



Lyons et al v. Peters et al

2019 | Cited 0 times | D. Oregon | July 22, 2019

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DEREK LYONS, BRIDGETTE LEWIS, TIFFANIE LEWIS, BRYAN SCHULTZ, ANTHONY ALDEGUER, JOSHUA SMITH, JESSICA DOVE, and BRANDON MCKEY, Plaintiffs, v. COLETTE PETERS, MIKE GOWER, OFFICER HELTON, DENNIS TIMMINS, RICK ANGELOZZI, BRIDGETTE AMSBERRY, BRANDON KELLY, BRIAN BELLEQUE, ROB PERSSON, ARLENE WHITNEY, JERI TAYLOR, STEVE BROWN, TIM CAUSEY, CHRISTINE POPOFF, KENT FANGER, and JOHN DOES 1-10, JANE DOES 1-10, Defendants.

Case No. 3:17-cv-00730-SI OPINION AND ORDER

Leonard R. Berman, LAW OFFICE OF LEONARD R. BERMAN, 9220 SW Barbur Blvd. Suite 119, Box 180, Portland, OR 97219. Of Attorneys for Plaintiffs. Ellen F. Rosenblum, Attorney General, Andrew Hallman and Jessica Spooner, Assistant Attorneys General, OREGON DEPARTMENT OF JUSTICE, 1162 Court Street NE, Salem, OR 97301- 4096. Of Attorneys for Defendants. Michael H. Simon, District Judge.

Plaintiffs are current or former inmates of the Oregon Department of Corrections Defendants violated their Eighth Amendment rights when Defendants served inadequate food at state prison facilities. Defendants are facility superintendents, food procurement and contract specialists, and the food services administrator for ODOC. Defendants

Motion for Summary Judgment (ECF 95) is granted.

STANDARDS Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine

dispute of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movants favor. Clicks Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9th Cir. drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a m the plaintiffs position [is] insufficient Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252,



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255 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the non- Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation and quotation marks omitted).

BACKGROUND Plaintiffs are current or former inmates at ODOC. They allege that ODOC violated their not nutritionally adequate, and was generally substandard, spoiled, unhealthy, moldy, expired, and stored for excessive periods of time.

Plaintiff Bryan Schultz alleges that he once felt ill after consuming . 1

Plaintiff Bridgette Lewis alleges that she also felt sick after eating human consumption. Def. Ex. 9. Plaintiff Bridgette Lewis claims that she complained to

multiple ODOC employees about the quality of the food, which she claims mad Id.

Plaintiff Tiffanie Lewis testified that she for human consumption, testified that she found the food, including meat alternative trays, Ex. 11.

Plaintiff Brandon McKey testified that he became ill five times during his 50 months of incarceration, including once on June 14, 2017 when Plaintiff McKey believes he suffered from food poisoning. Def. Ex. 15. Plaintiff McKey also testified that on at least ten occasions, he avoided eating food that he perceived to be of poor quality or spoiled and that on multiple occasions he complained about the food. Id. Plaintiff McKey testified that he maintained his weight and his good health while incarcerated. Id.

Plaintiff Derrick Lyons testified that he witnessed or consumed spoiled milk on several occasions got an upset stomach after eating inadequate food. Id. He also testified that he

Id.

- eggs and undercooked chicken while in ODOC custody. Def. Ex. 2. He also testified that he consumed chicken patties

1 that made him sick on one occasion, regularly consumed spoiled milk, and consumed spoiled

human consumpt Id. during his period of incarceration, but he experienced diarrhea, stomach aches, and dry heaves.

Id.



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Plaintiff Joshua Smith testified that he was served spoiled milk, discolored roast beef, Smith testified that he believed the food at ODOC made him constipated. Id.

Plaintiff Jessica Dove testified that she observed flies in the soup, undercooked hambur and vomiting caused by the food in ODOC. Id.

