141 of 166 DOCUMENTS

**Joseph Munoz, et al., Plaintiffs, v. Charles Marshall, et al., Defendants.**

**No. C-94-1839 MHP**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

***1994 U.S. Dist. LEXIS 12755***

**September 8, 1994, Decided**
**September 8, 1994, Filed, Entered**

**JUDGES:** [*1] Patel

**OPINION BY:** MARILYN H. PATEL

**OPINION**

Order of Dismissal Without Leave to Amend

INTRODUCTION

Plaintiffs, inmates at the Security Housing Unit ("SHU") of Pelican Bay State Prison ("PBSP"), have filed a *pro se* civil rights complaint under *42 U.S.C. § 1983*. Plaintiffs also seek to proceed *in forma pauperis*.

Venue is proper in this district as the defendants reside, and a substantial part of the events giving rise to the action occurred, in this district. *28 U.S.C. § 1391(b)*.

BACKGROUND

Plaintiffs, who seek classwide relief, claim that PBSP's policy of prohibiting inmates in the SHU from wearing athletic and orthopedic shoes violates their constitutional rights. Plaintiffs claim that the only shoes they are permitted to wear are state-issued deck-style slip-ons which provide insufficient heel and ankle support for inmates who wish to exercise vigorously on PBSP's concrete exercise yards or who have pre-existing orthopedic injuries. Plaintiffs do not seek to have the defendants provide them the athletic/orthopedic shoes they desire; rather, they wish to modify the defendants' policy respecting footwear such that they are [*2] permitted to receive the shoes of their choice from outside sources and to wear them.

Plaintiffs seek declaratory and injunctive relief.

DISCUSSION

A. Standard of Review

Title *28 U.S.C. § 1915(d)* authorizes federal courts to dismiss a claim filed *in forma pauperis prior* to service "if the allegation is untrue, or if satisfied that the action is frivolous or malicious." Under this standard, a district court may review the complaint and dismiss *sua sponte* those claims premised on meritless legal theories or that clearly lack any factual basis. *Denton v. Hernandez, 118 L. Ed. 2d 340, 112 S. Ct. 1728, 1730-31 (1992)*. *Pro se* pleadings must be liberally construed, however, especially where civil rights claims are involved. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*.

To state a claim under *42 U.S.C. § 1983*, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged deprivation was committed by a person [*3] acting under the color of state law. *West v. Atkins, 487 U.S. 42, 48, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988)*.

B. Legal Claims

*Eighth Amendment*

a. Necessities of Life

Plaintiffs claim that the failure to permit them to wear athletic/orthopedic shoes transgresses the *Eighth Amendment*. While the Constitution does not mandate that prisons be comfortable, *Rhodes v. Chapman, 452 U.S. 337, 349, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981)*, nor that they provide every amenity that one might find desirable, *Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982)*, neither does it permit inhumane ones. *Farmer v. Brennan, 128 L. Ed. 2d 811, 114 S. Ct. 1970, 1976 (1994)*. Prison officials must provide all prisoners with the basic necessities of life, *i.e.,* food, clothing, shelter, sanitation, medical care and personal safety. *Hoptowit,*

*682 F.2d at 1246*; *accord DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989)* [*4] (failure to provide basic human needs transgresses substantive limits on state action set by *Eighth Amendment*). The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the *Eighth Amendment*. *Helling v. McKinney, 125 L. Ed. 2d 22, 113 S. Ct. 2475, 2480 (1993)*. A prison official violates the *Eighth Amendment* when two requirements are met: (1) the deprivation alleged must be, objectively, sufficiently serious, *Farmer, 114 S. Ct. at 1977* (citing *Wilson v. Seiter, 501 U.S. 294, 298, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (1991))*, and (2) the prison official possesses a sufficiently culpable state of mind, *id. at 1977* (citing *Wilson, 501 U.S. at 297*). In prison-conditions cases the necessary state of mind is one of "deliberate indifference." *Wilson, 501 U.S. at 302-03* (general conditions of confinement); *Helling, 113 S. Ct. at 2480* [*5] (inmate health); *Estelle v. Gamble, 429 U.S. 97, 104, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976)* (inmate health); *cf. Hudson v. McMillian, 117 L. Ed. 2d 156, 112 S. Ct. 995, 998-99 (1992)* (claims of excessive force require *Eighth Amendment* claimant to show officials applied force maliciously and sadistically for very purpose of causing harm).

Neither negligence nor gross negligence will constitute deliberate indifference. *See Farmer, 114 S. Ct. at 1978* & n.4; *see also Estelle, 429 U.S. at 106* (establishing that deliberate indifference requires more than negligence). A prison official cannot be held liable under the *Eighth Amendment* for denying an inmate humane conditions of confinement unless the standard for criminal recklessness is met, i.e., the official knows of and disregards an excessive risk to inmate health or safety. *Farmer, 114 S. Ct. at 1979*. The official must both be aware of facts from which the inference could be drawn [*6] that a substantial risk of serious harm exists, and he must also draw the inference. *Id.* An *Eighth Amendment* claimant need not show, however, that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. *Id. at 1981*. This is a question of fact. *Id.*

