

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EDUARDO REYES,
Plaintiff,

v.

RICHARD KIRKLAND, et al.,
Defendants.

No. C 08-0813 SI (PR)

**ORDER GRANTING DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT**

INTRODUCTION

This is a federal civil rights action brought by a *pro se* state prisoner pursuant to 42 U.S.C. § 1983. Plaintiff alleges that defendants, officers and employees of Pelican Bay State Prison (“PBSP”) (1) used excessive force against him in violation of the Eighth Amendment; (2) forced plaintiff to stay overnight in a concrete yard in frigid temperatures; and (3) forced him to reside in a cell contaminated with pepper spray, after having denied his requests to have the cell cleaned.

Defendants move for summary judgment on grounds that there are no triable issues of material fact and that all defendants are entitled to judgment as a matter of law as to all claims. For the reasons stated herein, defendants’ motion for summary judgment is GRANTED in favor of all defendants as to all claims. Judgment will be entered in favor of all defendants, and

1 plaintiff shall take nothing by way of his complaint.
2

3 **STATEMENT OF FACTS**

4 It is undisputed that at 4:15pm on June 24, 2006, the B-yard, plaintiff's yard, at PBSP was
5 put on lock-down, and that an emergency count was instituted because some inmates classified
6 as "Southern Hispanics" had covered the openings of their cells with sheets and mattresses,
7 thereby preventing officers from taking an inmate count. (Plaintiff is classified as a "Southern
8 Hispanic.") (Am. Compl. at 3.) Defendants Peppiot, Slavec, Chapman, Miller, Richcreek,
9 George and Love, all correctional officers, were ordered to remove any coverings or barricades.
10 At first, none of the inmates complied with instructions to remove the coverings or to cuff up,
11 though plaintiff states that he attempted to cuff up when ordered. Defendants were able to
12 remove some of the coverings by pulling them through the handcuff ports, and resorted to using
13 pepper spray to stop inmates who tried to re-cover their cells, and failed to comply with
14 instructions. Defendants also used pepper spray when they were unable to remove the coverings
15 through the handcuff ports, and inmates refused to comply with instructions to remove the
16 coverings. After being handcuffed, the inmates were removed from their cells and taken to the
17 exercise yard, in order to decontaminate the cells, and perform medical examinations of the
18 inmates. At 8:45 pm that same day, defendants were ordered back to the unit because Southern
19 Hispanic inmates had again covered and barricaded their cells, allegedly to disrupt the 9pm
20 head-count. (Defs.' Mot. for Summ. J. ("MSJ") ¶¶ 6, 8-13.)

21 Defendants assert that plaintiff's cell, when visited during the 8:45 incident, was, like the
22 others, covered. Plaintiff does not dispute this, as he asserts that he was not given time to
23 comply with the officers' instructions to remove the covering. (Pl.'s Opp. to MSJ ("Opp.") at
24 17-18.) According to defendants, Miller repeatedly ordered the inmates to remove the
25 coverings, and, after the inmates failed to comply, removed the coverings himself through the
26 handcuff port. Because the inmates would not stop trying to recover their cell fronts, defendants
27 Chapman and George discharged pepper stray for 1-2 seconds. As Reyes and Flores, plaintiff's
28 cellmate, continued to try to cover up the door, defendant Richcreek threw an "OC" grenade in

1 their cell, which discharged. Inmates then complied with defendants’ orders to allow themselves
2 to be cuffed and removed to the exercise yard. Plaintiff was medically examined, but refused
3 to make a statement about his injuries, and a medical provider found none. In all, defendants
4 removed 81 Southern Hispanic inmates from their cells as a result of the 8:45 cell coverings.
5 Defendants assert that the use of force was necessary because the inmates presented a “direct,
6 immediate and serious threat to the safety and security” to staff and to the institution. (MSJ
7 ¶¶ 14–20.)