DISCUSSION A. Evidentiary Issues

As a preliminary matter, Defendant raises a number of evidentiary objections to summary judgment. Defendants object to Exhibit 1, also labeled Exhibit A, which appears to be

a photograph of a cardboard box Berman Decl. Ex. A. Plaintiff explains that the photograph was taken by an in the fishing industry. The family of the unnamed inmate sent the photograph who believed the box looked similar to boxes of frozen fish that Plaintiffs described seeing in ODOC facilities. Defendant objects that this photograph lacks foundation and has not been authenticated under Federal Rules of Evidence 401 and 901(a United States v. Gadson, 763 F.3d 1189, 1203 (9th Cir. 2014). This may be done through testimony of a knowledgeable witness, such as the testimony of the person who took the photograph who can testify that the photograph accurately depicts what the witness saw. See United States v. Brooks, 772 F.3d 1161, 1171 n.3 (9th Cir. 2014) (witness testified that the photographs admitted into evidence were the ones he took); Bennett v. Misner, 2004 WL 2091473, at *19 (D. Or. Sept. 17, 2004) (rejecting admission of photograph of prison food with expiration dates to prove Eighth Amendment claims because photograph was not appropriately authenticated).

The Court finds that this photograph lacks appropriate authentication. Not only is the source of the photograph entirely unknown and unnamed, but the photograph does not even purport to be a photograph of food at ODOC facilities. Instead, the box was apparently located somewhere in a fishing warehouse. ECF 111 at 9. There is also no basis to conclude that this

somewhere in the fishing industry has any relevance to food served to inmates at ODOC facilities. The photograph also contains hearsay, because Plaintiffs appear to assume that the labels on the box can be used to prove the contents of the box. 2

See United States v. Jenkins, 345 F.3d 928, 935 (6th Cir. 2003) (allowing labels on box to be used for the truth of the matter asserted only under business records exception to hearsay, which Plaintiffs do not assert applies here). Were this case to proceed to trial, inmates could testify about the food they consumed and what they personally witnessed. An anonymous photograph of a labeled box in an unknown

2 Even if the Court were to take the labels on the box for the truth of the matter asserted and assume that the box did contain frozen herring, Plaintiff Aldeguer testified that he knew the fish he was eating was pollack, not herring. Def. Ex. 2 at 9. Plaintiff Tiffanie Lewis testified that the boxes she



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saw that were n of fish. Def. Ex. 11 at 4. location is hearsay and lacks foundation, authentication, and relevance to the issues presented by this lawsuit.

Defendants also object to Exhibit 1, a spreadsheet that appears to list names of individuals and their complaints with the food served at ODOC facilities. Berman Decl. Ex. 1 contains multiple levels of hearsay, as it appears to be notes what inmates told them about the food as well as what inmates reported that prison officials told them. See Berman Decl. Ex. 1- Plaintiffs appear to rely on the document to prove the truth of the allegations and statements contained therein. This is both hearsay and hearsay within hearsay. See Fed. R. Evid. 801, 805. Therefore, this document will be excluded, but were this case to proceed to trial, inmates could testify about what they personally saw and experienced.

Defendants also object to Exhibits 3, 4, and 5, the tort claims notices, as hearsay. The Court agrees that any statements contained in the tort claims notices describing what Plaintiffs told Mr. Berman are hearsay. The tort claims notices cannot be used to prove the truth of the allegations that Plaintiffs made to Mr. Berman. See Fed. R. Evid. 801. They can, however, be used to demonstrate whether notice or exhaustion requirements were met. Therefore, the Court does not exclude the entirety of the tort claims notices but will not rely on them proof of the truthfulness of the allegations Plaintiffs describe.

Defendants object to the declaration of Natasha Loftis. Ms. Loftis was not disclosed as a witness during the course of the lengthy discovery in this case. Rule 26 of the Federal Rules of Civil Procedure requires parties to Fed. R. Civ. P. the party learns that in some material respect the disclosure it must supplement or correct its initial disclosures. Fed. R. Civ. P. 26(e). A failure to disclose information or identify a witness as required by Rules 26(a) and (e) means that party may not use that information or witness as evidence on a motion. Fed. R. Civ. P. 37(c). Accordingly, because Plaintiffs did not disclose Ms. Loftis as a witness at any point before Plaintiffs submitted her declaration in sup motion for summary judgment, Plaintiffs have failed to disclose Ms. Loftis in a timely manner and cannot xcluded.

