

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 DANNY CAESAR,

No. C 08-1977 SBA (PR)

4 Plaintiff,

**ORDER REVIEWING FIRST AMENDED
COMPLAINT; AND DIRECTING
PLAINTIFF TO FILE PROOF OF
SERVICE OR SHOW CAUSE**

5 v.

6 ROBERT HOREL, et al.,

7 Defendants.
8 _____/

9 **BACKGROUND**

10 Plaintiff Danny Caesar, who is currently incarcerated at California State Prison - Corcoran,
11 filed this pro se civil rights action pursuant to 42 U.S.C. § 1983 against prison officials at Pelican Bay
12 State Prison (PBSP), where he was formerly incarcerated. He seeks monetary damages. He has paid
13 the full filing fee.

14 In his complaint, Plaintiff alleged various claims, including deliberate indifference to his
15 serious medical needs and supervisory liability claims, against the following PBSP prison officials:
16 Warden Robert Horel; Medical Appeals Coordinator J. J. Kravitz; Chief Medical Officer Dr. Sayre;
17 Primary Care Provider Dr. Rowe; and Psychiatrist Dr. Douglas.

18 In an Order dated October 21, 2008, the Court dismissed Plaintiff's Eighth Amendment claims
19 for deliberate indifference to serious medical needs with leave to amend in order for him to specify
20 how Defendants were acting with deliberate indifference to his serious medical needs. Plaintiff's
21 claim against Defendant Kravitz relating to the grievance process was dismissed with prejudice.
22 Plaintiff's supervisory liability claims against Defendants Horel and Sayre were dismissed with leave
23 to amend. Plaintiff's claims against Doe Defendants were dismissed without prejudice, and the Court
24 granted Plaintiff leave to amend to add Doe Defendants if he learned their identities. The Court
25 ordered Plaintiff to file an amended complaint to correct the deficiencies of his claims and to allege
26 exhaustion on his administrative remedies within thirty days of the Order.
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28 Also on October 21, 2008, the Court denied Plaintiffs motion for a temporary restraining

1 order (TRO), in which Plaintiff sought relief in the form a transfer to another prison for the main
2 purposes of "fair" medical care, "avoidance of deliberate torture" and to avoid being "robbed" by
3 Defendant Horel's "Ku Klux Klan styled administration." (Oct. 21, 2008 Order at 7 (citing Mot. for
4 TRO at 1).)

5 On November 17, 2008, Plaintiff filed an amended complaint adding additional defendants,
6 including PBSP Mail Room Supervisor R. Silva; Correctional Lieutenant S. W. Repond; Physician
7 C. Williams and Mail Room Office Assistant E. Reilly. Plaintiff alleges he filed administrative
8 appeals relating to all the claims in his amended complaint; therefore, he believes that he did
9 everything he could to exhaust his administrative remedies.

10 In his amended complaint, Plaintiff amends his supervisory liability claim against Defendant
11 Horel, who is "responsible for policy, both written and unwritten, thereby setting the standard for the
12 behavior of his staff." (Am. Compl. at 1.) Plaintiff cites numerous grievances that he filed and were
13 subsequently denied, and connects them with Defendant Horel, claiming that "all were presented to
14 [Defendant] Horel or his counterpart, and he chose to do nothing about them, and accordingly, should
15 be held responsible." (Id.) He also amends his supervisory liability claim against Defendant Sayre,
16 and states that Defendant Sayre "forbid Dr. Rowe from giving [him] a referral [sic] to Neurology and
17 Podiatry," and that Defendant Sayre may have also been involved in his pain medication being
18 cancelled." (Pl. Decl. at 2.)

19 Plaintiff also claims that he subscribed to "Show Magazine" in October, 2007. (Am. Compl.
20 at 21.) Plaintiff alleges that he did not receive his December, 2007, April, 2008, and October, 2008
21 issues. (Id.) Plaintiff alleges that he tried to contact the publisher but never received a response.
22 (Id.) Plaintiff believes that Defendants Reilly, Silva and Horel were working in concert to "intercept"
23 his mail and deprive him of his "right to personal property." (Id. at 21-22.)

