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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BOB SAVAGE,

Plaintiff,

No. 2:08-cv-1346-LKK-JFM (PC)

vs.

SUZAN HUBBARD, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on claims against ten defendants, raised in plaintiff's first amended complaint filed January 22, 2009, that they violated his rights under the Eighth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (RA) by denying him participation in a Meals on Wheels program at California Medical Facility (CMF) and thereby denying him food for thirty-eight days. Plaintiff also raises pendent state law claims based on the allegations that underlie his federal claims. This matter is before the court on defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiff opposes the motion and seeks entry of judgment in his favor.



1 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome  
2 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
3 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.  
4 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could  
5 return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433,  
6 1436 (9th Cir. 1987).

7           In the endeavor to establish the existence of a factual dispute, the opposing party  
8 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the  
9 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
10 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary  
11 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a  
12 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory  
13 committee’s note on 1963 amendments).

14           In resolving the summary judgment motion, the court examines the pleadings,  
15 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
16 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,  
17 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the  
18 court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.  
19 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to  
20 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen  
21 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.  
22 1987). 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  
24 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no  
25 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

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1 Defendants' Ex. L, at 3.

2 At all times relevant to this action, CMF had a cell feeding program referred to as  
3 "Meals on Wheels." Defendants' Ex. B, Declaration of Dr. Andreasen in Support of Motion for  
4 Summary Judgment, filed May 31, 2011 (Andreasen Decl.), at ¶ 7. Plaintiff was on the cell feed  
5 list starting in 2004.

6 In 2007, a decision was made to limit the number of inmates on the cell feed list  
7 in plaintiff's housing unit. Id. at ¶ 10. In August 2007, defendant Sabin recommended that  
8 plaintiff be removed from the cell feed list. Defendants' Ex. C, Declaration of Dr. Sabin in  
9 Support of Motion for Summary Judgment, filed May 31, 2011 (Sabin Decl.), at ¶ 14. In  
10 September 2007, plaintiff was readmitted to the cell feed list with other inmates in his housing  
11 unit who had been removed. Id. at ¶ 17.

12 In support of their motion for summary judgment, defendants present the  
13 following evidence. The basis for the decision to limit the number of inmates on the cell feed list  
14 was that it had become burdensome on staff and resources to cell feed the number of inmates on  
15 the list. Andreasen Decl. at ¶ 10. Defendant Sabin was asked to review the cell feed list for  
16 plaintiff's housing unit to determine who on the list was medically able to go to the cafeteria to  
17 receive their meals. Sabin Decl. at ¶ 12. Defendant Sabin observed plaintiff, who walked with a  
18 cane, "frequently walk up and down the corridor of the prison with no difficulty." Id. at ¶ 13.  
19 Based on his observations of plaintiff, as well as his medical examination of plaintiff and his  
20 examination of plaintiff's medical records, defendant Sabin believed plaintiff did not require cell  
21 feeding and that it would be beneficial to plaintiff to obtain extra exercise by walking to an from  
22 the cafeteria. Id. at ¶ 14. Defendant Sabin also believed going to the cafeteria was consistent  
23 with plaintiff's chronos which said he could sit, stand, and walk for twenty to thirty minutes and  
24 then rest. Id. Defendant Sabin recommended that plaintiff be removed from the cell feed list,  
25 and based on that recommendation plaintiff was removed from the list. Id.

26 Defendants also present evidence that there is no evidence that plaintiff did not

1 receive food during the thirty-eight days that he was off the cell feed list. In particular, plaintiff's  
2 "medical records indicate that from August 4, 2007 through September 24, 2007, [plaintiff]'s  
3 vital signs (pulse, respiration, blood pressure) exhibited no changes that would indicate he was  
4 not eating on a regular basis." Id. at ¶ 22. Plaintiff was seen for weekly checkups on August 9,  
5 2007, August 16, 2007, August 23, 2007, August 30, 2007, September 6, 2007, and September  
6 13, 2007. Defendants' Ex. L. There is no record in the notes from any of those visits of plaintiff  
7 complaining of hunger or any other ill effects from not being cell fed. Id.