B. State Law Claims

Plaintiffs argue that the section of the Third Amended Complaint FIRST CAUSE OF ACTION under the Oregon Constitution. But this section of the Complaint only alleges claims under the

United States Constitution. Plaintiffs cite to Sections 9, 13, and 16 of the Oregon Constitution that and argue that the Complaint therefore pleads violations of those sections of the Oregon Constitution. The Complaint is clear, claims:

The acts and omissions of all defendants []Peters et al, enumerated above, who had a constitutional duty to protect plaintiffs and fellow inmates from violations of the Eighth and Fourteenth



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Amendments to the United States Constitution, amounted [sic] to a deliberate indifference to their nutritional and health needs. Defendants violated the requirements of the Eighth Amendment by providing spoiled, substandard, and literally marked not for human consumption comestibles to inmates as though they were yard animals. See ECF 40 ¶ 25. One passing reference to the Oregon Constitution, without stating that Plaintiffs intend to bring any claims under the Oregon Constitution, does not put Defendants on notice that Plaintiffs intended to bring state law claims. Even if Plaintiffs had adequately pleaded state claims, those claims would fail as a matter of law. See *Hunter v. City of Eugene*, 309 Or. s Bill of Rights provides no textual or historical basis for implying a

C. PLRA Exhaustion

Defendants argue that Plaintiffs Dove and Lyons failed to exhaust administrative remedies as required under the PLRA . Plaintiff responds that, because neither Dove nor Lyons was incarcerated at the time that the original complaint was filed, they are not subject to the exhaustion requirements of the PLRA. Plaintiff provides no legal support for the assertion that of the original complaint, as opposed to the time of filing of the operative complaint. Both

Plaintiff Dove and Plaintiff Lyons were out of custody at the time of filing of the original complaint, but by the time the operative complaint (in this case the Third Amended Complaint) was filed, both were in custody again. The exact dates that Plaintiffs Dove and Lyons were incarcerated are not disputed, and Plaintiffs do not dispute that Dove and Lyons failed to exhaust their administrative remedies the only dispute is whether they are subject to those exhaustion requirements as a matter of law.

Both Plaintiffs are subject to the exhaustion requirements of the PLRA. See *Jackson v. Fong*, 870 F.3d 928, 937 (9th Cir. 2017) (holding that a files the operative complaint, not the original complaint, is what determines whether exhaustion

requirements under the PLRA apply); see also *Jacobsen v. Curran*, 2018 WL 1693382, at *4 (E.D. Cal. Apr. 6, 2018) (requiring plaintiff to comply with PLRA exhaustion requirements where plaintiff was released from custody after allegedly wrongful events occurred, but was re- incarcerated at the time he filed the operative complaint); *McCullough v. Yates*, 2011 WL 773233, at *2 (E.D. Cal. Feb. 28, 2011) (same). Although both Plaintiffs were briefly released from state custody after the events giving rise to their claims, they were both in custody at the time of filing of the operative complaint. Thus, they are required to exhaust their administrative remedies under the PLRA. Plaintiff does not dispute that they failed to do so. Therefore, the Court dismisses the claims of Plaintiffs Dove and Lyons without prejudice. D. Statute of Limitations

Defendants argue that Plaintiffs Schultz and Bridgette Lewis bring untimely claims, and therefore their claims should be dismissed with prejudice. Federal claims brought under 42 U.S.C. § 1983 borrow the statute of limitations from the state law statute of limitations for personal injury claims.



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See *Wilson v. Garcia*, 471 U.S. 261 (1985); see also *Addison v. City of Baker City*, 258 F. Supp. 3d 1207, 1236 (D. Or. 2017). In Oregon, the applicable statute of limitations is two years. See *Sanok v. Grimes*, 306 Or. 259, 263 (1988) (applying Or. Rev. Stat. § 12.110 two-year statute of limitations for personal injury claims to § 1983 claims). Plaintiffs filed the original Complaint involve events that occurred in or after May of 2015.

Plaintiff Bridgette Lewis alleges that while she was a prisoner at Coffee Creek Correctional Facility in July of 2013, she handled Plaintiff Bridgette Lewis testified that she stopped eating the fish. Plaintiff Bridgette Lewis could

not recall eating any food products that caused her to become ill after she stopped eating the fish.

adverse health consequences of the food stopped sometime after 2013 or in 2014, when you stopped consuming the fish products, correct? A: Yeah. A couple of different times other food nts from 2013, or, at the latest, 2014, her claims pertain to events that occurred more than two years before the filing of the complaint in 2017.

