

1 John Doe Sergeant; Correctional Officer (C/O) A. Battle; C/O C. Vang. On August 6, 2009, an
2 order was entered, advising Plaintiff that the complaint stated a claim against Defendants Battle,
3 Doe and Vang for excessive force, but failed to state any other cognizable claims. Specifically,
4 Plaintiff failed to state a claim for a violation of the Due Process Clause of the Fourteenth
5 Amendment, and supervisory liability claims against Warden Yates. Plaintiff also failed to state
6 a claim on his allegations of conspiracy. Plaintiff was directed to either file an amended
7 complaint or notify the Court of his willingness to proceed only on the claims found to be
8 cognizable in the original complaint. On September 4, 2009, Plaintiff filed a notice, informing
9 the Court that he intended to proceed against Defendants Battle, Vang and Ladd on his excessive
10 force claim.²

11 On November 10, 2009, the District Court adopted the findings and recommendations of
12 the Magistrate Judge, dismissing Defendants Yates, as well as Plaintiff's Due Process and
13 conspiracy claims. Service was ordered on Defendants Ladd, Battle, and Vang. Defendants filed
14 an answer on January 26, 2010. On December 2, 2010, all three Defendants filed the motion for
15 summary judgment that is now before the Court. Plaintiff filed his opposition on December 21,
16 2010, and Defendants filed a reply on December 27, 2010.

17 **II. Summary of Complaint**

18 Plaintiff alleges that on August 18, 2005, he got into a heated argument with another
19 inmate. Plaintiff was pushed by the other inmate and fell. Defendant Vang activated the housing
20 unit alarm and two correctional officers, one of whom was Defendant Battle, ran over to
21 Plaintiff. Plaintiff was handcuffed by one of the officers, while Defendant Battle stood by
22 Plaintiff with a can of pepper spray. Plaintiff tried to explain the situation but Defendant Battle
23 warned him to shut up. Plaintiff refused, and then said, "What are you going to do spray me for
24 talking [?]" (Compl. ¶ 13.) In response, Defendant Battle pepper sprayed Plaintiff.

26 ² In the September 4, 2009, notice, he indicated that the identity of Defendant Sergeant Doe is Sergeant
27 Ladd.

1 Plaintiff was then escorted to a clinic where Defendant Ladd told him that if he would
2 drop the pepper spray incident, he would not receive a disciplinary write up. Plaintiff refused,
3 and Defendant Ladd had Plaintiff confined to a cell for four hours with pepper spray still
4 covering his entire face and upper body.

5 When Plaintiff was allowed to return to his housing unit, he asked Defendant Vang for a
6 shower to wash off the pepper spray, but Defendant Vang refused to allow him to take a shower
7 for three hours.

8 Plaintiff was issued a CDC Form 115 (Rules Violation Report) for the incident, but it was
9 dismissed at the disciplinary hearing because Plaintiff had been the victim in the incident, and
10 was cleared of any misconduct.

11 **III. Summary Judgment**

12 Summary judgment is appropriate when it is demonstrated that there exists no genuine
13 issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.
14 Fed. R. Civ. P. 56(c). Under summary judgment practice, the moving party

15 [a]lways bears the initial responsibility of informing the district
16 court of the basis for its motion, and identifying those portions of
17 “the pleadings, depositions, answers to interrogatories, and
18 admissions on file, together with the affidavits, if any,” which it
19 believes demonstrate the absence of a genuine issue of material
20 fact.

21 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

22 If the moving party meets its initial responsibility, the burden then shifts to the opposing
23 party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec.
24 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the
25 existence of this factual dispute, the opposing party may not rely upon the denials of its
26 pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or
27 admissible discovery material, in support of its contention that the dispute exists. Rule 56(e);
28 Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in

1 contention is material, i.e., a fact that might affect the outcome of the suit under the governing
2 law, Anderson, 477 U.S. at 248; Nidds v. Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir.
3 1996), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could
4 return a verdict for the nonmoving party, Matsushita, 475 U.S. at 588; County of Tuolumne v.
5 Sonora Community Hosp., 263 F.3d 1148, 1154 (9th Cir. 2001).