24 Plaintiff alleges that under the Americans with Disabilities Act of 1990 (ADA) and his status
25 as a disabled veteran, he should qualify for "qualified-disabled-approved-housing-institutions." (Am.
26 Compl. at 24.) Plaintiff claims he qualifies for such approved housing "because of [his] inability to
27 stand for a complete fifteen minute shower, and being very prone to slipping and falling in the
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1 shower; and [his] need for a wheelchair for daily recreation yard, because [he] can't stand or walk that
2 long/far at one time, and also used for long journeys outside [his] housing unit; a cane for in-cell and
3 inner-unit functioning." (Id. at 24.) Plaintiff claims that Defendants Williams's and Sayre's CDC
4 1845 denials disqualified him "from adequate housing, or the use of necessary aides." (Id.)

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6 Finally, Plaintiff also amends his deliberate indifference claims and declares that even after
7 his previous civil rights action involving medical claims -- Case No. C 05-1098 SBA (pr) -- had been
8 dismissed after the parties reached a settlement agreement in 2007,¹ he was still being "forced to live
9 with chronic-nerve-pain in [his] feet, which have now spread upward into [his] left hip." (Pl. Decl. at
10 1-2.) He claims that he was also being forced to live in an "extremely cold and humid cell." (Id. at
11 1.) He adds that his "weak stomach" was not being treated as his regular diet consists of everything
12 he should not eat. (Id.) He alleges that Defendants intentionally gave him a "sub-par version of
13 medicines." (Id.) He asserts that "both [his] feet and digestive systems [were] destined to become
14 cancerous." (Id. at 1-2.) He claims that despite his diligent attempts at seeking medical treatment
15 from prison staff for both his weak stomach and chronic nerve pain, Defendants "blockaded" such
16 treatment. (Id. at 2.)

17 On September 30, 2009, Plaintiff filed a renewed motion for a TRO while he was still
18 incarcerated at PBSP.

19 In an Order dated September 30, 2010, the Court noted that, as mentioned above, Plaintiff has
20 since been transferred to Corcoran. The Court added that the transfer to a different prison was
21 important because it made much of his requested relief moot. Therefore, the Court denied his
22 renewed motion for a TRO. The Court further ordered that should Plaintiff seek to allege that some
23 or all of the allegations of deliberate indifference from his original and amended complaints extend to
24 the conditions of his confinement at Corcoran, i.e., any allegations that he is not receiving chronic
25 nerve pain medication or treatment for problems with his digestive system, those claims must be
26 brought in a separate lawsuit in the United States District Court for the Eastern District of California,
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¹ On July 26, 2007, the Court issued an Order Dismissing Action upon being notified of the settlement of Plaintiff's previous civil rights action. See Case No. C 05-1098 SBA (pr).

1 the proper venue for claims arising in Kings County, where Corcoran is located. See 28 U.S.C.
2 § 1391(b); 28 U.S.C. § 84(b).

3 On October 18, 2010, Plaintiff filed a letter to the Court in reference to the September 30,
4 2010 Order. Plaintiff's allegations in his letter that "certain staff members" from both Corcoran and
5 PBSP are working in unison in a "systematic deprivation of [Plaintiff's] hygiene, and the means of
6 obtaining, coupled with food and personal property deprivations, as a means of force against [his]
7 voice for [his] constitutional rights" are conclusory. Even if the medical treatment Plaintiff is
8 receiving at Corcoran is a continuation of his treatment at PBSP, Plaintiff may not seek to add such
9 new claims against new Defendants because the alleged violations he is experiencing took place at
10 Corcoran, which is not located in this district. See 28 U.S.C. § 1391(b). Thus, Plaintiff must bring
11 such claims in a separate lawsuit in the proper venue.