While housed at the E

ECF 111 at 2-3. The housing records in this case demonstrate that Schultz was housed in the EOCI from December 2011 until August 2014, and Plaintiff does not dispute the accuracy of the housing records. See Def. Ex. 5. The two-year statute of limitations for any constitutional claims that arose out of Plaintiff Schult EOCI therefore expired at the latest in August of 2016. Plaintiff Schultz does not allege that he was served inadequate food at any other correctional institution after he left EOCI in 2014. by the two-year statute of limitations. E. Supervisory Liability

Defendants argue that the claims against the supervisory Defendants Defendants Peters, Gower, Angelozzi, Amsberry, Kelly, Belleque, Persson, Taylor, Brown, Causey, and Popoff should be dismissed because there is no evidence that these defendants had any knowledge of or

involvement in the food services in the institutions. for the unconstitutional conduct of their subordinates under a theory of respondeat superior *Ashcroft v. Iqbal*

§ 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Id. liable as a supervisor under § 1983 if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989)). Id. (citation omitted).



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Plaintiffs allegations amount to no more than a theory of respondeat superior. The Third had knowledge of and/or ratified the purchasing, procuring and serving of spoiled, inedible

and/or not fit for human consumption food by their staff through memos, emails, conference and phone calls and approval of procurement forms, hence binding them as complicit and liable for

alleged memoranda, emails, conference and telephone calls, or procurement forms that Plaintiffs thought may have existed. for Summary Judgment that any supervisory defendant besides Kent Fanger had any knowledge or personal involvement in any of the alleged constitutional violations. See ECF 111 at 11.

Plaintiffs argue that, because Kent Fanger knows the organizational structure of food services within ODOC, he should be held responsible for every aspect of food services within ODOC. 3

But Plaintiffs fail to point to any knowledge or action on the part of Fanger pertaining to the allegedly unconstitutional food. that they pertain to food not authorized for resale does not corroborate

3 Food Complaint list the supervisory defendants on notice and provided them with knowledge of the alleged substandard food. This document appears to have been compiled by Plain no evidence that Defendants ever would have seen it, and furthermore it consists entirely of unreliable hearsay and hearsay within hearsay. This exhibit cannot give Defendants knowledge of the allegations. food. Although Plaintiffs argue that Id be unaware of the procurement, housing and kitchen delivery of such inedible and improper

knowledge. 4

ECF 111 at 10. Unsupported allegations are insufficient to withstand summary judgment. F. Qualified Immunity

Defendants argue that there is no genuine dispute of fact as to whether the non-

maintain health and therefore Defendants are entitled to qualified immunity. Wood v. Moss, 134 S.Ct. 2056, 2066-67 (2014); Krainski v. Nevada ex. Rel. Bd. of Regents, 616 F.3d 963, the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassmen Pearson v. Callahan Whether qualified immunity can be invoked

objective legal s acts. And reasonableness of official assessed in light of the legal rules that were clearly established at the time [the action] was taken Ziglar v. Abbasi, 137 S.Ct. 1843, 1866 (2017) (citation omitted) (alteration in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) and Anderson v.



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4 Indeed, when presented with a list of named defendants in this case, most Plaintiffs did See Def. Ex. named Defendants). *Creighton*, 483 U.S. 635, 638 (1987)). immunity from suit rather than a mere

Saucier v. Katz, 533 U.S. 194, 200-01 (2001) (quotation marks omitted) (emphasis in original). *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

Qualified immunity, however, is only an immunity from suit for damages, it is not an immunity from suit for declaratory or injunctive relief. See *L.A. Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993).

In *Saucier*, the Supreme Court outlined a two-step process for determining the applicability of the qualified immunity doctrine. 533 U.S. at 200. The first step is to determine *Id.* The second *Id.* The constitutional issue, however, need not be addressed first in every case. *Pearson*, 555 U.S. at 227. Regardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not clearly established or the officer could have reasonably believed that his particular conduct was lawful. *Romero v. Kitsap Cty.*, 931 F.2d 624, 627 (9th Cir. 1991).

