.N.J. 1979)). Defendants act with "deliberate indifference" where they are "aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists," and they actually draw that inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Deliberate indifference to serious medical needs of prisoners exists "whether the indifference is manifested

[13]The Eighth Amendment applies to convicted felons; it does not apply to pre-trial detainees. *See Hubbard v. Taylor*, 399 F.3d 150, 166 (3d. Cir. 2005). Rather, for pre-trial detainees, the Fifth amendment applies. *Id*. Plaintiff was serving a sentence for a 1997 conviction while he was awaiting trial at FDC-Philadelphia during the relevant time period–approximately between July 2002 and March 2004. It is unclear whether the Fifth or Eighth Amendment should apply. In any event, plaintiff has elected to pursue his claim under the more stringent standard of the Eighth Amendment and defendants have not disputed it on this basis. Therefore, that standard will be applied.

by prison doctors in their response to the prisoner's needs, or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *White v. Napoleon*, 897 F.2d 103, 109 (3d Cir. 1990) (quoting *Estelle*, 429 U.S. at 104).

**1. Eighth Amendment Claim Against Acker**

Plaintiff testified that, during the relevant time period, he suffered from diabetes and that his doctor had prescribed Metformin to be taken three times a day. (Dep. of Pl. I 78:11-17; Ex. 11 to Pl.'s Resp. in Opp'n to Summ. J.) Plaintiff claimed that he informed Acker of his medical condition upon being assigned to Unit 4 South. (Dep. of Pl. I 45:4-19.) Nevertheless, Acker allegedly confiscated his Metformin more than ten times and, on several of those occasions, did not return the medication prior to leaving FDC-Philadelphia after the completion of his work-shift. (Dep. of Pl. I 69:20-80:21, 83:13-84:20.) As a result, plaintiff testified that he missed several dosages, his health deteriorated, and his organs were damaged. (Dep. of Pl. II 67:21-68:7, 74:24-75:16; Ex. 9 to Pl.'s Resp. in Opp'n to Summ. J.) Accepting plaintiff's testimony as true and making all justifiable inferences in his favor, which I must for purposes of this motion, I conclude that a reasonable jury could find that depriving a diabetic prisoner of his prescription medication is a sufficiently serious deprivation. Further, a reasonable jury could find that Acker knew of the substantial risk or harm of depriving plaintiff of his prescription medication, and acted with deliberate indifference to that risk or harm. Therefore, I conclude that summary judgment is inappropriate as to plaintiff's Eighth Amendment claim against Acker.[14]

[14]Notably, plaintiff cannot establish an Eighth Amendment claim in so far as it is based on the allegation that Acker once called him "hot" in front of another inmate. (Dep. of Pl. I 56:20-58:19.) It is unclear whether plaintiff attempts to do so. However, plaintiff has not

**2. Eighth Amendment Claim Against Mulvey and Motley**

As stated above, a supervisory official may be held liable if he or she had personal involvement or actual knowledge of and acquiesced in the alleged constitutional violation. *See supra* Part III.A.2. Accepting plaintiff's testimony as true and viewing the evidence in the light most favorable to plaintiff, I conclude that while a reasonable jury could find that Mulvey knew of and acquiesced in Acker's alleged misconduct of depriving plaintiff of his prescription medication for diabetes, the same is not true for Motley. In several written complaints to Mulvey, plaintiff specifically requested relief from Acker's alleged misconduct. For example, one document–addressed directly to Mulvey–states:

> I must tell you that Mr. Acker's harassment has reached the point that he realy [sic] wants to phisically [sic] harm me, he has been taking my medicine and instead of checking them and return them back to me, he leave with them and I have to tell the CO to call and if they find him he brings them back, many times he leaves them by the medical department where I have to wait to the evening to get them, my sugar is high, my blood pressure is high and missing one doze [sic] will increase the chances of permanent injuries or death. I am requesting that you or the Warden stop Mr. Acker of what he is trying to do before it is too late. I know you share with him the same feeling towards me but this is not just harassment, this is an attempt to cause me death.

(Ex. 10 to Pl.'s Resp. in Opp'n to Summ. J.) Another document complains of Acker's withholding plaintiff's medication with deliberate indifference to his health. (Ex. 9 to Pl.'s Resp. in Opp'n to Summ. J.) Further, plaintiff testified that Mulvey failed to put an end to Acker's alleged misconduct. (Dep. of Pl. I 94:5-95:9; Dep. of Pl. II 43:3-48:16; Pl.'s Resp. in Opp'n to

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proffered any evidence that would allow a reasonable jury to find that plaintiff was placed at a substantial risk of harm as a result of the alleged comment. (*See* Mem. & Order 16, June 29, 2005.) Thus, plaintiff cannot establish such a claim.