12 The Court now reviews the amended complaint to determine whether it states cognizable
13 claims for relief.
14

15 DISCUSSION

16 I. Exhaustion

17 A question which must be answered before Plaintiff can proceed with his claims is whether he
18 has exhausted available administrative remedies with respect to each claim.

19 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996)
20 (PLRA), amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to
21 prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any
22 jail, prison, or other correctional facility until such administrative remedies as are available are
23 exhausted." 42 U.S.C. § 1997e(a). Under this section, an action must be dismissed unless the
24 prisoner exhausted his available administrative remedies before he filed suit, even if the prisoner fully
25 exhausts while the suit is pending. See McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002).
26 "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they
27 involve general circumstances or particular episodes, and whether they allege excessive force or some
28 other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002). Exhaustion of all "available" remedies is

1 mandatory; those remedies need not meet federal standards, nor must they be "plain, speedy and
2 effective." Id. at 524; Booth v. Churner, 532 U.S. 731, 739-40 & n.5 (2001). Even when the prisoner
3 seeks relief not available in grievance proceedings, notably money damages, exhaustion is a
4 prerequisite to suit. Id. at 741. The purposes of the exhaustion requirement include allowing the
5 prison to take responsive action, filtering out frivolous cases and creating an administrative record.
6 See Porter, 534 U.S. at 525.

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8 The State of California provides its inmates and parolees the right to appeal administratively
9 "any departmental decision, action, condition or policy perceived by those individuals as adversely
10 affecting their welfare." See Cal. Code Regs. tit. 15, § 3084.1(a). It also provides its inmates the
11 right to file administrative appeals alleging misconduct by correctional officers. See id. § 3084.1(e).
12 In order to exhaust available administrative remedies within this system, a prisoner must proceed
13 through several levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602
14 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level
15 appeal to the Director of the California Department of Corrections and Rehabilitation. See id.
16 § 3084.5; Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). This satisfies the
17 administrative remedies exhaustion requirement under § 1997e(a). See id. at 1237-38.

18 Based on Plaintiff's declaration regarding his administrative appeals and his belief that he did
19 everything he could, the Court concludes that, for the purposes of this preliminary review of
20 Plaintiff's amended complaint, he has satisfactorily shown that he has exhausted his claims.

21 **II. Amended Legal Claims**

22 **A. Deliberate Indifference to Serious Medical Needs**

23 Deliberate indifference to serious medical needs is a cognizable claim for violation of the
24 Eighth Amendment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin v. Smith, 974 F.2d
25 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX Technologies, Inc. v. Miller, 104
26 F.3d 1133, 1136 (9th Cir. 1997) (en banc); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986). A
27 determination of "deliberate indifference" involves an examination of two elements: the seriousness
28 of the prisoner's medical need and the nature of the defendant's response to that need. McGuckin, 974

1 F.2d at 1059.

2 A "serious" medical need exists if the failure to treat a prisoner's condition could result in
3 further significant injury or the unnecessary and wanton infliction of pain. Id. The existence of an
4 injury that a reasonable doctor or patient would find important and worthy of comment or treatment;
5 the presence of a medical condition that significantly affects an individual's daily activities; or the
6 existence of chronic and substantial pain are examples of indications that a prisoner has a "serious"
7 need for medical treatment. Id. at 1059-60.

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9 In order for deliberate indifference to be established, there must be a purposeful act or failure
10 to act on the part of the defendant. Id. at 1060. Second, a prisoner can make no claim for deliberate
11 medical indifference unless the denial was harmful. Id.; Shapley v. Nev. Bd. of State Prison
12 Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). But the court need not find that the defendant's actions
13 are egregious or that they resulted in significant injury to the prisoner in order to find a violation of
14 the prisoner's federal constitutional rights. Id. at 1060, 1061.