8 Defendants also present evidence that the canteen, the visiting room, and the law  
9 library were farther away from plaintiff's cell than the cafeteria, and that plaintiff would have had  
10 to walk right by the cafeteria to get to any of those places. Defendants. Ex. H., Declaration of D.  
11 Borbe in Support of Motion for Summary Judgment, filed May 31, 2011 (Borbe Decl.), at ¶ 4. In  
12 August 2007, defendant Borbe, a correctional officer at CMF, observed plaintiff walking up and  
13 down corridors in his housing unit using a cane. Id. at ¶ 5. Plaintiff visited the prison canteen on  
14 August 16, 2007 and September 13, 2007. Defendants' Ex. M. Between August 7, 2007 and  
15 September 15, 2007, plaintiff had seventeen visits with his wife. Defendants' Ex. N. In addition,  
16 plaintiff "had access to a wheelchair, if he wanted to use one." Andreasen Decl. at ¶ 15.

17 In opposition to the motion, plaintiff presents the following evidence. The  
18 decision to discontinue cell-feeding inmates in plaintiff's housing unit was caused by a conflict  
19 between defendant Chanan, a correctional officer at CMF, and medical staff over whose  
20 responsibility it was to deliver the cell fed meals. Exhibit A to Plaintiff's Response to  
21 Defendants' Motion for Summary Judgment, filed September 19, 2011, Declaration of Plaintiff  
22 in Opposition to Summary Judgment and in Support of Direct Verdicts (Savage Decl.), at ¶¶ 20.  
23 Only inmates in plaintiff's housing unit were removed from the cell feed list; no other housing  
24 units reduced the number of cell fed inmates. Id. at 22.

25 In his declaration, plaintiff avers that it generally takes between forty-five minutes  
26 to an hour from the time an inmate at CMF is released from his cell to go to the cafeteria until

1 they are returned to their housing units, and that it can take longer if situations arise that require a  
2 staff response. *Id.* at ¶¶ 16-17. At his deposition, however, plaintiff testified that “[o]ne chow  
3 hall session from the time they unlock to the time you get back usually runs about 30 minutes.”  
4 Plaintiff’s Ex. B, Deposition of Bob Savage, filed September 19, 2011, at 16:21-23. Plaintiff  
5 also presents evidence that eating in the cafeteria would require that he “squat down low in order  
6 to sit on the steel stools”, and “causes [his] “legs to swell and throb and causes extreme pain in  
7 [his] back from bulging disks and spinal spurs.” Savage Decl. at ¶ 15. Plaintiff avers that he  
8 “never went to the chow halls in 2007 or for several years prior to 2007 or since for any meals  
9 because it causes me so much physical pain he [sic] cannot each once he [sic] is there.” *Id.* at ¶  
10 19. Plaintiff was “forced to ask for food from other prisoners and subsist on candy and snacks  
11 that have little nutritional value” until he could get to the prison canteen to buy food. *Id.* at ¶ 35.  
12 In addition, his family had to send him extra money to buy food during this period. *Id.* at ¶ 36.

13 Plaintiff disputes defendants’ evidence that he received weekly checkups,  
14 claiming that the reports tendered by defendants are “usually” prepared by nurses sitting with a  
15 stack of medical charts and writing notes about patients once a week. *Id.* at ¶ 52. Plaintiff  
16 acknowledges going to the visiting room, but avers that “staff made ADA Accommodations for  
17 the plaintiff in the form of a soft high back chair and a place so he can elevate his legs at a high  
18 table, with sufficient space to walk in the passageways.” *Id.* at ¶ 53.

## 19 ANALYSIS

### 20 I. Eighth Amendment

21 The Eighth Amendment protects a prison inmate’s right to food “adequate to  
22 maintain health.” *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) (quoting *LeMaire v.*  
23 *Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993)). “The sustained deprivation of food can be cruel and  
24 unusual punishment when it results in pain without any penological purpose.” *Foster v. Runnels*,  
25 554 F.3d 807, 814 (9th Cir. 2009) (citing *Phelps v. Kapnolas*, 308 F.3d 180, 187 (2d Cir.2002)).  
26 However, the United States Court of Appeals has suggested that “there may be ‘a difference

1 between using food deprivation as a punishment and establishing a reasonable condition to the  
2 receipt of food, ' . . . ' Id. (quoting Freeman v. Berge, 441 F.3d 543, 545 (7th Cir. 2006)).