Although the *Eighth Amendment* protects against cruel and unusual punishment, this does not mean that federal courts can or should interfere whenever prisoners are inconvenienced or suffer *de minimis* injuries. *Hernandez v. Denton, 861 F.2d 1421, 1424 (9th Cir. 1988)* (allegation that inmate slept without a mattress for one night is insufficient to state *Eighth Amendment* violation and no amendment can alter that deficiency), *vacated on other grounds sub nom. Denton v. Hernandez, 118 L. Ed. 2d 340, 112 S. Ct. 1728 (1992)*; *see, e.g., DeMallory v. Cullen, 855 F.2d 442, 445 (7th Cir. 1988)* (correctional officer spitting upon prisoner does not rise to level of constitutional [*7] violation); *Holloway v. Gunnell, 685 F.2d 150 (5th Cir. 1985)* (no claim stated where prisoner forced to spend two days in hot dirty cell with no water); *Miles v. Konvalenka, 791 F. Supp. 212 (N.D. Ill. 1992)* (single instance of finding mouse in food not actionable); *Vega v. Parsley, 700 F. Supp. 879 (W.D. Tex. 1988)* (burned out light bulb, promptly replaced, does not violate *Eighth Amendment*); *Evans v. Fogg, 466 F. Supp. 949 (S.D.N.Y. 1979)* (no claim stated by prisoner confined for 24 hours in refuse strewn cell and for two days in flooded cell). Federal courts should avoid enmeshing themselves in the minutiae of prison operations in the name of the *Eighth Amendment*. *Wright v. Rushen, 642 F.2d 1129, 1132 (9th Cir. 1981)*.

Plaintiffs' claim fails to meet the first requirement for claims worthy of *Eighth Amendment* scrutiny: that the alleged deprivation be sufficiently serious. While plaintiffs claim that orthopedic injury eventually may result from vigorous exercise in their state-issued footwear, such injury is preventable. Inmates [*8] can easily modify their exercise routines so as to decrease the impact of their feet on the concrete exercise yards. Inmates who claim that the state-issued footwear helps to exacerbate pre-existing orthopedic injuries may request to see a physician who, if he or she deems it medically indicated, may prescribe therapy or alternative footwear as needed. While there is no doubt that athletic footwear may be more comfortable than the state-issued footwear, the failure to permit inmates to wear the most comfortable apparel does not rise to a violation of the *Eighth Amendment*.

b. Deliberate indifference to serious medical/psychiatric needs

Nor have plaintiffs alleged a violation of the *Eighth Amendment's* proscription of deliberate indifference to serious medical need. Deliberate indifference to serious medical needs presents a cognizable claim for violation of the *Eighth Amendment* proscription of cruel and unusual punishment. *Estelle, 429 U.S. 97, 104, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976)*; *McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992)*; *Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986)*. [*9] A determination of "deliberate indifference" involves an examination of two elements: the seriousness of the prisoner's medical need and the nature of the defendant's response to that need. *McGuckin, 974 F.2d at 1059*.

A "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." *McGuckin, 974 F.2d at 1059* (citing *Estelle, 429 U.S. at 104*). The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that

significantly affects an individual's daily activities; or the existence of chronic and substantial pain are examples of indications that a prisoner has a "serious" need for medical treatment. *McGuckin, 974 F.2d at 1059-60* (citing *Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir. 1990)*; *Hunt v. Dental Dept., 865 F.2d 198, 100-01 (9th Cir. 1989)*. In order for deliberate [*10] indifference to be established, there must be a purposeful act or failure to act on the part of the defendant. *McGuckin, 974 F.2d at 1060*. Second, a prisoner can make no claim for deliberate medical indifference unless the denial was harmful. *McGuckin, 974 F.2d at 1060*; *Shapley v. Nevada Board of State Prison Commissioners, 766 F.2d 404, 407 (9th Cir. 1985)*.

Plaintiffs do not claim that they, or any of them, brought a serious medical condition to defendants' attention and that defendants were deliberately indifferent to that condition. Thus plaintiffs have stated no claim for deliberate indifference to serious medical need.

c. Denial of exercise

Plaintiffs allege that defendants' policy prohibiting plaintiffs from wearing athletic/orthopedic shoes denies them the opportunity to exercise and thus amounts to cruel and unusual punishment remediable under the *Eighth Amendment*. The denial of exercise is cognizable as a violation of civil rights. *Spain v. Procunier, 600 F.2d 189, 190 (9th Cir. 1979)*. Prisoners may not be deprived of all exercise, *Toussaint v. McCarthy, 597 F. Supp. 1388, 1393 (N.D. Cal. 1984)*, [*11] *aff'd in part, rev'd in part on other grounds, 801 F.2d 1080 (1986)*, *cert. denied, 481 U.S. 1069 (1987)*. A short term denial of exercise to an inmate for disciplinary or security reasons, however, does not violate the *Eighth Amendment*. *Toussaint, 597 F. Supp. at 1412*.

Plaintiffs here have not been denied the opportunity to exercise. They may continue to engage in non-aerobic and low-impact aerobic exercise free from injury. Thus plaintiffs have failed to state a claim for unconstitutional denial of exercise under the *Eighth Amendment*.

CONCLUSION

For the foregoing reasons, plaintiffs' complaint is dismissed with prejudice to filing another unpaid complaint.

IT IS SO ORDERED.

Marilyn H. Patel

U.S. DISTRICT JUDGE

SEP 8 - 1994