

1 On May 26, 2008, at approximately 2:00 p.m., an altercation occurred between
2 Correctional Officer Rafalowski and plaintiff in the second tier shower stall. Plaintiff alleges
3 that the incident began when Officer Rafalowski made a sexually derogatory gesture with his
4 mouth while plaintiff showered.¹ (Compl. at 4.) Plaintiff felt “angry and humiliated” as a result
5 and in the process of being escorted from the shower room back to his cell and while handcuffed,
6 plaintiff attempted to kick Officer Rafalowski in the right leg.² (Id.) In response, Officer
7 Rafalowski used force to take plaintiff to the ground. (Decl. Rafalowski at 2.) The parties
8 dispute the amount of force used by Officer Rafalowski during the incident.

9 According to plaintiff, after attempting to kick Officer Rafalowski, Officer Rafalowski
10 threw plaintiff against the second tier rail and continuously punched him on the right side of his
11 face. (Compl. at 5.) After being taken to the ground and while handcuffed, Officer Rafalowski
12 continued punching plaintiff in the face and “slammed” plaintiff’s head several times against the
13 ground. (Id.) Plaintiff asserts that, “at no time, other than the attempted kick,” did he resist
14 prison officials. (Id.)

15 According to defendants, Officer Rafalowski used minimal force to restrain plaintiff.
16 Officer Rafalowski states that in response to plaintiff’s attack he “was able to reach around
17 [plaintiff’s] chest with [his] left arm, and [plaintiff’s] back with [his] right arm,” and then used
18 “physical force and [his] body weight to take [plaintiff] to the ground.” (Decl. Rafalowski at 2.)
19 Officer Rafalowski asserts that plaintiff continuously “kick[ed] and flail[ed] his body around in
20 an erratic manner,” despite his orders to stop resisting. (Id.) Officer Rafalowski placed his knee
21 on plaintiff’s left shoulder and held his head down on the ground attempting to subdue him.
22 (Id. at 2-3.) Officer Clemons intervened to assist and eventually an unidentified officer placed
23 leg restraints on plaintiff’s ankles. (Id. at 3.)

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26 ¹ Officer Rafalowski denies making any such gesture. (Decl. Rafalowski at 4.)

27 ² Officer Rafalowski asserts that Plaintiff kicked him twice, once above and once below
28 his right knee (Decl. Rafalowski at 2.). Plaintiff claims he only kicked once and missed.
(Compl. at 4.)

1 Following the incident plaintiff was treated by prison medical staff who noted a one inch
2 laceration and an abrasion over his right eye, and that plaintiff had defecated. (Decl. Pl., Ex. A.)
3 No other injuries were documented. (Id.)

4 ANALYSIS

5 I. Standard of Review

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

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

20 Once the moving party meets its initial burden, the nonmoving party must go beyond the
21 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a
22 genuine issue for trial.” Fed. R. Civ. P. 56(e). The court is only concerned with disputes over
23 material facts and “factual disputes that are irrelevant or unnecessary will not be counted.”
24 Liberty Lobby, Inc., 477 U.S. at 248. It is not the task of the court to scour the record in search
25 of a genuine issue of triable fact. Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996). The
26 nonmoving party has the burden of identifying, with reasonable particularity, the evidence that
27 precludes summary judgment. Id. If the nonmoving party fails to make this showing, “the
28 moving party is entitled to judgment as a matter of law.” Celotex Corp., 477 U.S. at 323.

1 At the summary judgment stage, the court must view the evidence in the light most
2 favorable to the nonmoving party: if evidence produced by the moving party conflicts with
3 evidence produced by the nonmoving party, the judge must assume the truth of the evidence set
4 forth by the nonmoving party with respect to that fact. See Leslie v. Grupo ICA, 198 F.3d 1152,
5 1158 (9th Cir. 1999).

6 II. Legal Claims and Analysis

7 A. Correctional Officer Rafalowski

8 Plaintiff alleges that Officer Rafalowski used excessive force against him, in violation of
9 his Eighth Amendment right against cruel and unusual punishment. (Compl. at 4.) Officer
10 Rafalowski argues that he is entitled to summary judgment because on the undisputed facts he
11 did not violate plaintiff's constitutional rights, and alternatively, he is entitled to qualified
12 immunity. (Defs.' Mot. Summ. J. at 8-14.)