3 In the same way that an inmate relies on prison officials to provide  
4 appropriate medical care, see Estelle v. Gamble, 429 U.S. 97, 97  
5 S.Ct. 285, 50 L.Ed.2d 251 (1976), and protection from assaults by  
6 other inmates, see Farmer v. Brennan, 511 U.S. 825, 114 S.Ct.  
7 1970, 128 L.Ed.2d 811 (1994), inmates rely on prison officials to  
8 provide them with adequate sustenance on a daily basis. The  
9 repeated and unjustified failure to do so amounts to a serious  
10 deprivation [sic].

11 Foster, id.

12 The gravamen of plaintiff's claim is that the decision to remove him from the  
13 Meals on Wheels program caused him to be deprived of food in a manner that violated the  
14 Eighth Amendment. However, while there are several factual disputes between the parties, the  
15 facts material to resolution of this claim are undisputed. Plaintiff was removed from the Meals  
16 on Wheels Program for thirty-eight days. During that period, plaintiff was able to, and did, walk  
17 with a cane distances further from his cell than the cafeteria. While plaintiff presents evidence  
18 that sitting on the stools in the cafeteria caused him significant pain, it is undisputed that plaintiff  
19 had access to a wheelchair<sup>2</sup> and there is no evidence that he was prohibited from using a  
20 wheelchair in the cafeteria.

21 Unlike Foster, where the plaintiff was denied meals in his cell during a prison  
22 lockdown, it is undisputed that plaintiff could have received food in the prison cafeteria during  
23 the thirty-eight days that he was not on the cell feed list. Assuming the truth of plaintiff's  
24 evidence that he would have suffered significant pain while sitting on the stools in the cafeteria,  
25 it is undisputed that he had access to a wheelchair and there is no evidence that use of a  
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<sup>2</sup> In opposition to defendants' motion, plaintiff presents a declaration from inmate Rick Lauranzano, in which Mr. Lauranzano avers that plaintiff "never had a wheelchair until October of 2010." Plaintiff's Ex. D, Declaration of Rick Lauranzano, filed September 19, 2011, at ¶ 3. This is insufficient to create a triable issue of fact as to whether plaintiff had access to a wheelchair at all times relevant to this action. It does, however, demonstrate that plaintiff can use a wheelchair.



1 wheelchair would have been insufficient to address the seating issues in the cafeteria.

2 For the foregoing reasons, this court finds that defendants are entitled to summary  
3 judgment on plaintiff's Eighth Amendment claim.

4 II. ADA/Section 504 of the RA

5 Plaintiff also claims that his removal from the Meals on Wheels Program violated  
6 his rights under the ADA and Section 504 of the RA. Defendants seek summary judgment on the  
7 grounds that (1) the undisputed evidence shows that plaintiff was not denied access to the Meals  
8 on Wheels Program due to any disability, and (2) there is no evidence that any defendant  
9 intentionally discriminated against plaintiff. In opposition to the motion, plaintiff contends that  
10 defendants failed in their duty to accommodate his disability when they removed him from the  
11 Meals on Wheels program.

12 To prevail on an ADA claim

13 plaintiff must show: (1) he is a "qualified individual with a  
14 disability"; (2) he was either excluded from participation in or  
15 denied the benefits of a public entity's services, programs, or  
16 activities, or was otherwise discriminated against by the public  
17 entity; and (3) such exclusion, denial of benefits, or discrimination  
18 was by reason of his disability. Weinreich v. Los Angeles County  
19 Metropolitan Transp. Auth., 114 F.3d 976, 978 (9th Cir.1997).

20 Title II of the ADA was expressly modeled after § 504 of the  
21 Rehabilitation Act. [Footnote omitted] A plaintiff bringing suit  
22 under § 504 must show (1) he is an individual with a disability; (2)  
23 he is otherwise qualified to receive the benefit; (3) he was denied  
24 the benefits of the program solely by reason of his disability; and  
25 (4) the program receives federal financial assistance. Id.

26 Duvall v. County of Kitsap, 260 F.3d 1124, 1135 (9th Cir. 2001). In addition, to obtain money  
damages on a claim under the ADA or section 504 of the RA, "a plaintiff must prove intentional  
discrimination on the part of the defendant." Id. at 1138 (citing Ferguson v. City of Phoenix, 157  
F.3d 668, 674 (9th Cir.1998)).

Here, the issue is whether defendants denied plaintiff access to food by reason of  
his disability. For the reasons set forth in section I, supra, this court finds that the undisputed

1 evidence shows they did not. Defendants are entitled to summary judgment on plaintiff's  
2 ADA/RA claim.

3  
4 III. Equal Protection Clause

5 Defendants seek summary judgment on plaintiff's claim that his removal from the  
6 Meals on Wheels program and the accompanying denial of in cell feeding violated his rights  
7 under the Equal Protection Clause of the Fourteenth Amendment on the ground that there is no  
8 evidence that he was treated differently from any similarly situated inmate, and that there was a  
9 rational basis for the decision to remove him from the program. Plaintiff contends that there is  
10 evidence that he was treated differently from other disabled inmates and that he was removed  
11 from the program arbitrarily.

12 State prison inmates retain a right to equal protection of the laws guaranteed by  
13 the Fourteenth Amendment. Walker v. Gomez, 370 F.3d 969, 974 (9th Cir. 2004) (citing Lee v.  
14 Washington, 390 U.S. 333, 334 (1968)).

15 In the prison context, however, even fundamental rights such as the  
16 right to equal protection are judged by a standard of  
17 reasonableness-specifically, whether the actions of prison officials  
18 are "reasonably related to legitimate penological interests." Turner  
v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987);  
see also Jordan v. Gardner, 986 F.2d 1521, 1530 (9th Cir.1993)  
(equal protection concerns fall under Turner ).

19 Walker, at 974. Here, the undisputed evidence shows that a staffing issue led defendants to limit  
20 cell-feeding in plaintiff's housing unit for a period of thirty-eight days.<sup>3</sup> The cell feed list for  
21 plaintiff's entire housing unit was reviewed, and there is no evidence that plaintiff was treated  
22 differently from any similarly situated inmate in that unit. Defendants are entitled to summary  
23 judgment on this claim.

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25 <sup>3</sup> As noted above, plaintiff contends that the staffing issue was caused by defendant  
26 Chanan's objection to delivering trays to cells, and defendants contend that the staffing issue was  
one of limited resources. The dispute is immaterial. Under either scenario, reducing the size of  
the cell-feed list was "reasonably related to legitimate penological interests."

1 IV. Pendent State Law Claims

2 For the reasons set forth supra, defendants are entitled to summary judgment on  
3 plaintiff's federal claims. For that reason, the court should decline to exercise supplemental  
4 jurisdiction over plaintiff's state law claims, and those claims should be dismissed. See 28  
5 U.S.C. § 1367 (c)(3).

6 In accordance with the above, IT IS HEREBY RECOMMENDED that:

7 1. Defendants' May 31, 2011 motion for summary judgment be granted as to  
8 plaintiff's remaining federal claims;

9 2. Plaintiff's September 19, 2011 request for entry of judgment in his favor be  
10 denied; and

11 3. The district court decline to exercise supplemental jurisdiction over plaintiff's  
12 state law claims.

13 These findings and recommendations are submitted to the United States District  
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
15 days after being served with these findings and recommendations, any party may file written  
16 objections with the court and serve a copy on all parties. Such a document should be captioned  
17 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
18 objections shall be filed and served within fourteen days after service of the objections. The  
19 parties are advised that failure to file objections within the specified time may waive the right to  
20 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: January 27, 2012.

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23   
24 UNITED STATES MAGISTRATE JUDGE  
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26