6 In the endeavor to establish the existence of a factual dispute, the opposing party need not
7 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual
8 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at
9 trial.” Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 872 (9th Cir. 2007). Thus, the
10 “purpose of summary judgment is to ‘pierce the pleadings and to assess the proof in order to see
11 whether there is a genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P.
12 56(e) advisory committee’s note on 1963 amendments).

13 In resolving the summary judgment motion, the court examines the pleadings,
14 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
15 any. Rule 56(c). The evidence of the opposing party is to be believed, Anderson, 477 U.S. at
16 255, and all reasonable inferences that may be drawn from the facts placed before the court must
17 be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United States v.
18 Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)). Nevertheless, inferences are not drawn
19 out of the air, and it is the opposing party's obligation to produce a factual predicate from which
20 the inference may be drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45
21 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir. 1987).

22 Finally, to demonstrate a genuine issue, the opposing party “must do more than simply
23 show that there is some metaphysical doubt as to the material facts. Where the record taken as a
24 whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine
25 issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

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1 **A. Excessive Force**

2 The unnecessary and wanton infliction of pain violates the Cruel and Unusual
3 Punishments Clause of the Eight Amendment. Hudson v. McMillian, 503 U.S. 1, 5
4 (1992)(citations omitted). When a prison security measure is undertaken in response to an
5 incident, the question of whether the measure taken inflicted unnecessary and wanton pain and
6 suffering depends on “whether force was applied in a good faith effort to maintain or restore
7 discipline or maliciously and sadistically for the very purpose of causing harm.” Id. at 6.

8 The infliction of pain in the course of a prison security measure “does not amount to cruel
9 and unusual punishment simply because it may appear in retrospect that the degree of force
10 authorized or applied was unreasonable, and hence unnecessary.” Whitley v. Albers, 475 U.S.
11 312, 319 (1986); see also Hudson, 503 U.S. at 1. Prison administrators “should be accorded
12 wide-ranging deference in the adoption and execution of policies and practices that in their
13 judgment are needed to preserve internal order and discipline and to maintain institutional
14 security.” Whitley, 475 U.S. at 321-322 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1970)).

15 Moreover, not “every malevolent touch by a prison guard gives rise to a federal cause of
16 action,” Hudson, 503 U.S. at 9. “The Eighth Amendment’s prohibition of cruel and unusual
17 punishments necessarily excludes from constitutional recognition de minimis uses of physical
18 force, provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’”
19 Id. at 9-10 (internal quotations marks and citations omitted). Although de minimis uses of force
20 do not violate the Constitution, the malicious and sadistic use of force to caused harm always
21 violates the Eighth Amendment. Id.; see also Oliver v. Keller, 289 F.3d 623, 628 (9th Cir.
22 2002)(Eighth Amendment excessive force standard examines de minimis uses of force, not de
23 minimis injuries)).

24 Factors such as the need for the application of force, the relationship between the need
25 and amount of force that was used, and the extent of injury inflicted are relevant to the ultimate
26 determination as to whether force used by prison personnel was excessive. From these factors,
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1 inferences may be drawn as to whether the use of force could plausibly have been thought
2 necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm
3 as is tantamount to a knowing willingness that it occur. “Equally relevant are such factors as the
4 extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible
5 officials on the basis of facts known to them, and any efforts made to temper the severity of a
6 forceful response.” Whitley, 475 U.S. at 321.

7 **IV. Defendants’ Motion**

8 In order to meet their burden on summary judgment, Defendants must come forward with
9 evidence that establishes the lack of existence of a triable issue of fact. Defendants’ evidence
10 must establish, without dispute, that their use of force was applied in a good faith effort to restore
11 or maintain prison discipline, and not sadistically or maliciously.

12 Defendants support their motion with the declarations of Defendant Ladd, Defendant
13 Vang, Defendant Battle and Medical Technical Assistant (MTA) Carr. Attached as exhibits to
14 Defendants’ declarations are copies of the incident report regarding the event at issue, as well as
15 copies of portions of Plaintiff’s medical record.