13 The arbitrary and wanton infliction of pain violates the Cruel and Unusual Punishments
14 Clause of the Eighth Amendment. Hudson v. McMillian, 503 U.S. 1, 5 (1992). When prison
15 officials stand accused of using excessive force in violation of the Eighth Amendment, the core
16 judicial inquiry is whether force was applied in a good-faith effort to maintain or restore
17 discipline, or maliciously and sadistically for the very purpose of causing harm. Id. at 6-7. In
18 determining whether the use of force was for the purpose of maintaining or restoring discipline,
19 or for the malicious and sadistic purpose of causing harm, a court may evaluate the need for
20 application of force, the relationship between that need and the amount of force used, the extent
21 of any injury inflicted, the threat reasonably perceived by the responsible officials, and any
22 efforts made to temper the severity of a forceful response. Id. at 7. In reviewing these factors,
23 courts must accord prison administrators wide-ranging deference in the adoption and execution
24 of policies and practices to further institutional order and security. Jeffers v. Gomez, 267 F.3d
25 895, 917 (9th Cir. 2001).

26 Taking the evidence in the complaint as true, and drawing all inferences therefrom in
27 plaintiff's favor, there is a genuine issue of material fact as to whether Officer Rafalowski's use
28 of force was excessive. According to plaintiff, "after a brief period of being swayed and

1 continuously punched,” Officer Rafalowski “slammed” plaintiff against a cell door and then
2 “intermittently slamm[ed] his head against the pavement.” (Compl. at 5.) Plaintiff was
3 handcuffed and after the initial kick, did not physically resist “since it would only make matters
4 worse.” (Id.) Accepting this account as true, an inference could certainly be drawn that even if
5 plaintiff was the initial aggressor and needed to be restrained, Officer Rafalowski could have
6 done so without continuously punching plaintiff or slamming his head into the ground after
7 plaintiff was on the ground and handcuffed.

8 Defendants argue that the extent of plaintiff’s injuries reflect the minimal amount of force
9 used to subdue him. (Defs.’ Mot. Summ. J. at 9.) While prison medical staff noted that plaintiff
10 had received only a small laceration and an abrasion above his right eye, plaintiff contends he
11 suffered undocumented injuries including other “cuts to his face,” “swelling,” and an “abrasion”
12 on his right arm. (Pl’s Opp’n at 4.) While the extent of the injury may indicate the amount of
13 force applied, a significant injury is not a threshold for stating an excessive force claim. Hudson,
14 503 U.S. at 7. An inmate who is gratuitously beaten by guards does not lose his ability to pursue
15 an excessive force claim merely because he has the good fortune to escape without serious
16 injury. Wilkins v. Gaddy, 130 S. Ct. 1175, 1178-79 (2010) (per curiam). Therefore, taken as
17 true, plaintiff’s allegations demonstrate a genuine issue of material fact with regards to whether
18 Officer Rafalowski used excessive force for the purpose of causing plaintiff harm.

19 Having concluded that genuine issues of material fact exist as to whether Officer
20 Rafalowski used excessive force against plaintiff in violation of the Eighth Amendment, the
21 court next addresses whether he is entitled to qualified immunity. The defense of qualified
22 immunity protects “government officials . . . from liability for civil damages insofar as their
23 conduct does not violate clearly established statutory or constitutional rights of which a
24 reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A
25 court considering a claim of qualified immunity must determine whether the plaintiff has alleged
26 the deprivation of an actual constitutional right and whether such right was clearly established
27 such that it would be clear to a reasonable officer that his conduct was unlawful in the situation
28 he confronted. See Pearson v. Callahan, 129 S. Ct. 808, 818 (2009). Regarding the first prong,

1 the threshold question must be: Taken in the light most favorable to the party asserting the
2 injury, do the facts alleged show the officer’s conduct violated a constitutional right? Saucier v.
3 Katz, 533 U.S. 194, 201 (2001). The inquiry of whether a constitutional right was clearly
4 established must be undertaken in light of the specific context of the case, not as a broad general
5 proposition. Id. at 202. The relevant, dispositive inquiry in determining whether a right is
6 clearly established is whether it would be clear to a reasonable officer that his conduct was
7 unlawful in the situation he confronted. Id.