15 Here, Plaintiff alleges that Defendants Sayre, Rowe, Douglas, and Williams were deliberately
16 indifferent to his serious medical needs. Specifically, Plaintiff claims that Defendants intentionally
17 provided him with "sub-par version of medications," which he believed could cause both his feet and
18 digestive systems "to become cancerous." (Pl. Decl. at 1.) Plaintiff alleges that with his frostbite
19 condition, he has suffered from nerve pain due to a cold cell, as well as mobility complications since
20 he did not have access to a walking aide. (Am. Compl. at 6, 10.) Plaintiff was given Terazosin,
21 Omeprazole and Ranifidine as substitutes to Plaintiff's previous nerve-pain related medications. (Id.
22 at 14.) Plaintiff claims that after trying the substitute medications for a period of time, he found that
23 they were ineffective in alleviating his pain. (Id. at 15.)

24 Plaintiff also sought a referral for a podiatrist to address his athlete's foot fungal condition;
25 however, his request was denied. (Pl. Decl. at 2.) Plaintiff claims that Defendant Rowe was not
26 willing to provide him with enough prescribed foot cream to last for more than thirty days. (Am.
27 Compl. at 20.) Plaintiff claims that having to visit Defendant Rowe for his prescription foot cream
28 refill every thirty days, in addition to medical visits for his other medical complications, was

1 intolerable due to his limited mobility and lack of a cane or wheelchair. (Id.)

2 Finally, Plaintiff alleges that he suffered from a weak stomach. (Id. at 17.) Plaintiff claims
3 that he was unable to double-cell because his weak stomach causes him to suffer "unbearable
4 flatulence, belching and burping." (Id. at 18.) Plaintiff was seen by a stomach specialist and his
5 former primary care provider, who advised him to avoid eating certain spicy, half-cooked foods and
6 prescribed him with "real" Prilosec. (Id.) Plaintiff alleges that most of the meals he was served at
7 PBSP contained spicy foods and half-cooked meats or vegetables. (Id. at 19.)

8 Plaintiff has addressed the deficiencies of his deliberate indifference claim; therefore, the
9 Court finds that he has alleged a cognizable deliberate indifference to serious medical needs claim
10 against Defendants Sayre, Rowe, Douglas and Williams.

11 **B. Supervisory Liability Claims**

12 A supervisor may be liable under § 1983 upon a showing of personal involvement in the
13 constitutional deprivation or a sufficient causal connection between the supervisor's wrongful conduct
14 and the constitutional violation. Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir.
15 1991) (en banc) (citation omitted). A supervisor therefore generally "is liable only for constitutional
16 violations of his subordinates if the supervisor participated in or directed the violations, or knew of
17 the violations and failed to act to prevent them." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).
18 This includes evidence that a supervisor implemented "a policy so deficient that the policy itself is a
19 repudiation of constitutional rights and is the moving force of the constitutional violation." Redman,
20 942 F.2d at 1446; see Jeffers v. Gomez, 267 F.3d 895, 917 (9th Cir. 2001).

21 Plaintiff has amended his supervisory liability claims by stating that Defendants Horel and
22 Sayre "participated in or directed the violations, or knew of the violations and failed to act to prevent
23 them." Taylor, 880 F.2d at 1045. Specifically, Plaintiff alleges that, as the warden, Defendant Horel
24 handled Plaintiff's numerous appeals, which denied some of Plaintiff's requests for medical treatment.
25 Plaintiff claims that, as the chief medical officer, Defendant Sayre was responsible for directing the
26 medical staff to purposely deny him "fair medical care" for his chronic nerve pain and mobility
27 problems. (Pl. Decl. at 2.)
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1 Plaintiff has addressed the deficiencies of his supervisory liability claims; therefore, he has
2 adequately pled cognizable supervisory liability claims against Defendants Horel and Sayre.