16 **A. Defendant Ladd**

17 Defendant Ladd declares that in 2005, he was assigned as the Recreation Yard and Dining
18 Hall Sergeant at Pleasant Valley State Prison. Regarding the incident at issue in this case,
19 Sergeant Ladd declares that “I had no involvement in the use-of-force incident on August 18,
20 2005 because I worked outside of Building Four. I was not the building’s Program Sergeant. I
21 did not work in the medical clinic where Maddox decontaminated himself.” (Ladd Decl. ¶ 2.)

22 The Court finds that Defendant Ladd has come forward with evidence that he was not
23 involved in the alleged use of excessive force, and was not present. Sergeant Ladd’s declaration
24 establishes that he had no involvement with the use of force at issue in this lawsuit.

25 In his opposition, Plaintiff fails to make any reference to Defendant Ladd. The Court has
26 reviewed the verified complaint, Plaintiff’s opposition, and exhibits in support of his opposition.

1 Plaintiff has failed to come forward with any evidence that Defendant Ladd subjected Plaintiff to
2 excessive force. Defendant Ladd's declaration establishes that he was not present during the
3 event at issue. Plaintiff has not come forward with any evidence to the contrary. Judgment
4 should therefore be entered in Defendant Ladd's favor.

5 **B. Defendant Battle**

6 Regarding the events at issue, Defendant Battle declares the following.

7
8 On August 18, 2005, I worked as a Floor Officer in Building Four.
9 At approximately 3:20 p.m., I observed inmate Maddox engaged in
10 a heated argument with fellow inmate Lewis in the day room.
11 I yelled at the inmates to stop arguing, but they did not comply.

12 Lewis pushed Maddox to the ground.

13 I instructed the inmates to get down on the ground so that they
14 could be restrained and separated.

15 Maddox attempted to get up and began arguing with me.

16 I repeatedly commanded him to stay down and I drew my OC
17 pepper-spray canister.

18 Officer Martinez arrived, stood near Maddox, ordered Maddox to
19 stay down, and told him to put his hands behind his back.

20 Maddox then swore at Officer Martinez, attempted to get up, and
21 grabbed Maddox's [sic] wooden cane lying next to his right hand.

22 I perceived that Maddox was attempting to assault Officer
23 Martinez, so I sprayed Maddox once in the face with pepper spray.

24 Maddox dropped his cane and lay prone on the ground.
25 Correctional staff restrained both inmates and escorted them from
26 the building.

27 (Battle Decl. ¶¶ 1-12.)

28 The Court finds that Defendant Battle has met her burden on summary judgment.
Defendant Battle's declaration establishes that Plaintiff disobeyed an order to get down, and
disobeyed an order to put his hands behind his back. Battle's declaration also establishes that,
instead of putting his hands behind his back, Plaintiff reached for a wooden cane. Battle declares

1 that she sprayed Plaintiff because she perceived that he was attempting to assault Officer
2 Martinez with his cane. Defendant Battle’s declaration establishes that she used force in a good
3 faith effort to restore order and discipline, and not sadistically and maliciously for the purpose of
4 harming Plaintiff. Defendant Battle has therefore met her burden on summary judgment.

5 Plaintiff’s complaint, as well as his opposition, is made under penalty of perjury.³
6 Plaintiff declares that Defendant Battle applied pepper spray to Plaintiff because Plaintiff would
7 not stop talking. (Compl. ¶¶ 13, 14.) Plaintiff further declares that Defendant Battle’s conduct
8 was the cause of disruption in the dayroom. Specifically, Plaintiff declares that the supervising
9 officers that arrived were “taken by surprise” at the amount of pepper spray used as well as how
10 upset the dayroom was. Plaintiff declares that he “was later told and there upon alleges on
11 information or belief, that due to the extremely volatile situation in the unit caused by said
12 defendant’s actions, the dayroom was immediately closed and Officer Battle relieved of her post
13 for the rest of the day.” (Compl. ¶ 15.)

