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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KEVIN JONES,

Plaintiff,

v.

M. PALOMBO,

Defendant.

CASE NO. 1:07-cv-01788-OWW-GSA PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING PLAINTIFF’S CROSS-
MOTION FOR SUMMARY JUDGMENT BE
DENIED AS UNTIMELY FILED, AND
DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT BE GRANTED

(Docs. 37 and 41)

OBJECTIONS DUE WITHIN THIRTY DAYS

Findings and Recommendations Addressing Parties’ Motions for Summary Judgment

I. Background

Plaintiff Kevin Jones, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action filed pursuant to 42 U.S.C. § 1983 on December 10, 2007. This action for money damages is proceeding on Plaintiff’s amended complaint, filed January 28, 2008, against Defendant Palombo for use of excessive physical force, in violation of the Eighth Amendment. The event at issue in this action occurred at Kern Valley State Prison, in Delano, California on July 18, 2006.

Defendant filed a motion for summary judgment on June 29, 2009. After obtaining an extension of time from the Court to file an opposition, Plaintiff filed what he entitled a motion for summary judgment, which is addressed below.¹ The motions have been deemed submitted pursuant

¹ Plaintiff was provided with notice of the requirements for opposing a motion for summary judgment by the Court in an order filed on June 23, 2008. Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988). (Doc. 19.)

1 to Local Rule 230(l), and the Court now issues its findings and recommendations for consideration.
2 (Docs. 37, 41.)

3 **II. Plaintiff's Cross-Motion for Summary Judgment**

4 The deadline for filing pretrial dispositive motions was June 29, 2009, and Defendant timely
5 filed a motion for summary judgment on that date. On July 23, 2009, Plaintiff filed a motion seeking
6 an extension of time to file his response to Defendant's motion, which was granted, and on July 30,
7 2009, Plaintiff filed what he entitled a motion for summary judgment.

8 Despite Plaintiff's language to the contrary, it is not clear that Plaintiff is seeking summary
9 judgment given his representation in his motion that there are triable issues of fact. Regardless, the
10 deadline for filing pretrial dispositive motions was June 29, 2009. Plaintiff's cross-motion was not
11 timely, and Plaintiff did not seek an extension of the dispositive motion deadline. Although
12 Plaintiff was granted an extension of time, it was to file an opposition to Defendant's motion and
13 did not have the effect of extending the deadline by which to file dispositive motions.

14 Therefore, Plaintiff's cross-motion for summary judgment is untimely, and the Court
15 recommends that it be denied on that ground. The Court will, however, consider the filing as an
16 opposition to Defendant's motion.

17 **III. Defendant's Motion for Summary Judgment**

18 **A. Summary Judgment Standard**

19 Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate when
20 it is demonstrated that there exists no genuine issue as to any material fact, and that the moving
21 party is entitled to judgment as a matter of law. Summary judgment must be entered, "after
22 adequate time for discovery and upon motion, against a party who fails to make a showing sufficient
23 to establish the existence of an element essential to that party's case, and on which that party will
24 bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548
25 (1986). The "party seeking summary judgment bears the initial responsibility of informing the
26 district court of the basis for its motion, and identifying those portions of the 'pleadings,
27 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,'

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1 which it believes demonstrate the absence of a genuine issue of material fact.” Celotex, 477 U.S.
2 at 323 (quoting Rule 56(c) of the Federal Rules of Civil Procedure).

3 If the moving party meets its initial responsibility, the burden then shifts to the opposing
4 party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec.
5 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). In attempting to
6 establish the existence of this factual dispute, the opposing party may not rely upon the denials of
7 its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or
8 admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P.
9 56(e); Matsushita, 475 U.S. at 586 n.11.

10 The parties bear the burden of supporting their motions and oppositions with the papers they
11 wish the Court to consider and/or by specifically referencing any other portions of the record they
12 wish the Court to consider. Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031
13 (9th Cir. 2001). The Court will not undertake to mine the record for triable issues of fact. Id.

14 **B. Undisputed Background Facts**

15 On July 18, 2006, Plaintiff was housed in the Administrative Segregation Unit at Kern
16 Valley State Prison in Delano, California. (Doc. 37-3, Def. Undisputed Facts 2 & 4; Doc. 41, Opp.,
17 Jones Dec. at court record p. 18.) Officer Perez, a female officer, was facilitating showers in the
18 unit and observed Plaintiff standing on his toilet masturbating. (Def. U.F. 5 & 6; Jones Dec. c.r.
19 p. 19.) Plaintiff was escorted to Sergeant Harden’s office, verbally counseled, and informed he was
20 receiving a Rules Violation Report (RVR) based on the incident. (Def. U.F. 14; Opp. & Jones Dec.
21 c.r. pp. 5 & 19.) Plaintiff became agitated and in expressing his displeasure in receiving an RVR,
22 raised his voice to Sgt. Harden. (Def. U.F. 15; Opp. c.r. pp. 5 & 6.) Plaintiff was returned to his
23 cell and shortly thereafter, Plaintiff began kicking his cell door repeatedly with great force out of
24 anger over receiving the RVR. (Def. U.F. 16 & 17; Opp. & Jones Dec. c.r. p. 6 & 19.)