8 The court finds granting summary judgment on the ground of qualified immunity is
9 improper in this case. A dispute of fact exists as to whether plaintiff resisted Officer Rafalowski
10 and whether Officer Rafalowski continuously punched plaintiff and slammed his head into the
11 ground without resistance from plaintiff. Resolving all factual disputes in favor of plaintiff, the
12 court concludes Officer Rafalowski violated plaintiff’s clearly established right to be free from
13 excessive force. See Martinez v. Stanford, 323 F.3d 1178, 1183 (9th Cir. 2003) (“the law
14 regarding a prison guard’s use of excessive force was clearly established by 1994”). Granting
15 summary judgment on the ground of qualified immunity is “improper if, under the plaintiff’s
16 version of the facts, and in light of the clearly established law, a reasonable officer could not
17 have believed his conduct was lawful.” Schwenk v. Hartford, 204 F.3d 1187, 1196 (9th Cir.
18 2000). Here, based on plaintiff’s version of the facts, no reasonable officer could believe that
19 continuously punching, and slamming an inmate’s head against a concrete floor while he lay
20 prone on the ground was permitted under the Eighth Amendment.

21 In sum, accepting plaintiff’s allegations as true, there is a genuine issue of fact as to
22 whether Officer Rafalowski violated plaintiff’s constitutional rights. Accordingly, Officer
23 Rafalowski is not entitled to summary judgment.

24 B. Correctional Officer Clemons

25 Plaintiff claims that Officer Clemons failed to intervene and prevent Officer Rafalowski’s
26 use of excessive force. (Compl. at 6.) Defendants contend that because Officer Rafalowski used
27 minimal force, Officer Clemons had no duty to intervene and in the alternative that Officer
28 Clemons is entitled to qualified immunity. (Defs.’ Mot. Summ. J. at 8-14.)

1 The Eighth Amendment requires that prison officials intervene on behalf of a prisoner if
2 he has knowledge that other officers are violating the prisoner’s constitutional rights. See
3 Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995). In the context of police officers, this
4 duty extends only to an officer that is aware of a specific risk of harm to the plaintiff and if he
5 has a reasonable opportunity to intervene. Ting v. United States, 927 F.2d 1504 (9th Cir. 1991).
6 The Ninth Circuit has clarified that the opportunity to intervene is also necessary in the context
7 of prison guards. See Robins, 60 F.3d at 1442. Thus, to prevail on a motion for summary
8 judgment, the moving party carries the burden of demonstrating that the officer had no
9 reasonable opportunity to intervene. Id. (denying motion for summary judgment because
10 “officers failed to carry their burden” of showing that they could not have prevented use of
11 excessive force).

12 Here, all parties agree that Officer Clemons assisted in escorting plaintiff from the
13 showers back to his cell and was present immediately before and after plaintiff’s initial attack.
14 (Compl. at 6; Decl. Clemons at 2.) Plaintiff alleges that Officer Clemons “observed
15 Rafalowski’s use of excessive force.” (Compl. at 6.) The evidence, taken in the light most
16 favorable to plaintiff, indicates that Officer Clemons was with Officer Rafalowski as he
17 allegedly punched and slammed plaintiff’s head into the ground. Moreover, defendants do not
18 allege that Officer Clemons lacked the opportunity to intervene. Because Officer Clemons has
19 failed to carry his burden of showing that he could not have prevented Officer Rafalowski’s
20 conduct, plaintiff’s allegations, taken as true, demonstrate a genuine issue of material fact as to
21 whether Officer Clemons had an opportunity to intervene and failed to do so. Robins, 60 F.3d at
22 1442.

23 Having concluded that a genuine issue of material fact exists as to whether Officer
24 Clemons failed to intervene, the court next addresses whether he is entitled to qualified
25 immunity. It is clearly established that prison guards have a duty to stop constitutional
26 violations at the hands of other guards. Id. at 1442. Here, resolving all factual disputes in favor
27 of plaintiff, the court concludes that a reasonable officer would know that failing to intervene
28 while another officer continuously punched and slammed plaintiff’s head against a concrete floor

1 was clearly unlawful. Accordingly, Officer Clemons is not entitled to qualified immunity.