Summ. J. 13-14.) Therefore, accepting plaintiff's testimony as true and viewing the evidence in the light most favorable to him, I conclude that a reasonable jury could find that Mulvey knew of and acquiesced in Acker's misconduct of depriving plaintiff of his prescription medication. *See Robinson*, 120 F.3d at 1293 ("Where a supervisor with authority over a subordinate knows that the subordinate is violating someone's rights but fails to act to stop the subordinate from doing so, the factfinder may usually infer that the supervisor 'acquiesced' in (i.e., tacitly assented to or accepted) the subordinate's conduct.").

However, plaintiff's Eighth Amendment claim against Motley cannot survive summary judgment. Unlike his claim against Mulvey, plaintiff has not proffered any evidence or testimony in support of his assertion that Motley had knowledge of Acker's alleged misconduct of depriving plaintiff of his medication. Plaintiff's complaints addressed directly to Motley do not mention the deprivation of medication. (*See* Ex. 5, 6 to Pl.'s Resp. in Opp'n to Summ. J.) Further, plaintiff has not presented any testimony specifically stating that he notified Motley that Acker was depriving him of his medication. (*See* Pl.'s Resp. in Opp'n to Summ. J. 15-17); *see also Robertson*, 914 F.2d at 382 n.12 (stating "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment"). Without knowledge of Acker's alleged violation of plaintiff's rights under the Eighth Amendment, Motley could not have acquiesced in the alleged violation. *See Robinson*, 120 F.3d at 1293. Therefore, because I conclude no reasonable jury could find that Motley had knowledge of Acker's alleged misconduct of depriving plaintiff of his medication, Motley is entitled to summary judgment as to plaintiff's Eighth Amendment claim against him.

**C. Qualified Immunity**

Government officials, performing discretionary functions, are entitled to qualified immunity for their actions, if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is an affirmative defense that the officer must raise. *See Siegert v. Gilley*, 500 U.S. 226, 231 (1991). Because the Supreme Court characterizes the issue of qualified immunity as a question of law, *Elder v. Holloway*, 510 U.S. 510, 511 (1994), the Court has repeatedly encouraged the resolution of immunity questions early in the proceedings. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

Whether or not defendants are entitled to qualified immunity from plaintiff's claims will depend on whether they are able to show that their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. This requires a two-part analysis ("the *Saucier* test"): First, taken in the light most favorable to the party asserting the injury, the court must determine if the facts alleged show that the defendant violated a constitutional right. *Saucier*, 533 U.S. at 201. Second, if the initial prong is satisfied, the court must determine whether that right was clearly established at the time of the alleged violation. *Id.* at 201-02; *Curley v. Klem*, 298 F.3d 271, 279-80 (3d Cir. 2002); *Grant v. City of Pittsburgh*, 98 F.3d 116, 121 (3d Cir. 1996) (citing *Anderson*, 483 U.S. at 636-37).

Motley, Mulvey, and Acker claim that they are entitled to qualified immunity. I conclude otherwise. First, taken in the light most favorable to plaintiff, as I must, the facts alleged show that defendants violated plaintiff's constitutional rights under the Fifth Amendment–the right to equal protection–and the Eighth Amendment–the right to be free from cruel and unusual

punishment. *See Saucier*, 533 U.S. at 201; *Dibella*, 407 F.3d at 601 . A reasonable prison official would know that purposefully discriminating against plaintiff because of his Jordanian descent and depriving plaintiff of his prescribed medication for diabetes violate his rights under the Constitution. Likewise, a reasonable prison official in a supervisory role would know that allowing subordinates to act in such a manner would violate plaintiff's constitutional rights. Second, the right to be free from discrimination based on race or ethnicity and the right to be free from the deliberate deprivation of prescribed medication for a serious medical condition are clearly established. *See Angstadt*, 377 F.3d 338; *White*, 897 F.2d at 109.

In addition, genuine issues of material fact exist as to defendants' knowledge and motivation behind their conduct. Defendants' testimonies contradict that of plaintiff's with regard to the alleged events that took place. The Third Circuit has stated a "decision on qualified immunity . . . 'will be premature when there are unresolved disputes of historical fact relevant to the immunity analysis.'" *Wright v. City of Philadelphia*, 409 F.3d 595, 599 (3d Cir. 2005) (quoting *Curley*, 298 F.3d at 278). Therefore, I cannot conclude that defendants are entitled to qualified immunity.