3 **III . New Legal Claims in Amended Complaint**

4 **A. Deprivation of Personal Property**

5 Ordinarily, due process of law requires notice and an opportunity for some kind of hearing
6 prior to the deprivation of a significant property interest. Memphis Light, Gas & Water Div. v. Craft,
7 436 U.S. 1, 19 (1978). Neither the negligent nor intentional deprivation of property states a due
8 process claim under § 1983 if the deprivation was random and unauthorized, however. Parratt v.
9 Taylor, 451 U.S. 527, 535-44 (1981) (state employee negligently lost prisoner's hobby kit), overruled
10 in part on other grounds, Daniels v. Williams, 474 U.S. 327, 330-31 (1986); Hudson v. Palmer, 468
11 U.S. 517, 533 (1984) (intentional destruction of inmate's property).

12 If the deprivation is not random and unauthorized, but the result of "established state
13 procedure," the availability of a post-termination tort action does not necessarily provide due process.
14 Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982) (failure on part of state commission to
15 hold hearing within statutory time limits not permitted to terminate timely filed claim). In those
16 instances, the Fourteenth Amendment requires "'an opportunity . . . granted at a meaningful time and
17 in a meaningful manner,' . . . for a hearing appropriate to the nature of the case.'" Id. at 437.

18 Read liberally, the allegations in Plaintiff's amended complaint do not state a claim against
19 Defendants Reilly, Silva and Horel for intentionally depriving Plaintiff of his missing "Show
20 Magazine" issues.
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22 Accordingly, Plaintiff's claims against Defendants Reilly, Silva and Horel for deprivation of
23 private property are DISMISSED.

24 **B. Disability Discrimination**

25 Plaintiff has filed a new claim seeking "qualified-disabled-approved-housing" under the ADA.
26 (Am. Compl. at 24.) Specifically, Plaintiff claims that because he is a disabled veteran, and his
27 inability to stand for more than fifteen minutes at a time, he should at least be given a walking aide
28 for both in-cell and inner-unit use. (Id.) Plaintiff alleges that Defendants Williams and Sayre

1 discriminated against him by disqualifying him from adequate housing or the use of walking aides.

2 (Id.)

3 **1. Cause of Action**

4 Title II of the ADA, 42 U.S.C. § 12101 et seq., and § 504 of the Rehabilitation Act of 1973, as
5 amended and codified in 29 U.S.C. § 794(a), prohibit discrimination on the basis of disability in the
6 programs, services or activities of a public entity. The elements of a cause of action under Title II of
7 the ADA are: (1) that the plaintiff is a qualified individual with a disability; (2) that the plaintiff was
8 either excluded from participation in or denied the benefits of a service, program, or activity of a
9 public entity, or was otherwise discriminated against by the public entity; and (3) that such exclusion,
10 denial of benefits, or discrimination was by reason of disability. Duvall v. County of Kitsap, 260
11 F.3d 1124, 1135 (9th Cir. 2001); 42 U.S.C. § 12132. A cause of action under § 504 of the Rehabilitation
12 Act essentially parallels an ADA cause of action. See Olmstead v. Linn, 527 U.S. 581, 589-90
13 (1999); Duvall, 260 F.3d at 1135. A qualifying "disability" is "(A) a physical or mental impairment
14 that substantially limits one or more of the major life activities of such individual; (B) a record of
15 such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

17 Federal regulations require a public entity to "make reasonable modifications in policies,
18 practices, or procedures when the modifications are necessary to avoid discrimination on the basis of
19 disability, unless the public entity can demonstrate that making the modifications would
20 fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

21 **2. Proper Defendants**

22 Plaintiff cannot bring an ADA or § 504 action against individual prison officials, because the
23 proper defendant in such actions is the public entity responsible for the alleged discrimination. Nor
24 can he bring a § 1983 action against Defendants based on allegedly discriminatory conduct. See
25 Vinson v. Thomas, 288 F.3d 1145, 1156 (9th Cir. 2002) ("[A] plaintiff cannot bring an action under
26 42 U.S.C. § 1983 against a State official in her individual capacity to vindicate rights created by Title
27 II of the ADA or section 504 of the Rehabilitation Act."). Therefore, Plaintiff's disability
28 discrimination claims against Defendants Williams and Sayre -- who are individual prison officials --

1 are DISMISSED WITH PREJUDICE.