To determine whether court must ask whether it would have been clear to a reasonable officer that the alleged conduct

Ziglar, 137 S.Ct. at 1867. To be clearly established,

is, an officer might lose qualified immunity even if there is no reported case directly on point. But in the light of pre-existing law, the *unla Id.* ensure that before they are subject to suit, [government officials] are on notice their conduct is unlawful *Eng v. Cooley*, 552 F.3d 1062, 1075 (9th Cir. 2009) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)) (alteration in original). Thus, the key inquiry in determining whether an t his conduct was unconstitutional. *Hope*, 536 U.S. at 741; see also *Saucier*, 533 U.S. at 202 (noting that the law

certain conduct is a constitutional violation under facts not distinguishable in a fair way from the *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013) officials *Bull v. City & Cty. of San Francisco*, 595 F.3d 964, 1003 (9th Cir. need not be materially or fundamentally similar to the situation in

The plaintiff bears the burden of making a showing that the right was clearly established at the time of the alleged violation. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002). When considering whether qualified immunity applies, the court must resolve all factual disputes in favor of the party asserting the injury. *Ellins*, 710 F.3d at 1064.

The Supreme Court has instructed that courts use a two- *LeMaire v. Maass*, 12 F.3d 1444, 1451 (9th Cir. 1993) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). jective: Was the deprivation sufficiently



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serious? The second part *Id.* Prison officials cannot be held liable for violations of the Eighth Amendment unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

LeMaire, 12 F.3d at 1456 (citing *Cunningham v. Jones*, 567 F.3d. 659, 660 (6th Cir. 1977)). The Ninth Circuit has held that food occasionally does not violate the Eighth Amendment. *Id.* (quoting with approval *Hamm v. DeKalb Cty.*, 774 F.2d 1567, 1575 (11th Cir. 1985)).

and claims of occasional illness or food poisoning. Plaintiff Aldeguer testified that he suffered from diarrhea once or twice every six weeks, which he attributed to the food served at ODOC, and that his weight stayed the same the entire time he was in ODOC custody. Def. Ex. 2 at 11, 16-17. Plaintiff

Joshua Smith testified that he gained 100 pounds while in ODOC custody. Def. Ex. 4 at 2. He also testified that he suffered from constipation. Def. Ex. 4 at 12. Plaintiff Tiffanie Lewis testified that she e the She testified that she never got sick while in ODOC custody. Def. Ex. 11 at 7. Plaintiff Brandon McKey testified that after getting diarrhea three times at ODOC he stopped eating pink meat patties. Def. Ex. 15 at 4. He estimated that me might have gotten sick from the food served in ODOC five times over the course of 50 months. Def. Ex. 15 at 7. Plaintiff McKey testified that he gained between 65 and 73 pounds while in ODOC custody bu Def. Ex. 15 at 5-6. None of the Plaintiffs testified that they were unable to maintain their overall health while incarcerated. They produced no medical records corroborating any decline in health, or any evidence that they suffered from a serious medical condition as a result of the food in ODOC facilities.

Claims that food was contaminated or made Plaintiffs occasionally ill, without any supporting medical evidence of any adverse health impacts, does not create a genuine dispute of fact whether the food was constitutionally adequate. See *Brown v. Union Cty.*, 2018 WL 3371597, at *8-9 (D. Or. May 18, 2018); *Bennett*, 2004 WL 2091473, at *20 (granting summary judgment on Eighth Amendment claims where neither alleged nor provided evidence, such as their own medical records, to establish that they suffered significant injury or illness directly resulting from their consumption of unfit food [in prison], such as repeated symptoms of food poisoning, serious malnutrition, or drastic weight loss. regularly and frequently suffer from food poisoning with truly serious medical complications as a result of particular, known unsanitary practices which are customarily followed by the prison food service organization, and the authorities without arguable justification refuse to attempt *George v. King*, 837 F.2d 705, 707 (5th Cir. 1988). Here, however, the most serious allegations

complain of occasional diarrhea and vomiting, and not a single Plaintiff claims that they suffered from any medical complications, long-term consequences or serious adverse health impacts.

