

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

3 ERIC L. GONZALEZ,

No. C 09-0953 CW (PR)

4                                    Plaintiff,

ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT AND  
MOTION TO FILE SUR-REPLY

5                                    v.

6 P. MULLEN, et al.,

(Docket nos. 41, 63)

7                                    Defendants.  
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10                                    INTRODUCTION

11                    Plaintiff, a state prisoner incarcerated at the Correctional  
12 Training Facility (CTF) at Soledad, filed this pro se civil rights  
13 action pursuant to 42 U.S.C. § 1983, seeking prospective  
14 injunctive relief for the alleged violation of his constitutional  
15 rights. On initial review of the first amended complaint,  
16 pursuant to 28 U.S.C. § 1915A, the Court determined that none of  
17 Plaintiff's allegations stated a claim for relief under § 1983 and  
18 dismissed the claims with prejudice. On appeal, the Ninth Circuit  
19 found two of Plaintiff's claims cognizable and remanded the case  
20 for further proceedings.

21                    The Court ordered the first amended complaint served on  
22 Defendants, who filed a motion for summary judgment that has been  
23 briefed fully by the parties.<sup>1</sup> For the reasons discussed below,  
24 the motion for summary judgment is GRANTED.

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27                    <sup>1</sup> Defendants' motion for leave to file a sur-reply is  
28 GRANTED. The sur-reply was filed on October 12, 2012 and  
Plaintiff filed a response thereto on October 22, 2012.

DISCUSSION

Plaintiff alleges violations of the Eighth Amendment and the equal protection clause of the Fourteenth Amendment. He seeks prospective injunctive relief to remedy the alleged violations.

I. Defendant Mullen

The Court ordered service of Plaintiff's claims on Defendants P. Mullen -- the appeals coordinator at CTF, Randy Grounds -- the warden at CTF, and Matthew Cate -- the Director of the California Department of Corrections and Rehabilitation.

In their motion for summary judgment Defendants argue that Plaintiff has failed to link Mullen to his allegations and, therefore, all claims against Mullen should be dismissed. In his opposition to Defendants' motion, Plaintiff responds that "P. Mullen is not a defendant in this action." Opp'n at 31:23-24.

Accordingly, all claims against Mullen are DISMISSED with prejudice.

II. Summary Judgment Legal Standard

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

The court will grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party

1 will bear the burden of proof at trial." Celotex Corp. v.  
2 Catrett, 477 U.S. 317, 322-23 (1986); see also Anderson, 477 U.S.  
3 at 248 (holding fact to be material if it might affect outcome of  
4 suit under governing law). The moving party bears the initial  
5 burden of identifying those portions of the record that  
6 demonstrate the absence of a genuine issue of material fact. The  
7 burden then shifts to the nonmoving party to "go beyond the  
8 pleadings, and by his own affidavits, or by the 'depositions,  
9 answers to interrogatories, or admissions on file,' designate  
10 'specific facts showing that there is a genuine issue for trial.'" Celotex,  
11 477 U.S. at 324 (citing Fed. R. Civ. P. 56(e)).

12 In considering a motion for summary judgment, the court must  
13 view the evidence in the light most favorable to the nonmoving  
14 party; if, as to any given fact, evidence produced by the moving  
15 party conflicts with evidence produced by the nonmoving party, the  
16 court must assume the truth of the evidence set forth by the  
17 nonmoving party with respect to that fact. See Leslie v. Grupo  
18 ICA, 198 F.3d 1152, 1158 (9th Cir. 1999). The court's function on  
19 a summary judgment motion is not to make credibility  
20 determinations or weigh conflicting evidence with respect to a  
21 disputed material fact. See T.W. Elec. Serv. v. Pacific Elec.  
22 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

23 A district court may consider only admissible evidence in  
24 ruling on a motion for summary judgment. See Fed. R. Civ. P.  
25 56(e); Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002).

26 A verified complaint may be used as an opposing affidavit  
27 under Rule 56, as long as it is based on personal knowledge and  
28 sets forth specific facts admissible in evidence. See Schroeder

1 v. McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995).