**D. FTCA Claim**[15]

[15]The parties dispute whether plaintiff's claim under the FTCA is one for medical malpractice or for ordinary negligence; the former requires expert testimony, which is absent in the instant action. In his response to the government's motion for summary judgment, plaintiff asserts that he is only pursuing a claim for ordinary negligence. Defendants argue that a claim for ordinary negligence has not been administratively exhausted as required under 28 U.S.C. § 2675(a). I conclude otherwise. While plaintiff's administrative tort claim filed with the Federal Bureau of Prisons was for the most part a medical malpractice claim, it also included allegations supporting plaintiff's claim for ordinary negligence. The government incorrectly states that plaintiff makes "no mention of any 'failure' of prison staff to carry out his prescribed regimen." (Def.'s Reply 2.) In his administrative tort claim, which was filed *pro se*, plaintiff alleged negligence on the part of the "Medical *and Institutional* Staff." (Pl.'s Admin. Tort Claim ¶ 9

The government asserts that plaintiff's negligence claim under the FTCA cannot survive summary judgment because it is untimely under 28 U.S.C. § 2401(b), which provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or *unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency* to which it was presented.

§ 2401(b) (emphasis added). I am in agreement with the government. The Federal Bureau of Prisons denied plaintiff's negligence claim in a letter dated January 6, 2005. (Ex. 7 to Pl.'s Resp. in Opp'n to Summ. J.) The letter provides that it was received by the legal department at FDC-Philadelphia on January 13, 2005 (*id*.), and served on plaintiff on January 27, 2005–plaintiff has admitted to receiving the denial letter on this date (Pl.'s Mot. to Amend Compl.). Plaintiff's claim under the FTCA was not filed until July 31, 2005,[16] after the six month time period had expired. (Pl.'s Resp. to Def.'s Undisputed Facts ¶ 7.) Nevertheless, plaintiff contends the claim is timely because the government never mailed the denial through certified or registered mail.[17]

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(emphasis added); *see also* Pl.'s Resp. in Opp'n to Summ. J.) In addition, plaintiff specifically alleged in his administrative tort claim that: "Inmate was denied his medicne [sic] many times, whenever he send for his refill (every two weeks) they lose his prescription for at least two or three days leaving claimant without medicine." (Pl.'s Admin. Tort Claim ¶ 7.) Therefore, by providing the Bureau of Prisons with the requisite notice, I conclude that plaintiff has exhausted his administrative remedies for his claim of ordinary negligence under § 2675(a). *See Tucker v. U.S. Postal Serv.*, 676 F.2d 954, 958 (3d Cir. 1982) (stating that § 2675 requires a plaintiff to provide the relevant agency with "minimal notice . . . of the circumstances of the accident so that it may investigate the claim and respond either by settlement or by defense").

[16]Plaintiff first asserted his negligence claim under the FTCA in his first amended complaint, which was filed with this court on August 9, 2005. Affording plaintiff the benefit of the prison mailbox rule, I will use July 31, 2005 as the filing date. *See supra* note 10.

[17]The parties have not submitted evidence as to whether that the denial letter was sent by regular, certified, or registered mail.

*See* § 2401(b). This argument must be rejected because plaintiff–even with the benefit of the prison mailbox rule–failed to file his negligence claim under the FTCA within six months from the date on which he actually received the denial letter–January 27, 2005. Therefore, because I conclude plaintiff's negligence claim under the FTCA is untimely pursuant to § 2401(b), the government is entitled to summary judgment.

## V. Conclusion

For the aforementioned reasons, defendants' motion for summary judgment will be granted in part and denied in part. I will grant the motion for summary judgment as to plaintiff's claim under the Eighth Amendment against Motley and negligence claim under the FTCA against the United States, and will deny the balance of the motion.

An appropriate order follows.

# IN THE UNITED STATES DISTRICT COURT
# FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| AKTHAM ABUHOURAN,<br>Plaintiff, | : | CIVIL ACTION |
| v. | : | NO. 04-2265 |
| DOUGLAS ACKER, et al.,<br>Defendants. | : | |

## Order

AND NOW on this _____ day of February 2007, upon careful consideration of defendants' motion for summary judgment (Docket No. 71), plaintiff's response, and defendants' reply, IT IS HEREBY ORDERED that:

1. Defendants' motion for summary judgment as to plaintiff's Fifth Amendment claim against Douglas Acker, Thomas Mulvey, and Edward Motley is DENIED.
2. Defendants' motion for summary judgment as to plaintiff's Eighth Amendment claim is GRANTED as to Edward Motley and judgment is entered in his favor and against plaintiff, but DENIED as to Douglas Acker and Thomas Mulvey.
3. The government's motion for summary judgment as to plaintiff's negligence claim under the Federal Tort Claims Act is GRANTED and judgment is entered in favor of the United States of America and against plaintiff as to this claim.
4. Trial is scheduled for May 21, 2007 at 10:00 AM.

s/ William H. Yohn Jr.
William H. Yohn Jr., Judge