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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ARNOLD C. BACON, JR.,

Plaintiff,

vs.

WILLIAM B. KOLENDER, San Diego
Sheriff, and COUNTY OF SAN DIEGO,

Defendants.

Civil No. 05cv0310 BTM (PCL)

**ORDER ENTERING PARTIAL
JUDGMENT FOR COUNTY OF SAN
DIEGO AND SHERIFF KOLENDER
IN HIS OFFICIAL CAPACITY**

I.

Procedural History

Before the Court is Plaintiff Arnold Bacon’s First Amended Complaint (“FAC”), filed pursuant to the Civil Rights Act, 42 U.S.C. § 1983 [Doc. No. 45]. On December 8, 2006, Defendants filed their first Motion for Summary Judgment pursuant to FED.R.CIV.P. 56 [Doc. No. 65]. After reviewing all papers filed, both in opposition to and in support of Defendants’ Motion, the Court granted in part and denied in part Defendants’ Motion. *See* Sept. 6. 2007 at 21-22. However, at the time of trial, Defendants expressed confusion as to the claims that remained against Defendant Kolender in his individual capacity. Thus, the Court granted Defendants’ request for a continuance of the trial and permitted leave for Defendants to file an

1 additional Motion for Summary Judgment to resolve the remaining issues prior to trial. *See* June
2 23, 2008 Order at 1.

3 On July 25, 2008, Defendants filed their second Motion for Summary Judgment pursuant
4 to FED.R.CIV.P. 56 [Doc. No. 129]. The Court advised Plaintiff of his rights and obligations to
5 oppose Defendants' Motion pursuant to *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988) and
6 *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998) (en banc). Plaintiff filed his Opposition [Doc.
7 No. 133], to which Defendants Replied [Doc. No.137].

8 The Court, after reviewing all the papers submitted by all parties, granted Defendant
9 Kolender's Motion for Summary Judgment in his individual capacity as to Plaintiff's Access to
10 Courts claim, Fourth Amendment strip search claims, Fourteenth Amendment right to personal
11 security claims and Fourteenth Amendment right to privacy claims. *See* Dec. 18, 2008 Order
12 at 13. However, Defendants had failed to move for summary judgment with regard to Defendant
13 Kolender in his official capacity and the County of San Diego for those same claims. Because
14 it appeared that summary judgment would be appropriate for Defendants, the Court ordered
15 Plaintiff to show cause why judgment should not be entered for Sheriff Kolender in his official
16 capacity and the County of San Diego after finding that Plaintiff's constitutional rights were not
17 violated by the policies in question. *Id.* at 12-14.

18 Plaintiff filed his response to the Court's Order to Show Cause on February 2, 2009 and
19 Defendants filed their response on February 6, 2009 [Doc. Nos. 150, 151].

20 II.

21 ORDER TO SHOW CAUSE

22 Here, Plaintiff attempts to re-open the issue of whether the policies in his First Amended
23 Complaint violated his constitutional rights. The Court has already decided in its previous
24 Orders that there was no triable issue of material fact to show that these policies, with the
25 exception of the decision to house Plaintiff with penal detainees, violated Plaintiff's
26 constitutional rights. *See* Sept. 6, 2007 Order at 21-22; *see also* Dec. 18, 2008 Order at 13-14.
27 The purpose of this OSC is not for the Plaintiff or Defendants to continue to argue the issue of
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1 whether there is a triable issue of material fact that these policies violated Plaintiff's
2 constitutional rights. That issue has been decided.

3 The issue before the Court is whether partial judgment for Sheriff Kolender in his official
4 capacity and the County of San Diego should be entered because there can be no liability against
5 them if the underlying policies were not found to violate Plaintiff's constitutional rights. A
6 public entity cannot be held liable for the implementation of an underlying policy unless a civil
7 rights violation stemmed from the enforcement of a municipal policy or custom. *Monell v.*
8 *Department of Social Services*, 436 U.S. 658, 694 (1978)).

9 In *Monell*, the United States Supreme Court held that "a local government may not be
10 sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when
11 execution of a government's policy or custom inflicts the injury that the government as an entity
12 is responsible under § 1983." *Id.* Because the Court has found that there is no triable issue of
13 material fact to show that Defendant Kolender violated Plaintiff's constitutional rights with
14 respect to the specific policies as stated above, there can be no municipal liability on the part of
15 the County of San Diego as to these policies. "[T]he language of § 1983, read against the
16 background of the same legislative history, compels the conclusion that Congress did not intend
17 municipalities to be held liable unless action pursuant to official municipal policy of some nature
18 caused a constitutional tort." *Monell*, 436 U.S. at 691. Moreover, a claim against a municipal
19 officer such as Sheriff Kolender in his official capacity is equivalent to a claim against a
20 municipality. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

21 In Plaintiff's response to the OSC, he fails to address the issue of municipal liability. In
22 fact, his entire response to the OSC contains arguments that were contained in his original
23 Oppositions to Defendants' prior Motions for Summary Judgment.

24 Accordingly, the Court will enter partial judgment in favor of the County of San Diego
25 and Sheriff Kolender in his official capacity as to all claims except for the one remaining claim
26 to be decided at trial. Defendant Kolender was found to have qualified immunity in his
27 individual capacity with regard to the decision to house Plaintiff with penal detainees in 2003.
28 *See* Sept. 6, 2007 Order at 20-21; *see also Jones*, 393 F.3d at 933 (holding that a civil detainee

1 awaiting adjudication is entitled to conditions of confinement that are not punitive.). However,
2 neither Defendant Kolender in his official capacity nor the County of San Diego are entitled to
3 qualified immunity with respect to this decision to house Plaintiff with penal detainees. A
4 municipality, such as the County of San Diego, and its employees sued in their official capacity,
5 like Sheriff Kolender, “may not assert a qualified immunity defense to liability under Section
6 1983.” *Hallstrom v. City of Garden City*, 991 F.2d 1473 (citing *Owen v. City of Independence*,
7 445 U.S. 622, 638 (1980)).

8 **III.**

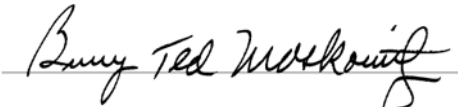
9 **Conclusion and Order**

10 Based on the foregoing, the Court hereby:

11 The Court enters summary judgment in favor of the County of San Diego, and Sheriff
12 Kolender in his official capacity as to Plaintiff’s access to courts, Fourth Amendment strip
13 search, Fourteenth Amendment right to personal security and Fourteenth Amendment right to
14 privacy claims.

15 **IT IS SO ORDERED.**

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17 DATED: March 2, 2009

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19 Honorable Barry Ted Moskowitz
20 United States District Judge
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