2 The proper defendants to Plaintiff's disability discrimination claims are the public entities
3 that allegedly denied him equal access to their programs: PBSP and the California Department of
4 Corrections and Rehabilitation (CDCR). State correctional facilities are "public entities" within the
5 meaning of the ADA. See 42 U.S.C. § 12131(1)(A) & (B); Pennsylvania Dep't of Corrections v.
6 Yeskey, 524 U.S. 206, 210 (1998); Armstrong v. Wilson, 124 F.3d 1019, 1025 (9th Cir. 1997). State
7 prisons that receive federal financial assistance are covered by the Rehabilitation Act. See
8 Armstrong, 124 F.3d at 1022-23.

9 As state agencies, these entities are shielded from suit in federal court unless they waive
10 their sovereign immunity or Congress has validly abrogated their sovereign immunity in the
11 applicable statute. See Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985). In Board of Trustees of
12 the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001), the Supreme Court held that Congress did not have
13 the power to abrogate the States' Eleventh Amendment immunity under Title I of the ADA, but
14 declined to reach the question whether Congress validly abrogated the States' immunity as to Title II.
15 See Garrett 531 U.S. at 360 n.1. The Court specifically noted that Title II has somewhat different
16 remedial provisions from Title I. Id. For purposes of initial review, the Court will assume that the
17 California prisons do not enjoy Eleventh Amendment immunity with respect to Plaintiff's ADA
18 claims.

19 As to the Rehabilitation Act, the Ninth Circuit has held that, "[b]ecause California accepts
20 federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh
21 Amendment" as to that Act's anti-discrimination provisions. See Clark v. State of California, 123
22 F.3d 1267, 1271 (9th Cir. 1997); see also Douglas v. California Dept. Youth Authority, 271 F.3d
23 812, 819 (9th Cir.), amended, 271 F.3d 910 (9th Cir. 2001) (adhering to Clark after Supreme Court's
24 decision in Garrett.) Thus, Plaintiff may pursue claims for both money damages and prospective
25 injunctive relief under the Rehabilitation Act directly against PBSP and the CDCR.

26 In sum, assuming Plaintiff has a valid disability discrimination claim, he may assert the
27 claim in an amendment to the first amended complaint against PBSP and the CDCR, but not against
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1 any individual defendants.

2 **3. Analysis of Claim**

3 Even assuming Plaintiff's allegation that he is a disabled veteran could establish that
4 he is an individual with a disability under the federal statutes, he has not alleged discriminatory
5 conduct. Plaintiff makes conclusory allegations that Defendants discriminated against him
6 because of his disability by failing to provide him with adequate housing or walking aides. (Am.
7 Compl. at 24.) Plaintiff does not allege that he was treated differently than similarly-situated non-
8 disabled inmates and he does not allege that he was excluded from participation in a prison program
9 or service because of his disability. Therefore, he does not appear to have a cognizable disability
10 discrimination claim.

11 If Plaintiff names PBSP and the CDCR as Defendants, his ADA and Section 504 claims
12 against these public entities are DISMISSED WITH LEAVE TO AMEND. Plaintiff may reassert the
13 claims in an amendment to the first amended complaint if he can in good faith allege that he is an
14 individual with a disability under the federal statutes, that the prison discriminated against him on the
15 basis of his "disability," and if he names the proper Defendants.

16 **C. Deliberate Indifference to Basic Needs**

17 Adequate food is a basic human need protected by the Eighth Amendment. See Keenan v.
18 Hall, 83 F.3d 1083, 1091 (9th Cir. 1996), amended, 135 F.3d 1318 (9th Cir. 1998). The Eighth
19 Amendment right to food was clearly established as of at least 2001. Foster v. Runnels, 554 F.3d 807,
20 815 (9th Cir. 2009). Denial of food service presents a sufficiently serious condition to meet the
21 objective prong of the Eighth Amendment deliberate indifference analysis. Id. at 812-13; see, e.g., id.
22 at 812 (denial of sixteen meals over twenty-three days was "a sufficiently serious deprivation because
23 food is one of life's basic necessities"); Id. at 812 n.1 (denial of two meals over nine-week period was
24 not sufficiently serious to meet objective prong of Eighth Amendment deliberate indifference).