14 Federal Rule of Civil Procedure 56(c)(4) requires that affidavits be made on personal
15 knowledge, set forth facts that would be admissible in evidence (i.e., no inadmissible hearsay or
16 opinions), and that show the affiant is competent to testify to the matters stated. “Hearsay
17 evidence in Rule 56 affidavits is entitled to no weight.” Schosche Industries Inc. v. Visor Gear
18 Inc., 121 F.3d 675, 681 (9th Cir. 1997). Plaintiff declares that “on information and belief” he
19 was “told” that Battle’s motivation for spraying him was the fact that Plaintiff would not stop
20 talking. Although personal knowledge may be inferred from a declarant’s position and nature of
21 participation in the matter, Barthelemy v. Air Line Pilots Ass’n, 897 F.2d 999, 1018 (9th Cir.
22 1990), declarations on “information and belief” are entitled to no weight where the declarant
23 lacks personal knowledge. Argo v. Blue Cross & Blue Shield of Kansas Inc., 452 F.3d 1193 ,

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26 ³ A verified complaint in a pro se civil rights action may constitute an opposing affidavit for purposes of the
27 summary judgment rule, where the complaint is based on an inmate’s personal knowledge of admissible evidence,
and not merely on the inmate’s belief. McElyea v. Babbitt, 833 F.2d 196, 197-98 (9th Cir. 1987) (per curiam); Lew
v. Kona Hospital, 754 F.2d 1420, 1423 (9th Cir. 1985); F.R.C.P. 56(e)

1 1200 (10th Cir. 2006). Plaintiff's declaration does not dispute that he refused to follow orders to
2 stop talking. Plaintiff appears to argue that he has undisputed evidence of Battle's subjective
3 state of mind as to why she sprayed Plaintiff.

4 Defendant Battle has come forward with evidence that Plaintiff reached for his cane, and
5 that she acted in order to maintain discipline. Her liability, therefore, turns on whether Plaintiff
6 can offer any evidence that he did not offer any resistance or present any threat to officer safety.
7 In his opposition, made under the penalty of perjury, Plaintiff states that he "was so passive that
8 the responding officer Martinez, after correctly assessing the situation put away his baton and
9 asked Plaintiff to cuff-up, which Plaintiff was complying with when Battle excessively sprayed
10 Plaintiff and Officer Martinez." (Opp'n., 2:25-28.) Plaintiff states that he "complied with all
11 verbal commands to get down, stay down and cuff-up." (*Id.*, 4:9-10.) Although Plaintiff does
12 not specifically declare that he did not reach for his cane, his verified opposition establishes that
13 he did not offer resistance. As noted above, the evidence of the opposing party is to be believed,
14 Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed
15 before the court must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587. A
16 reasonable inference may be drawn from Plaintiff's opposition that he did not offer resistance,
17 and that he complied with all verbal orders. Summary judgment should therefore be denied as to
18 Defendant Battle.

19 **C. Defendant Vang**

20 Plaintiff claims that Defendant Vang, despite Plaintiff's request to take a shower to
21 remove the pepper spray, waited three hours before allowing Plaintiff to take a shower. Plaintiff
22 claims that making him wait three hours to take a shower to remove the pepper spray constituted
23 deliberate indifference within the meaning of the Eighth Amendment.

24 A prison official's failure to decontaminate a prisoner after exposure to pepper spray may
25 support an Eighth Amendment claim for deliberate indifference to his serious medical needs.
26 Clement v. Gomez, 298 F.3d 898, 905 (9th Cir. 2002). In Clement, prison officials used pepper
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1 spray inside a cell to stop a fight between inmates, and the pepper spray spread into the nearby
2 cells. Id. at 901. Although the inmates in the nearby cells were coughing, gagging and taking
3 turns to go outside for fresh air, four hours passed before the inmates were allowed to shower.
4 Id. The Ninth Circuit affirmed the district court’s denial of summary judgment for the officers,
5 stating that “the prisoners may be able to show that the defendants were subjectively aware of the
6 risk of serious injury when they denied showers and medical attention for the inmates for the 4
7 hour period.