2 III. Plaintiff's Claims

3 A. Eighth Amendment Claim

4 Plaintiff claims that he is being subjected to cruel and  
5 unusual punishment in violation of the Eighth Amendment because  
6 the state prison system does not provide him, as an indigent  
7 inmate, with free shower shoes. Specifically, Plaintiff maintains  
8 that, as an indigent inmate who cannot afford to purchase shower  
9 shows at the canteen, his health is put at risk each time he  
10 showers because he is likely to be exposed to a serious contagious  
11 disease, such as hepatitis or HIV, from coming into contact with  
12 the bodily fluids of other inmates, or to a bacterial infection  
13 such as athlete's foot.

14 The Eighth Amendment requires that prison officials take  
15 reasonable measures to guarantee the safety of prisoners. Farmer  
16 v. Brennan, 511 U.S. 825, 832 (1994). The failure of prison  
17 officials to protect inmates from attacks by other inmates or from  
18 dangerous conditions at the prison violates the Eighth Amendment  
19 only when two requirements are met: (1) the deprivation alleged  
20 is, objectively, sufficiently serious; and (2) a prison official  
21 is, subjectively, deliberately indifferent to inmate safety. Id.  
22 at 834.

23 Defendants argue that the conditions of which Plaintiff  
24 complains are not sufficiently egregious to amount to a violation  
25 of the Eighth Amendment, that Defendants are not the cause of his  
26 lack of shower shoes, and that his claim is moot. The Court need  
27 not decide if a triable issue exists as to whether the deprivation  
28 alleged by Plaintiff rises to the level of an Eighth Amendment

1 violation; rather, the Court finds, for the reasons discussed  
2 below, that Defendants are not responsible for Plaintiff's lack of  
3 shower shoes and, therefore, have not acted with deliberate  
4 indifference to his safety.

5 The undisputed evidence shows that shower shoes are available  
6 for purchase at CTF's inmate canteen for \$1.20. Decl. A. Kester  
7 Supp. Mot. Summ. J. (Kester Decl.) ¶ 4. Shower shoes also are  
8 available through the quarterly package program. Id. Under this  
9 program, inmates in a qualifying privilege group (or their friends  
10 and families) are entitled to purchase certain items from approved  
11 outside vendors for delivery on a quarterly basis, i.e., every  
12 ninety days. Id. Plaintiff regularly receives quarterly packages  
13 and shower shoes are not a restricted item. Id. ¶¶ 4-5.

14 Plaintiff acknowledges that he routinely receives quarterly  
15 packages, but maintains that he orders the packages for other non-  
16 indigent inmates, who provide him with \$5.00 worth of items from  
17 the prison canteen in exchange for each quarterly package. Opp'n  
18 at 15:8-16:10; Pl.'s Decl. Supp. Opp'n ¶ 3-7. Plaintiff states  
19 that he uses the \$5.00 to purchase three deodorants and a lotion,  
20 which does not leave him with enough money to buy shower shoes.  
21 Opp'n at 16:11-17:6.

22 Based on this evidence, it is clear that Defendants' actions  
23 have not placed Plaintiff at risk of serious harm. Instead, the  
24 evidence shows 1) that Plaintiff is allowed to receive shower  
25 shoes through quarterly packages but sells his quarterly packages  
26 to other inmates; 2) that Plaintiff receives \$5.00 worth of items  
27 from the prison canteen in exchange for each quarterly package;  
28 3) that shower shoes are available in the canteen for \$1.20; and

1 4) that Plaintiff chooses to purchase deodorant and lotion rather  
2 than shower shoes. In sum, Plaintiff does not have shower shoes  
3 because he has chosen not to buy them, not because Defendants have  
4 prevented him from doing so.