8 Plaintiff disputes some of these facts. Plaintiff asserts that rather than simply responding
9 to exigent circumstances, defendants “carried out a planned, premeditated use of force to commit
10 multiple cell extraction[s].” (Pl.s’ Opp. to Mot. for Summ. J. (“Opp.”), Ex. E, Decl. Reyes at
11 1.) “When the COs came to my door, they opened the food port and immediately started
12 spraying and simultaneously yelling, ‘Stop trying to cover the window’ and ‘Cuff up[,]’
13 simultaneously spraying me with pep[p]er spray.” (Id.) Without waiting for plaintiff to comply
14 to cuff up or remove the covering, they squirted O.C. spray and launched flash grenades into the
15 cell. (Id.)

16 According to plaintiff, defendants then required plaintiff to strip down to his socks and
17 boxer shorts and then took him handcuffed into the concrete yard. (The concrete yard apparently
18 is a confined area with walls but not a roof.) Plaintiff was left in the concrete yard handcuffed
19 behind his back, along with all “Southern Hispanic” inmates for more than 16 hours in frigid
20 temperatures. He was not fed breakfast or lunch the next day, could not defecate or urinate, and
21 was not given “basic hygienic necessities” while in the yard. (Opp. at 18–19.)

22 The parties do not dispute the following facts. At about 1:30 p.m. on June 25, 2006,
23 plaintiff and other inmates were removed from the concrete yard and returned to their cells.
24 When plaintiff reached his cell, his socks were removed, so that he was then clothed in only his
25 boxer shorts. He was put back in his cell, but the cell had not been fully decontaminated; there
26 was residual orange powder and liquid in the cell from the O.C. spraying. All personal and state
27 property had been removed from the cell — including the mattress, linens, hygienic supplies,
28 and eating utensils. At dinner time, plaintiff received his first meal of the day, but was not

1 provided any utensils with which to eat it. When he asked for eating utensils and if the cell was
2 going to be decontaminated, floor officer John Doe told him that he could eat with his hands and
3 that the cell would not be decontaminated. This state of affairs continued for five days, i.e., a
4 contaminated cell, no linen, no change of underwear, and no eating utensils. Plaintiff then was
5 transferred to administrative segregation, where he filed a grievance about the foregoing
6 treatment.

8 STANDARD OF REVIEW

9 Summary judgment is proper where the pleadings, discovery and affidavits demonstrate
10 that there is “no genuine issue as to any material fact and that the moving party is entitled to
11 judgment as a matter of law.” Fed. R. Civ. P. 56(c). Material facts are those which may affect
12 the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute
13 as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a
14 verdict for the nonmoving party. Id.

15 The party moving for summary judgment bears the initial burden of identifying those
16 portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine
17 issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). Where the moving
18 party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no
19 reasonable trier of fact could find other than for the moving party. On an issue for which the
20 opposing party by contrast will have the burden of proof at trial, as is the case here, the moving
21 party need only point out “that there is an absence of evidence to support the nonmoving party’s
22 case.” Id. at 325.

23 Once the moving party meets its initial burden, the nonmoving party must go beyond the
24 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is
25 a genuine issue for trial.” Fed. R. Civ. P. 56(e). The court is only concerned with disputes over
26 material facts and “factual disputes that are irrelevant or unnecessary will not be counted.”
27 Anderson, 477 U.S. at 248. It is not the task of the court to scour the record in search of a
28 genuine issue of triable fact. Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996). The

1 nonmoving party has the burden of identifying, with reasonable particularity, the evidence that
2 precludes summary judgment. *Id.* If the nonmoving party fails to make this showing, “the
3 moving party is entitled to judgment as a matter of law.” *Celotex*, 477 U.S. at 323.