25 Officers Terrazas and Palombo responded to Plaintiff’s cell, where they observed him
26 kicking his cell door. (Def. U.F. 19; Opp. & Jones Dec. c.r. p. 6 & 19.) Defendant Palombo
27 ordered Plaintiff to stop kicking the cell door. (Def. U.F. 21; Jones Dec. c.r. p. 19.) Plaintiff
28 stopped kicking the door, walked to the back of the cell, and sat on his desk after Defendant told

1 him that kicking the door would not resolve his dissatisfaction with receiving an RVR. (Def. U.F.
2 25; Jones Dec. c.r. p. 19 & 20.)

3 Officer Terrazas and Defendant Palombo exited the area, believing the issue was resolved.
4 (Def. U.F. 26; Jones Dec. c.r. p. 20.) Plaintiff waited until they began walking down the stairs and
5 then began kicking the cell door again. (Def. U.F. 27; Jones Dec. c.r. p. 20.) The officers returned
6 and Defendant Palombo told Plaintiff that if he did not stop kicking the door, Defendant was going
7 to spray him with pepper spray. (Def. U.F. 33; Jones Dec. c.r. p. 20.) Defendant issued multiple
8 orders to Plaintiff to quit kicking the cell door or he would be sprayed, but Plaintiff failed to
9 comply. (Id.) Defendant then opened the food port door and deployed his MK-9 O.C. pepper
10 spray, spraying toward Plaintiff's facial area. (Def. U.F. 35; Jones Dec. c.r. p. 20.) Plaintiff
11 grabbed his state issued mattress and deflected some of the spray from his face while Defendant
12 emptied his canister. (Def. U.F. 38 & 39; Jones Dec. c.r. p. 20.)

13 Thereafter, Plaintiff submitted to being handcuffed and was escorted to a nurse for
14 examination, after which he was decontaminated. (Def. U.F. 42; Jones Dec. c.r. p. 20.) The injuries
15 sustained by Plaintiff during the incident were limited to a burning sensation from the pepper spray,
16 (Def. U.F. 51; Opp. & Jones Dec. c.r. pp. 7 & 21), although Plaintiff also represents the pepper
17 spray subsequently made his sinus and allergy issues worse, (Opp. & Jones Dec. c.r. pp. 7 & 22).²

18 **C. Legal Standard for Excessive Force Claims**

19 “[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual
20 punishments forbidden by the Eighth Amendment,” Hudson v. McMillian, 503 U.S. 1, 5, 112 S.Ct.
21 995 (1992) (internal quotations and citations omitted), and “[w]hat is necessary to establish an
22 unnecessary and wanton infliction of pain . . . varies according to the nature of the alleged
23 constitutional violation,” Hudson, 503 U.S. at 5. Correctional officers must balance the need to
24 maintain or restore discipline through force against the risk of injury to inmates, which may require
25 them to act quickly and decisively, and which implicates the principle that prison administrators
26 should be accorded wide deference in the adoption and execution of policies and practices that in
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28 ² The Court will assume the truth of that representation in resolving Defendant's motion.

1 their judgment are needed to preserve internal order and discipline and to maintain institutional
2 security. Id. at 6 (quotations and citations omitted).

3 Therefore, for excessive force claims, “the core judicial inquiry is . . . whether force was
4 applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to
5 cause harm.” Id. at 6-7. “In determining whether the use of force was wanton and unnecessary, it
6 may also be proper to evaluate the need for application of force, the relationship between that need
7 and the amount of force used, the threat reasonably perceived by the responsible officials, and any
8 efforts made to temper the severity of a forceful response.” Id. (internal quotation marks and
9 citations omitted). While “[t]he absence of serious injury is . . . relevant to the Eighth Amendment
10 inquiry, [it] does not end it.” Id.

11 **D. Discussion**

12 Plaintiff was angry over receiving an RVR for masturbation and expressed that anger by
13 forcefully kicking his cell door. After Officers Terrazas and Palombo came to Plaintiff’s cell door
14 the first time and succeeded in getting Plaintiff to stop kicking the door, Plaintiff waited for them
15 to leave and then began forcefully kicking the door again. When they returned to his cell, Plaintiff
16 refused to comply with repeated orders to stop kicking the door, even though he admits he was
17 warned that pepper spray would be used against him if he did not comply with the orders.

18 Defendants submit evidence, uncontroverted by Plaintiff, that Officer Ojeda, who was in
19 the control booth, had an unobstructed view of Plaintiff’s cell and observed Plaintiff kicking his cell
20 door with as much force as possible. (Def. U.F. 28 & 29.) A red light on the control panel indicates
21 that a cell door is open or insecure while a green light indicates that a cell door is closed or secure.
22 (Def. U.F. 30.) After Plaintiff began kicking his cell door, Officer Ojeda saw the control panel light
23 for Plaintiff’s cell begin flickering and it continued to flicker as Plaintiff continued to kick the door.
24 (Id.) As a result, Officer Ojeda informed Defendant Palombo that the door to Plaintiff’s cell was
25 no longer secure, which is of particular concern in Administrative Segregation because inmates are
26 not allowed out of their cells unless restrained and escorted, usually by two officers. (Def. U.F. 31
27 & 32.)