5 Further, the evidence shows that, during the course of these  
6 proceedings, on May 8, 2012, a Public Health Nurse at CTF issued  
7 shower shoes to Plaintiff even though he could not pay for them.  
8 Decl. H. Dowless Supp. Defs' Sur-Reply (Dowless Decl.) ¶¶ 2-4 &  
9 Exs. A-B; Pl's Decl. Supp. Sur-Reply Response ¶¶ 3-4. Defendants  
10 argue that Plaintiff's receipt of the shower shoes renders his  
11 current claim for injunctive relief moot. Plaintiff argues that  
12 the claim is not moot because he is still indigent and there is  
13 no guarantee that he will be provided with shower shoes by the  
14 Public Health Nurse in the future.

15 As discussed above, even if Plaintiff has no funds in his  
16 trust account and qualifies for pauper status in the present  
17 proceedings, the evidence shows that he receives \$5.00 from other  
18 inmates each quarter and chooses to spend those funds on deodorant  
19 and lotion rather than shower shoes, which cost \$1.20. Further,  
20 there is no indication that he will not be provided with shower  
21 shoes free of charge by medical staff in the future if he requests  
22 them.

23 In sum, Plaintiff's claim in this action is that his  
24 inability to obtain shower shoes places him at a serious risk of  
25 harm of contracting a serious illness. However, the undisputed  
26 evidence shows that he does not face such harm because he has the  
27 ability to purchase shower shoes and has been provided with shower  
28 shoes free of charge. Accordingly, Plaintiff is not entitled to

1 prospective injunctive relief.<sup>2</sup>

2 Based on the above, summary judgment is GRANTED in favor of  
3 Defendants on this claim.

4 II. Equal Protection Claim

5 Plaintiff claims his right to equal protection is being  
6 violated by CDCR regulations that prohibit male inmates from  
7 purchasing certain personal property items from the canteen or  
8 receiving them in their quarterly packages, while female inmates  
9 do not face the same prohibitions. According to Plaintiff, such  
10 property items include, but are not necessarily limited to, denim  
11 wear, hair dryers, immersion heating devices and earrings. He  
12 seeks prospective injunctive relief that would revise the  
13 pertinent CDCR regulations to allow all male inmates to purchase  
14 the same products as female inmates. He also claims that male  
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18 <sup>2</sup> Further, Plaintiff cannot challenge the contested prison  
19 policy on behalf of other inmates. Specifically, pro se prisoners  
20 cannot act as class representatives. See Johns v. County of San  
21 Diego, 114 F.3d 874, 877 (9th Cir. 1997). Moreover, any class  
22 claim for prospective injunctive relief related to medical needs  
23 is barred by the pending class action Plata v. Brown, No. 01-cv-  
24 01351 TEH (N.D. Cal.), which concerns the constitutional adequacy  
25 of CDCR inmate medical health care. The Plata class consists of  
26 "all prisoners in the custody of the CDCR with serious medical  
27 needs." See Stip. for Inj. Relief 5, ECF No. 24, No. 01-cv-01351  
28 TEH (N.D. Cal.). A plaintiff who is a member of a class suing for  
equitable relief from prison conditions may not maintain a  
separate, individual suit for equitable relief involving the  
subject matter of the class action. See Crawford v. Bell, 599  
F.2d 890, 892-93 (9th Cir. 1979); see also McNeil v. Guthrie, 945  
F.2d 1163, 1165 (10th Cir. 1991) ("Individual suits for injunctive  
and equitable relief from alleged unconstitutional prison  
conditions cannot be brought where there is an existing class  
action.")

1 inmates must be allowed to wear earrings like female inmates.<sup>3</sup>

2 In support of their motion for summary judgment, Defendants  
3 argue that the CDCR regulations differentiating between items that  
4 can be possessed by male and female inmates are reasonably related  
5 to legitimate penological interests. Specifically, they present  
6 evidence of various security reasons for denying access to certain  
7 property items to inmates based on gender, housing institution and  
8 custody status.

9 The proper standard for determining the validity of a prison  
10 regulation or practice claimed to infringe on an inmate's  
11 constitutional rights is whether the regulation or practice is  
12 "reasonably related to legitimate penological interests." Turner  
13 v. Safley, 482 U.S. 78, 89 (1987). This is the case even when the  
14 constitutional right claimed to have been infringed is fundamental  
15 or a suspect class is involved, and the state under other  
16 circumstances would be required to satisfy a more rigorous  
17 standard of review. See Washington v. Harper, 494 U.S. 210, 223-  
18 25 (1990).