8 In his complaint, Plaintiff declares that he had pepper spray “over his entire face and
9 upper body.” (Compl. ¶ 17.) In his opposition, Plaintiff declares that he was sprayed “in his eyes
10 and face.” (Opp’n. 3:18.) Defendant Vang’s declaration is submitted in support of defendants’
11 motion. Defendant Vang declares that “Maddox argued with Officer Battle before she sprayed
12 him once with pepper spray.” (Vang Decl. ¶ 4.) It is undisputed that Plaintiff was sprayed in the
13 face, and had some exposure to his upper body.

14 Defendants also submit the declaration of Medical Technical Assistant (MTA) J. Carr,
15 who examined Plaintiff after he was sprayed and placed in a holding cell. MTA Carr examined
16 Plaintiff, noted no injuries, and instructed Plaintiff on self-decontamination. Plaintiff
17 decontaminated himself using water from the sink in the medical clinic’s holding cell. (Carr
18 Decl. ¶¶ 3,4.) Defendants’ Exhibit C-1 is a copy of CDC Form 7219, Medical Report of Injury
19 or Unusual Occurrence, dated August 18, 2005, the date of the incident at issue. The report
20 indicates that, as to Plaintiff, no injuries were found, Plaintiff was decontaminated, and self-
21 decontamination instructions were given.⁴

22 Defendant Vang declares that after Plaintiff was sprayed, correctional staff returned
23 Plaintiff to his cell, where he could use the water from his cell’s sink to decontaminate himself.

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25 ⁴ Although not submitted as an exhibit by either party, the governing operational procedures are set forth in
26 the Department Operations Manual [DOM], Ch. 5, Art. 2, § 51020.15.3. Inmates affected by pepper spray should be
27 given access to either fresh air or water. The pertinent portion of DOM policy provides that “decontamination from
OC [oleoresin capsicum] may be accomplished by exposing the individual to fresh moving air, or flushing the
affected body area with cool water, e.g., shower sink, or wet cloths.” Id., § 501020.15.3.

1 The escort officers did not inform Vang that Plaintiff had any difficulty decontaminating himself
2 in the medical clinic. Although Vang did not recall Plaintiff asking him to release him from his
3 cell to take a shower, he declares that even if Plaintiff had made the request, Vang was not
4 authorized to release Plaintiff to shower unless he received a direct order from the Program
5 Sergeant. He did not receive any such order. (Vang. Decl. ¶¶ 6,7.)

6 Plaintiff's claim against Defendant Vang is that he was not allowed to shower for three
7 hours. As noted above, however, Vang's liability turns on whether he knowingly subjected
8 Plaintiff to a serious risk to his safety. The undisputed evidence establishes that Plaintiff was
9 sprayed once in the face with pepper spray, with some exposure to his upper body. Plaintiff was
10 allowed (and instructed to) decontaminate himself using the sink in the holding cell and the cell
11 in his housing unit. Defendants' Exhibit C-1 establishes that, in addition to being instructed on
12 self-decontamination procedures, Plaintiff did indeed decontaminate himself in the medical
13 holding cell. That Plaintiff was not allowed to take a shower for three hours does not subject
14 Vang to liability. There is no evidence that Plaintiff was significantly exposed to pepper spray
15 other than his face and upper body, or that he was not allowed to decontaminate himself.
16 Plaintiff does not dispute Defendants' evidence that Plaintiff was sprayed once in the face. The
17 evidence indicates, at most, incidental exposure to Plaintiff's upper body. There is no
18 constitutional requirement that Plaintiff be allowed to take a shower, absent evidence that
19 exposure to pepper spray over other parts of his body warranted it. In order to hold Defendant
20 Vang liable under the Eighth Amendment, Plaintiff must come forward with evidence that he
21 knew of a serious risk to Plaintiff's health or safety, and acted with deliberate indifference to that
22 risk, causing injury to Plaintiff. There is no such evidence in this case. Judgment should
23 therefore be entered in favor of Defendant Vang.

24 Accordingly, IT IS HEREBY RECOMMENDED that:

- 25 1. Defendants' motion for summary judgment be granted in part and denied in part.
- 26 2. Judgment be entered in favor of Defendants Ladd and Vang and against Plaintiff.