4 5 **DISCUSSION**

6 7 **I. Excessive Force Claims**

8 As noted above, plaintiff alleges that defendants used excessive force in extracting him
9 from his cell.

10 The correctly-stated standard for determining whether excessive force was used in
11 violation of the Eighth Amendment “is whether the defendants applied force ‘maliciously and
12 sadistically for the very purpose of causing harm,’ — that is any harm.” *Robins v. Meecham*,
13 60 F.3d 1436, 1439–41 (9th Cir. 1995). In determining whether the use of force was for the
14 purpose of maintaining or restoring discipline, or for the malicious and sadistic purpose of
15 causing harm, a court may evaluate the need for application of force, the relationship between
16 that need and the amount of force used, the extent of any injury inflicted, the threat reasonably
17 perceived by the responsible officials, and any efforts made to temper the severity of a forceful
18 response. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *LeMaire v. Maass*, 12 F.3d 1444, 1454
19 (9th Cir. 1993); *see also Spain v. Procunier*, 600 F.2d 189, 195 (9th Cir. 1979) (guards may use
20 force only in proportion to need in each situation); *see, e.g., Watts v. McKinney*, 394 F.3d 710,
21 712 (9th Cir. 2005) (finding that kicking the genitals of a prisoner who was on the ground and
22 in handcuffs during an interrogation was “near the top of the list” of acts taken with cruel and
23 sadistic purpose to harm another); *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002) (pepper-
24 spraying fighting inmates a second time after hearing coughing and gagging from prior spray
25 was not malicious and sadistic for purpose of causing harm, where initial shot of spray had been
26 blocked by inmates’ bodies).

27 In order to establish excessive force, the plaintiff needs to meet a threshold of evidence.
28 Where evidence of excessive force is “woefully sparse,” the plaintiff fails to raise a material

1 issue of fact regarding an excessive force claim. *Henderson v. City of Simi Valley*, 305 F.3d
2 1052, 1061 (9th Cir. 2002) (affirming summary judgment on excessive force claim where
3 plaintiff swung her feet in the air while being led by officers who gripped her arms to prevent
4 her from falling). Additionally, failure to deny allegations of non-cooperation that would justify
5 increased force can support a grant of summary judgment against the plaintiff. *Arpin v. Santa*
6 *Clara Valley Transportation Authority*, 261 F.3d 912, 922 (9th Cir. 2001).

7 In the instant matter, to determine whether the use of force was for the purpose of
8 maintaining or restoring discipline, or for the malicious and sadistic purpose of causing harm,
9 the Court will use the *Hudson* factors. The first factor — the need for the application of force
10 and the amount of force used — weighs in favor of defendants. It is undisputed that there were
11 two cell-covering incidents (4:15pm and 8:45pm) involving dozens of inmates, including
12 plaintiff, the repeated resistance to orders, and the multiple attempts to re-cover cells fronts.
13 These facts presented a need for the application of force, and the use of pepper spray and
14 handcuffing to restore order. Plaintiff’s assertion that he was not given time to comply is an
15 indirect admission that his cell front was covered. Such an assertion is undercut by his
16 admission that the officers had removed 12 inmates before reaching plaintiff, a removal process
17 that involved loud and repeated warnings to remove cell coverings. (Opp., Mem. of P. & A. at
18 4.) Furthermore, his assertion that he was not given time to comply with instructions is undercut
19 by his admission that the officers were yelling, “Stop trying to cover the window,” an indication
20 that plaintiff and his cellmate were not following instructions, but instead were trying to recover
21 the cell front. While plaintiff may have tried to comply with the orders to cuff-up, he does not
22 dispute the assertion that his cell was covered, that he did not uncover his cell, or that he
23 attempted to re-cover his cell. This tense, threatening atmosphere, provided the need for force,
24 and the amount of force appears to have been narrowed to fit the need. Specifically, defendants
25 used pepper spray and handcuffing to remove the inmates, reasonable choices for imposing
26 order. Also, there are no allegations of gratuitous violence, such as throwing persons to the floor
27 or punches being throw. As to the second factor — the extent of any injury inflicted — plaintiff
28 speaks little of any injuries, pain or discomfort, and none that have caused permanent or lasting

1 pain or damage.