19 As an initial matter, the Court finds that the  
20 constitutionality of all of the restrictions addressed by the  
21 relevant CDCR matrices is not at issue in this case. Instead, the  
22 allegations in Plaintiff's first amended complaint and his  
23 administrative appeals show that the only specific item to which  
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25 <sup>3</sup> Plaintiff also complained originally about the denial of  
26 access to certain high-sugar content food items, but he has  
27 withdrawn that contention and conceded that Defendants have a  
28 legitimate penological interest in prohibiting inmates from  
possessing food items that can be used to make pruno. Opp'n at  
25:26-26:3.

1 he has sought access for personal use is an earring. The Court  
2 finds that Plaintiff's broad-based administrative grievance that  
3 all male inmates be allowed to possess all of the same property  
4 items as female inmates is not sufficient to constitute exhaustion  
5 of that claim for purposes of this Court's review. 42 U.S.C.  
6 § 1997e(a). Specifically, because Plaintiff did not expressly  
7 exhaust a request for all of the items that male inmates are  
8 prohibited from possessing, only the prohibition of earrings is  
9 properly before the Court. As noted above, Plaintiff cannot  
10 challenge contested prison policies on behalf of other inmates.  
11 The Court, therefore, will not review Plaintiff's comprehensive  
12 claim that the CDCR property matrices are unconstitutional as to  
13 each item that female inmates can possess but male inmates cannot.

14 With respect to Plaintiff's specific claim that the  
15 prohibition on receiving and wearing earrings violates his right  
16 to equal protection, the Court finds the claim unsupported by the  
17 evidence. Defendants have presented evidence that shows a  
18 rational relationship between the restriction on male possession  
19 of earrings and security concerns.<sup>4</sup> Specifically, California Code  
20 of Regulations, title 15, section 3062(k) provides the following:

21 [I]nmates shall not possess or wear any type of jewelry  
22 or other object intended to be worn as a body piercing  
23 adornment. This is necessary as it may pose a threat to  
24 the health and well being of inmates in that instruments  
25 or devices used for piercing may not be sterile, and  
26 could cause infections, as well as transmitting blood-  
borne diseases. Additionally, these provision are  
necessary because body piercings may be ripped out  
during an altercation, and they [] also would pose an

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27 <sup>4</sup> The Court GRANTS Defendants' motion for the Court to take  
28 judicial notice of the applicable regulations.

1 additional safety and security risk as piercings can be  
2 altered to make weapons.

3 Defs' Req. Jud. Not. Ex. A at 3.

4 The property matrices exempt prisoners at women's  
5 institutions from this restriction because the CDCR has determined  
6 that fewer acts of violence occur at those prisons than at men's  
7 prisons such as Plaintiff's. Plaintiff claims that this is not  
8 the case because female inmates are just as, or more, likely than  
9 male inmates to pull on hair and earrings during a fight.  
10 Plaintiff's contention, however, is purely speculative and not  
11 based on admissible evidence.

12 Based on the above, the Court finds that Defendants' evidence  
13 shows that the prohibition on the possession of earrings by male  
14 inmates is reasonably related to the legitimate penological  
15 interest of prison security. Because Plaintiff has not raised a  
16 triable issue of fact with respect to that evidence, summary  
17 judgment is GRANTED in favor Defendants on this claim.  
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19 CONCLUSION

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

21 1. Defendants' motion for summary judgment is GRANTED.

22 (Docket no. 41.)

23 2. Defendants' motion to file a sur-reply is GRANTED.

24 (Docket no. 63.)

25 The Clerk of the Court shall enter judgment in favor of  
26 Defendants and close the file. All parties shall bear their own  
27 costs.  
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This Order terminates Docket nos. 41 and 63.

IT IS SO ORDERED.

Dated: 3/29/2013

  
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CLAUDIA WILKEN  
United States District Judge