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1 After observing Plaintiff's cell door move back and forth and receiving Officer Ojeda's
2 warning that the cell was no longer secure, and in the face of Plaintiff's refusal to comply with
3 repeated orders to stop kicking the door despite being threatened with the use of pepper spray,
4 Defendant deployed his pepper spray into the cell through the food port door in order to gain
5 Plaintiff's compliance with orders. (Def. U.F. 34 & 35; Doc. 37-6, Palombo Dec., ¶22.) Plaintiff
6 deflected the some of the spray by using his mattress as a shield, but did feel the effects of the spray,
7 which achieved the desired effect of gaining Plaintiff's compliance with orders. (Def. U.F. 39;
8 Palombo Dec., ¶22.)

9 Plaintiff argues that the use of pepper spray against him violated his constitutional rights
10 despite his acknowledgment that he was forcefully kicking his cell door out of anger and refusing
11 to obey orders to cease, because Defendant used pepper spray not only to gain his compliance but
12 to "immobilize him" for failing to comply with verbal orders; that Defendant's conduct was
13 unprofessional and unreasonable; that Plaintiff did not present a threat to himself or others; that
14 Defendant had other options to gain compliance, such as issuance of another RVR; and that Plaintiff
15 was harmed by the use of the pepper spray. (Opp. & Jones Dec., c.r. pp. 4, 5, 8, 12, 13, 14, 21, &
16 22.)

17 Plaintiff's arguments are unavailing. Plaintiff's belief that Defendant could have or should
18 have used another method to gain control over the situation is unpersuasive in light of the
19 undisputed facts showing that Plaintiff was repeatedly and forcefully kicking his cell door to the
20 point of compromising the security of the cell, and that Plaintiff failed to comply with repeated
21 orders to cease kicking the cell door despite being warned that pepper spray would be deployed.
22 The Constitution protects Plaintiff from use of force that is sadistic and malicious. It does not
23 mandate that prison officials, in the midst of trying to regain control of a situation that is threatening
24 the safety and security of the institution, evaluate all potential methods and employ one that, in the
25 inmate's opinion, is least forceful.

26 To the contrary, judgments such as that made by Defendant Palombo in this instance and
27 under these circumstances are entitled to wide deference. Hudson at 6. Having clearly and
28 admittedly created a situation that required some sort of response by correctional officers to regain

1 order, the Eighth Amendment does not entitle Plaintiff to second guess the method employed to
2 restrain him. The issue is whether the force was applied in a good-faith effort to restore discipline
3 or not, and the facts clearly demonstrate that it was so employed.

4 Further, the fact that Plaintiff felt pain from the pepper spray and experienced breathing
5 issues as a result of the application of pepper spray does not suffice to raise a triable issue of fact
6 with respect to whether the force used was excessive. If pepper spray was benign and caused no
7 pain, it would be ineffective and would serve no usefulness as a tool by law enforcement to
8 maintain or restore discipline. It is a given that pain will result from the application of pepper spray
9 and therefore, suffering from a painful burning sensation is not evidence that the force used was
10 excessive, as Plaintiff argues.

11 There is no evidence in the record, other than Plaintiff's unsupported opinion, that the force
12 was used against him was malicious and sadistic. Rather, the facts support Defendant's position
13 that the use of pepper spray was limited to a good faith effort to restore discipline in light of
14 Plaintiff's conduct and failure to obey orders to stop kicking the cell door. The Court finds that
15 Defendant is entitled to summary judgment on Plaintiff's excessive force claim.

16 **IV. Conclusion and Recommendation**

17 The Court finds that based on the undisputed facts in this case, Defendant is entitled to
18 judgment as a matter of law on Plaintiff's claim that Defendant violated his rights under the Eighth
19 Amendment by using excessive force against him. In light of the Court's finding that Defendant
20 is entitled to judgment on the merits, the Court does not reach Defendant's argument that he is
21 entitled to qualified immunity.

22 Accordingly, the Court HEREBY RECOMMENDS that Defendant's motion for summary
23 judgment, filed June 29, 2009, be GRANTED, and judgment be entered for Defendant and against
24 Plaintiff.

25 These Findings and Recommendations will be submitted to the United States District Judge
26 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**
27 **days** after being served with these Findings and Recommendations, the parties may file written
28 objections with the court. The document should be captioned "Objections to Magistrate Judge's

1 Findings and Recommendations.” The parties are advised that failure to file objections within the
2 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d
3 1153 (9th Cir. 1991).

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6 IT IS SO ORDERED.

7 **Dated: January 21, 2010**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

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