Although several Plaintiffs gained weight while in custody, the Ninth Circuit has considered weight gain a sign that *LeMaire*, 12 F.3d at 1456. Plaintiffs do not claim that the food offered in the vegetaria



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- alternative tray the meat and fish products that Plaintiffs complain of. There is no dispute of fact that Plaintiffs had an available option at every meal that contained none of the food items that they claim caused their illness or tasted foul (Plaintiff Tiffanie Lewis testified that she ate the vegetarian option instead of the fish and never became ill). Thus, Plaintiffs have failed to create a genuine dispute of fact as to the objective component of their Eighth Amendment claim that they were not provided with food that was adequate to maintain their health.

r diarrhea fell below a standard of adequately maintained health, Plaintiffs fail to allege or establish any evidence to show that they could meet the subjective component of the Eighth Amendment test: *Id.* at 1451. Although Plaintiffs do not allege that any of the Defendants served inedible food with the intent to cause harm, Plaintiffs allege that Defendants acted with deliberate indifference to their well-being.

As evidence that Defendant Fanger acted with a culpable state of mind, Plaintiffs again point to Exhibit 1, the unauthenticated hearsay notes that appear to have been compiled by saw these notes, and therefore no evidence that he had knowledge of the complaints that they appear to document. None of the Plaintiffs identified Fanger as someone to whom they reported issues with the food service. Plaintiffs point to no evidence that Defendant Fanger had any knowledge of a risk to inmate health or safety, or that he ever deliberately disregarded that risk.

Plaintiffs fail to provide any evidence that Defendants Whitney or Bowser had any knowledge of the allegedly contaminated food or the alleged food-borne illnesses. Other than alleging that Whitney and Bowser are responsible for managing the food service program, Plaintiff fails to articulate any evidence that Whitney and Bowser would have had knowledge of the specific issues that Plaintiffs complain of in this lawsuit. *claims of food Ferris v. Jefferson Cty.*, 2008 WL 5101240, at *6 (D. Colo. Nov. 26, 2008).

Several Plaintiffs claim that they complained to Defendants Helton and Timmons about the quality of the food in ODOC facilities and therefore Defendants Helton and Timmons had actual knowledge of the quality of the food and acted with deliberate indifference in serving it. it is not clearly established that these complaints rise to the level of an Eighth Amendment

violation.

The standard under the Eighth Amendment, as discussed above, is that the food must be adequate for inmates to maintain their health. temporary lapses in sanitary food service, nor service of meals contaminated with maggots are

sufficiently serious to cons *Bennett*, 2004 WL 2091473, at *20. Courts have approved of serving food with foreign objects in it, *LeMaire*, 12 F.3d at *id.*, moldy raisins and rancid peanut butter, *Williams v. Berge* maggots, *Islam v. Jackson*, 782 F. Supp. 1111, 1114-15 (E.D. Va. 1992). It was not clearly



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established that serving fish not intended for human consumption or spoiled meat and milk on occasion violated the Eighth Amendment, especially when there is no dispute that the vegetarian meals (which no Plaintiff alleges ever caused illness) were available to inmates at every meal. Thus, even for Defendants who may have had knowledge of Plaintiffs at ODOC facilities, it was not clearly established that serving food that tastes bad or even causes inmates to occasionally become ill after eating it, but causes no serious or long-term health impacts, violates the Eighth Amendment.

In sum, all Defendants are entitled to qualified immunity because Plaintiffs have not produced evidence to create a genuine dispute of fact as to whether Plaintiffs were able to maintain their health. Even assuming that the food was objectively inadequate to maintain inmate health, Plaintiffs have not demonstrated that Defendants either knew about the food quality or that it was clearly established that food of the quality that the inmates describe here, which caused occasional illness but no other adverse health impacts, was constitutionally inadequate. Defendants are entitled to qualified immunity. G. Sanitation

is not materially distinguishable from wholesome food because it rests on allegations that Defendants served spoiled and bad-tasting food. See ECF 40 ¶

. Therefore, for the

of material fact.

CONCLUSION Plaintiffs have failed to establish a genuine dispute of material fact on any of their claims.

IT IS SO ORDERED. DATED this 22nd day of July, 2019. /s/ Michael H. Simon

Michael H. Simon United States District Judge