25 Prison officials may withhold food service for legitimate penological purposes (e.g., staff
26 safety) but must prove the penological concern justified refusal to feed the prisoner. See Foster, 554
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1 F.3d at 813-14 (guard not entitled to qualified immunity because she did not establish that prisoner's
2 refusal to uncover back window of his cell caused safety issues for food service through food port
3 where front window of cell was uncovered, nor did she establish that uncovering back window was a
4 reasonable condition for the receipt of a meal by a prisoner). See, e.g., Freeman v. Berge, 441 F.3d
5 543, 546 (7th Cir. 2006) (withholding food from inmate who refused to comply with requirement of
6 putting on pants or shorts was not cruel and unusual punishment).

7
8 Plaintiff claims that Defendant Reppond relied on witnesses' statements that subsequently
9 placed Plaintiff on paper tray status for a rule violation, i.e., throwing a food tray at a correctional
10 officer. (Am. Compl. at 4.) Plaintiff claims that he was then deprived of food because the paper
11 plates contained "only perhaps one fourth of the content of regular plates." (Id.) Plaintiff fails to
12 show that Defendant Reppond denied him food. Instead, Plaintiff was placed on paper tray status for
13 throwing a food tray at a correctional officer, and as a precautionary measure for penological
14 purposes. (Id., Ex. 6.)

15 Without more, Plaintiff's allegations fail to state a claim of deliberate indifference to his basic
16 needs; therefore, it is DISMISSED for failure to state a claim.

17 CONCLUSION

18 For the foregoing reasons, the Court orders as follows:

19 1. Plaintiff states a cognizable claim for deliberate indifference to serious medical needs
20 against Defendants Horel, Sayre, Rowe, Williams and Douglas. Plaintiff states cognizable
21 supervisory liability claims against Defendants Horel and Sayre.

22 2. Plaintiff's disability discrimination claims against Defendants who are individual
23 prison officials are DISMISSED WITH PREJUDICE. If Plaintiff names PBSP and the CDCR as
24 Defendants, then his ADA and Section 504 claims against these public entities are DISMISSED
25 WITH LEAVE TO AMEND, as directed above.

26 Within **thirty (30) days** of the date of this Order Plaintiff may file an amendment to the first
27 amended complaint with his amended ADA and Section 504 claims against PBSP and the CDCR as
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set forth above in Sections III(B)(3) of this Order. (Plaintiff shall resubmit only his amended ADA and Section 504 claims and not the entire complaint.) The failure to do so will result in the dismissal without prejudice of his ADA and Section 504 claims against PBSP and the CDCR.

3. The remaining claims against all other Defendants are dismissed.

4. Within **thirty (30) days** of the date this Order is filed Plaintiff shall either provide the Court with proof of service of the summons and complaint upon the Defendants against whom he alleges his deliberate indifference to serious medical needs and supervisory liability claims, or otherwise show cause why the complaint should not be dismissed without prejudice as to each unserved Defendant pursuant to Rule 4(m) of the Federal Rules of Civil Procedure.

5. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court informed of any change of address and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

6. Extensions of time are not favored, though reasonable extensions will be granted. Any motion for an extension of time must be filed no later than **fifteen (15) days** prior to the deadline sought to be extended.

IT IS SO ORDERED.

DATED: 10/29/10


SAUNDRA BROWN ARMSTRONG
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DANNY CAESAR,
Plaintiff,

Case Number: CV08-01977 SBA

CERTIFICATE OF SERVICE

v.

ROBET HOREL et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 29, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Danny L. Caesar D-07644
Corcoran State Prison
P.O. Box 3481
Corcoran, CA 93212

Dated: October 29, 2010

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk