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

WAYDE HOLLIS HARRIS,

Plaintiff,

No. CIV S-09-1557 FCD KJN (TEMP) P

vs.

STATE OF CALIFORNIA, et al.,

ORDER AND

Defendants.

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a California prisoner proceeding without counsel and with an action for violation of civil rights under 42 U.S.C. § 1983. On June 4, 2010, the court screened plaintiff's December 28, 2009 first amended complaint pursuant to 28 U.S.C. § 1915A, and found that service of process was appropriate for defendants Thomas,<sup>1</sup> Ordez, Gudino,<sup>2</sup> Noack,<sup>3</sup> Elsey and

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<sup>1</sup> Defendant Thomas is identified as defendant "Sara" in plaintiff's first amended complaint and the court's June 4, 2010 screening order.

<sup>2</sup> Defendant Gudino is identified as defendant "Gadino" in plaintiff's first amended complaint and the court's June 4, 2010 screening order.

<sup>3</sup> Defendant Noack is identified as defendant "Nuack" in plaintiff's first amended complaint and the court's June 4, 2010 screening order.

1 Savage<sup>4</sup> with respect to claims arising under the Eighth Amendment and for San Joaquin County  
2 with respect to a claim arising under the Americans with Disabilities Act, 42 U.S.C. §§ 12131 et  
3 seq. (“ADA”). All of these defendants have appeared and have filed a motion to dismiss.

4 I. Standard For Motion To Dismiss

5 Defendants bring their motion under Rule 12(b)(6) of the Federal Rules of Civil  
6 Procedure. In considering a motion to dismiss for failure to state a claim upon which relief can  
7 be granted, the court must accept as true the allegations of the complaint in question, Erickson v.  
8 Pardus, 127 S. Ct. 2197, 2200 (2007), and construe the pleading in the light most favorable to the  
9 plaintiff, see Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

10 In order to avoid dismissal for failure to state a claim, a complaint must contain  
11 more than “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements  
12 of a cause of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other  
13 words, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
14 statements do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a  
15 claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570.  
16 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
17 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129  
18 S. Ct. at 1949.

19 The court notes that in his opposition to defendants’ motion, plaintiff makes  
20 assertions of fact not found in plaintiff’s first amended complaint. Because a motion to dismiss  
21 under Rule 12(b)(6) is a challenge to the pleadings, facts presented by plaintiff outside of those  
22 appearing in the pleadings are not considered. To consider facts presented outside of the  
23 pleadings, the court would have to convert defendants’ motion to dismiss to a motion for  
24 summary judgment. See Fed. R. Civ. P. 12(d). The court will not convert the pending motion to

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26 <sup>4</sup> Defendant Savage is identified as defendant “Pyle” in plaintiff’s first amended  
complaint and the court’s June 4, 2010 screening order.

1 a motion for summary judgment, because, among other things, this action is still in early stages.

2 II. Eighth Amendment / Fourteenth Amendment

3 Defendants' first argument is that plaintiff's Eighth Amendment claims must be  
4 dismissed because he was a pretrial detainee at the time of the events alleged in his first amended  
5 complaint and, therefore, the Eighth Amendment did not apply to plaintiff. Plaintiff's allegations  
6 concern events which occurred in the San Joaquin County Jail between January of 2007 and  
7 August of 2008. Pursuant to defendants' request attached to their motion to dismiss, the court  
8 takes judicial notice of the fact that plaintiff was not actually sentenced to prison until October  
9 24, 2008. See Fed. R. Evid. 201; U.S. v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (court may  
10 consider judicially noticed facts in deciding motion to dismiss). Plaintiff does not dispute that at  
11 all times relevant he was a pretrial detainee in the San Joaquin County Jail.

12 Because the Eighth Amendment applies only to persons who have been sentenced  
13 following a criminal conviction, Bell v. Wolfish, 441 U.S. 520, 528 (1979), plaintiff cannot  
14 proceed under the Eighth Amendment. However, as acknowledged by defendants, pretrial  
15 detainees receive protection from onerous conditions of confinement from the Fourteenth  
16 Amendment and the standards for protection for prisoners under the Eighth Amendment, and  
17 pretrial detainees under the Fourteenth Amendment are generally the same. Frost v. Agnos, 152  
18 F.3d 1124, 1128 (9th Cir. 1998). Therefore, plaintiff will be permitted to proceed with the  
19 claims the court previously identified as cognizable under the Eighth Amendment under the  
20 Fourteenth Amendment. To the extent that the court identifies Eighth Amendment principles  
21 below, the court implies those principles are equally applicable to plaintiff's Fourteenth  
22 Amendment claims.

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1 III. General Background Allegations<sup>5</sup>

2 Plaintiff alleges that he arrived at the San Joaquin County Jail in January of 2007,  
3 and upon arrival he was in need of foot surgery. Surgery was not performed until February 22,  
4 2008. Generally speaking, plaintiff complains about the care he received after surgery.

5 IV. Defendants Ordez and Gudino

6 In his opposition to defendants' motion to dismiss, plaintiff requests that  
7 defendants Ordez and Gudino be dismissed. Good cause appearing, the court will recommend  
8 that they be dismissed.

9 V. Defendant Thomas

10 Plaintiff alleges that defendant Thomas, a nurse, caused plaintiff's foot to become  
11 infected. Essentially, plaintiff alleges that on February 25, 2008, three days after surgery,  
12 defendant Thomas conducted routine treatment on plaintiff's surgical wound. Plaintiff alleges  
13 that during the visit, Thomas put one of her hands inside a "bio-hazard-waste bin," and  
14 subsequently touched and "rubbed" the open wound on plaintiff's foot with the same hand.<sup>6</sup>

15 Jail officials have a limited duty to protect inmates from harm. See Farmer v.  
16 Brennan, 511 U.S. 825, 847 (1994). A jail official will be liable if he knowingly subjects a  
17 detainee to a substantial risk of serious harm and disregards the risk by failing to take reasonable  
18 measures to abate it. Id.

19 While it is a very close call, the court will recommend that defendants' motion to  
20 dismiss be denied with respect to defendant Thomas. The court finds that plaintiff's claim that  
21 Thomas was deliberately indifferent to the risk of plaintiff's foot becoming infected and, as a  
22 result of that indifference, plaintiff's foot did become infected, has facial plausibility. While

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23 <sup>5</sup> Below, the court recounts only those allegations from plaintiff's complaint necessary  
24 for an understanding of the claims which are still before the court.

25 <sup>6</sup> Plaintiff's allegations against defendant Thomas are found on pages 10-11 of plaintiff's  
26 first amended complaint. Again, plaintiff refers to defendant Thomas as "Sara" in his amended  
complaint.

1 plaintiff faces seemingly insurmountable challenges in terms of producing evidence as to the  
2 contents of the trash can (which it appears he would have to do to prove defendant knowingly  
3 subjected plaintiff to a substantial risk of harm), and that his infection was, in fact, caused by  
4 Thomas, those are matters the court considers on a motion for summary judgment.

5 VI. Defendants Noack and Savage

6 Plaintiff alleges that on May 26, 2008, he was escorted to the shower by  
7 defendants Noack and Savage. Plaintiff alleges that despite the fact that plaintiff was walking on  
8 crutches, was wearing a brace from his knee to his toes, and that plaintiff told Noack and Savage  
9 he had fallen in the shower on May 12, 2008, Noack and Savage denied plaintiff's request that he  
10 be taken to the "handicap" shower. Instead, Noack and Savage took him to a regular shower  
11 which was next to the "handicap" shower. Plaintiff asserts that, at that time, he had to remove  
12 his knee brace for showering and that was not easy to do in a regular shower with no seat or rails  
13 considering his foot was very unstable.<sup>7</sup>

14 Noack and Savage were under the same duty to protect plaintiff from substantial  
15 risks of serious harm under the Fourteenth Amendment as defendant Thomas. Id.

16 The court finds that plaintiff fails to state a Fourteenth Amendment claim against  
17 Noack and Savage. While the court finds it strange that plaintiff was allegedly not allowed to use  
18 the handicapped shower, the court cannot find that the manner in which plaintiff did shower on  
19 May 26, 2008, rose to the level of a Constitutional violation. Plaintiff does not indicate that he  
20 ever told defendants Noack and Savage that he felt unsafe in the shower, or that they refused him  
21 assistance by helping plaintiff stand, by retrieving a chair for plaintiff, etc. Also, there is no  
22 indication why plaintiff elected to shower if he did feel like he was confronted with a substantial  
23 risk of serious harm in the regular shower. Nothing suggests plaintiff was in any worse position  
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25 <sup>7</sup> Plaintiff's allegations against defendants Noack and Savage are found on pages 13 and  
26 14 of plaintiff's first amended complaint. Again, plaintiff refers to defendant Savage as "Pyle" in  
his amended complaint.

1 than defendants to assess the risk presented by the shower and it does not stand to reason that  
2 plaintiff would knowingly place himself in a seriously dangerous situation.<sup>8</sup> In fact, he was in a  
3 better position to understand the risk because he was in the best position to understand the  
4 limitations on his ability to move. Furthermore, nothing indicates plaintiff actually fell in the  
5 shower. While it appears, under the facts alleged, the more appropriate shower would have been  
6 the handicapped shower, there is simply nothing before the court suggesting that the manner in  
7 which plaintiff did shower presented itself to defendants Noack and Savage as a seriously  
8 dangerous situation. For these reasons, the court will recommend that defendants Noack and  
9 Savage be dismissed.

10 VII. Defendant Elsey

11 Plaintiff alleges defendant Elsey denied plaintiff access to the “handicap” shower  
12 on May 28, 2008. Am Compl. at 14. Plaintiff fails to allege anything suggesting circumstances  
13 of the May 28, 2008 shower were materially different than the May 26, 2008 shower supervised  
14 by defendants Noack and Savage. Therefore, for the same reasons described above, the court  
15 will recommend that defendant Elsey be dismissed.

16 VIII. San Joaquin County / ADA

17 After reviewing defendants motion to dismiss and plaintiff’s amended complaint,  
18 the court cannot identify a claim arising under the ADA against San Joaquin County on which  
19 plaintiff can proceed. Generally, speaking, and with some exceptions, the ADA prohibits public  
20 entities from denying services to disabled persons because of their disability. 43 U.S.C. § 12132.  
21 As indicated above, plaintiff asserts certain defendants denied him access to a shower designed  
22 for handicapped inmates. Plaintiff admits that the San Joaquin County Jail had such a shower  
23 and otherwise fails to allege anything suggesting that San Joaquin County violated any of  
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25 <sup>8</sup> Of course, if plaintiff were not allowed to shower at all, a Constitutional violation could  
26 occur. But, plaintiff does not point to anything suggesting the amount of shower time he was  
allotted even approached a Constitutional violation.

1 plaintiff's rights arising under the ADA. Also, plaintiff was not actually denied the ability to  
2 shower and therefore was not denied a "service" under the ADA. For these reasons, the court  
3 will recommend that plaintiff's ADA claim against San Joaquin County be dismissed.

4 In accordance with the above, IT IS HEREBY ORDERED that:

- 5 1. Defendants' January 7, 2011 request for judicial notice is granted; and
- 6 2. The court judicially notices the fact that plaintiff was sentenced in the Superior  
7 Court of San Joaquin County to state prison on October 24, 2008.

8 IT IS HEREBY RECOMMENDED that:

- 9 1. Defendants' motion to dismiss be granted in part and denied in part as follows:
  - 10 A. Granted as to plaintiff's claims against defendants Ordez, Gudino  
11 Noack, Elsey, Savage and San Joaquin County thereby resulting in their  
12 being dismissed from this action; and
  - 13 B. Denied as to plaintiff's Fourteenth Amendment claim against  
14 defendant Thomas.
- 15 2. Defendant Thomas be ordered to file her answer within twenty-one days.

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

24 DATED: July 26, 2011

25   
26 KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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