2 In sum, accepting plaintiff's allegations as true and drawing all inferences therefrom in
3 his favor, there is a genuine issue of material fact as to whether Officer Clemons violated
4 plaintiff's clearly established constitutional rights. Therefore, Officer Clemons is not entitled to
5 summary judgment either on the grounds of qualified immunity or on the grounds that he did not
6 violate plaintiff's constitutional rights.

7 C. Correctional Officer Ramey

8 Plaintiff claims Officer Ramey acted with deliberate indifference to his safety by failing
9 to record the incident in question with the unit camcorder. (Compl. at 7.) At the time of the
10 altercation Officer Ramey was stationed in the control booth, an enclosed area above the unit.
11 (Decl. Rafalowski at 3.) Defendants do not dispute that a camcorder was readily available.

12 Liability may be imposed on an individual defendant under 42 U.S.C. § 1983 only if the
13 plaintiff can show that the defendant proximately caused the deprivation of a federally protected
14 right. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988). "A person deprives another 'of a
15 constitutional right within the meaning of section 1983 if he does an affirmative act, participates
16 in another's affirmative act or omits to perform an act which he is legally required to do, that
17 causes the deprivation of which [] the plaintiff complains []'". Id. at 633 (internal citations
18 omitted).

19 Plaintiff's allegations, taken as true, fail to demonstrate a violation of his federally
20 protected rights. Plaintiff does not allege Officer Ramey failed to take action to stop the
21 altercation only that it was unreasonable for him not to record the incident. However, plaintiff
22 offers no evidence that Officer Ramey was under an obligation to record the event or that PBSP
23 has a policy of recording similar altercations. Because plaintiff has not alleged any facts, even if
24 true, that indicate Officer Ramey proximately caused his injuries or failed to take an action
25 which he was legally required to, summary judgment with respect to Officer Ramey is granted.³

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28 ³ Defendants also contend that Officer Ramey is protected by the doctrine of qualified immunity. Because the court finds that he is entitled to judgment as a matter of law on other grounds, the court need not reach the question of qualified immunity.

1 III. Referral to Pro Se Prisoner Settlement Program

2 Prior to setting this matter for trial and appointing pro bono counsel to represent plaintiff
3 for that purpose, the court finds good cause to refer this matter to Judge Vadas pursuant to the
4 Pro Se Prisoner Settlement Program for settlement proceedings on the claims set forth above.
5 The proceedings will consist of one or more conferences as determined by Judge Vadas. The
6 conferences shall be conducted with defendants Officer Rafalowski and Officer Clemons, or
7 their representatives, attending by videoconferencing if they so choose. If these settlement
8 proceedings do not resolve this matter, the court will then set this matter for trial and consider a
9 motion from plaintiff for appointment of counsel.

10 **CONCLUSION**

11 1. Defendants' motion for summary judgment is GRANTED in part and DENIED in
12 part. The motion is granted as to all claims against defendant Officer Ramey. The motion is
13 denied as to all claims against defendants Officer Rafalowski and Officer Clemons. Plaintiff has
14 set forth a genuine triable issue as to whether defendant Officer Rafalowski's use of force was
15 excessive and whether defendant Officer Clemons was deliberately indifferent to plaintiff's
16 safety by failing to intervene.

17 2. The instant case is REFERRED to Judge Vadas pursuant to the Pro Se Prisoner
18 Settlement Program for settlement proceedings on the remaining claims in this action, as
19 described above. The proceedings shall take place within **ninety (90) days** of the filing date of
20 this order. Judge Vadas shall coordinate a time and date for a settlement conference with all
21 interested parties or their representatives and, within **ten (10) days** after the conclusion of the
22 settlement proceedings, file with the court a report regarding the prisoner settlement proceedings.
23 If these settlement proceedings do not resolve this matter, plaintiff can file a renewed motion
24 for appointment of counsel and the court will then set this matter for trial.

25 3. The clerk of the court shall mail a copy of the court file, including a copy of
26 this order, to Judge Vadas in Eureka, California.

27 4. The instant case is STAYED pending the settlement conference proceedings.
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IT IS SO ORDERED.

DATED: 7/30/10



RONALD M. WHYTE
United States District Judge