2 As to the third factor, the undisputed facts support a conclusion that defendants perceived
3 a reasonable threat. As noted above, it is undisputed that there were two cell-covering incidents
4 and dozens of uncooperative inmates, who, because hidden, may have been planning an ambush
5 or other violent acts. As to the fourth factor, the efforts, if any, made to temper the severity of
6 a forceful response, the Court concludes that this weighs in favor of defendants. It is undisputed
7 that inmates were repeatedly instructed to remove cell coverings and to cuff up, instructions that
8 were ignored, and, in the instances where inmates tried to recover their cells, flouted.

9 On these undisputed facts, read in the light most favorable to the nonmoving party, the
10 Court concludes plaintiff has not shown evidence that precludes summary judgment on his
11 excessive force claims. Accordingly, defendants' motion for summary judgment on the
12 excessive force claims is GRANTED.

13
14 **II. Detention in Exercise Yard**

15 As noted above, plaintiff contends that defendants violated his Eighth Amendment rights
16 when they forced him to stay in the cold exercise yard from roughly 9pm on June 24 to 1:30pm
17 on June 25, some fourteen hours. During this time, plaintiff was clad in only his underwear, and
18 was not allowed to use the bathroom, and was denied food.

19 The Constitution does not mandate comfortable prisons, but neither does it permit
20 inhumane ones. See Farmer v. Brennan, 511 U.S. 825, 832 (1994). The Eighth Amendment
21 imposes duties on these officials, who must provide all prisoners with the basic necessities of
22 life such as food, clothing, shelter, sanitation, medical care and personal safety. See Farmer, 511
23 U.S. at 832; DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200
24 (1989); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982). A prison official violates the
25 Eighth Amendment when two requirements are met: (1) the deprivation alleged must be,
26 objectively, sufficiently serious, Farmer, 511 U.S. 825, 834 (1994) (citing Wilson v. Seiter, 501
27 U.S. 294, 298 (1991)), and (2) the prison official possesses a sufficiently culpable state of mind,
28 id. (citing Wilson, 501 U.S. at 297).

1 In determining whether a deprivation of a basic necessity is sufficiently serious to satisfy
2 the objective component of an Eighth Amendment claim, a court must consider the
3 circumstances, nature, and duration of the deprivation. The more basic the need, the shorter the
4 time it can be withheld. See Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000). Substantial
5 deprivations of shelter, food, drinking water or sanitation for four days, for example, are
6 sufficiently serious to satisfy the objective component of an Eighth Amendment claim. See id.
7 at 732–733; see, e.g., Hearn v. Terhune, 413 F.3d 1036, 1041–42 (9th Cir. 2005) (allegations
8 of serious health hazards in disciplinary segregation yard for a period of nine months, including
9 toilets that did not work, sinks that were rusted and stagnant pools of water infested with insects,
10 and a lack of cold water even though the temperature in the prison yard exceeded 100 degrees,
11 enough to state a claim of unconstitutional prison conditions); Anderson v. County of Kern, 45
12 F.3d 1310, 1314 (9th Cir.) (“[A] lack of sanitation that is severe or prolonged can constitute an
13 infliction of pain within the meaning of the Eighth Amendment.”), amended, 75 F.3d 448 (9th
14 Cir. 1995).

15 The requisite state of mind to establish an Eighth Amendment violation depends on the
16 nature of the claim. In a case such as the instant one, the “malicious and sadistic” standard
17 applies to officials’ actions and state of mind until prisoners were secured in the yard, and
18 “deliberate indifference” standard applies thereafter. See Johnson, 217 F.3d at 734. Neither
19 negligence nor gross negligence will constitute deliberate indifference. See Farmer, 511 U.S.
20 at 835–36 & n.4; see also Estelle, 429 U.S. at 106 (establishing that deliberate indifference
21 requires more than negligence). A prison official cannot be held liable under the Eighth
22 Amendment for denying an inmate humane conditions of confinement unless the standard for
23 criminal recklessness is met, i.e., the official knows of and disregards an excessive risk to inmate
24 health or safety. See Farmer, 511 U.S. at 837. The official must both be aware of facts from
25 which the inference could be drawn that a substantial risk of serious harm exists, and he must
26 also draw the inference. See id.

27 Reading the facts of the instant matter in the light most favorable to the nonmoving party,
28 plaintiff has not shown evidence that precludes summary judgment. The undisputed facts show

1 that there were two cell-covering incidents, requiring forcible cell-extraction, the use of pepper
2 spray and handcuffing, detention of the inmates in the yard, and after such detention, cleaning
3 of the cells. Defendants removed and detained plaintiff, along with 80 other inmates, in order
4 to defuse an emergency situation, perform an inmate head-count, examine the inmates for
5 medical needs, search the dozens of cells, empty the cells of contaminated items, clean the cells,
6 and return the inmates to their cells. Under the undisputed circumstances of this case, having
7 to endure many hours in the cold, and without food, while inconvenient and painful, are not
8 sufficiently serious to warrant relief under Farmer. See Johnson, 217 F.3d at 732–733. Plaintiff
9 was returned to his cell, and given food, though it was delayed.

10 These undisputed facts also do not indicate that defendants possessed a sufficiently
11 culpable state of mind. While the conditions were difficult and uncomfortable, they do not,
12 under the exigent circumstances presented by the cell-coverings, indicate that defendants were
13 aware of a risk and ignored it. Rather, the temporary detention of the inmates in the exercise
14 yard was apparently reasonable under the emergency circumstances, especially considering the
15 need for safety and to clean the cells in order to make them habitable.

16 Furthermore, plaintiff’s allegations of denial of bathroom facilities are contradicted by
17 his own assertions. Plaintiff admits that toilets and sinks were available, though they were dirty.
18 Though plaintiff states that he was unable to use the toilets because he was cuffed, he does not
19 assert that he asked for assistance in using the toilets, and was refused.

20 Plaintiff having failed to show that there are triable issues of material fact, defendants’
21 motion for summary judgment as to the yard detention claims is GRANTED.

22
23 **III. Contaminated Cells**

24 As noted above, plaintiff asserts that the cells were inadequately cleaned causing him to
25 suffer the effects of exposure to pepper spray residue, and he was deprived of bedding and
26 personal items, as well as eating utensils. Plaintiff asserts that these conditions persisted for five
27 days.

28

1 Reading the facts of the instant matter in the light most favorable to the nonmoving party,
2 plaintiff has not shown evidence that precludes summary judgment. The undisputed facts show
3 that the cells were imperfectly cleaned for five days, and that plaintiff was deprived of bedding
4 and personal items for five days, and suffered some pain and discomfort because of the pepper
5 spray residue. Such facts do not indicate that the deprivation was sufficiently serious or that
6 defendants possessed the requisite state of mind for deliberate indifference. The fact that the
7 cells were cleaned within a few days of the contamination, and that contaminated bedding was
8 removed in order to prevent inmates from further exposure indicate that defendants were in fact
9 aware of the conditions faced by the inmates and took steps to prevent injury and pain. The
10 deprivation of eating utensils does not rise to the level of deliberate indifference. Plaintiffs were
11 given food, however inconvenient it was to eat it. Accordingly, plaintiff having failed to show
12 that there is a triable issues as to any material fact, defendants' motion for summary judgment
13 as to his claims regarding the conditions of his cell is GRANTED.

14 **CONCLUSION**

15 Plaintiff having failed to show that there are triable issues of material fact, defendants'
16 motion for summary judgment (Docket No. 40) is GRANTED as to all claims against the
17 following defendants: Yax, Chapman, George, C. Hamilton, Love, Miller, D. Nelson, Peppiot,
18 Richcreek, and Slavec. Judgment will be entered in favor of these defendants. Plaintiff shall
19 take nothing by way of his complaint.

20 The Clerk shall enter judgment in favor of defendants, terminate the pending motion, and
21 close the file.

22 This order terminates Docket No. 40.

23 **IT IS SO ORDERED.**

24 DATED: August 27, 2010

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26 _____
27 SUSAN ILLSTON
28 United States District Judge