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

GREGORY NORWOOD, CDC # J-53407,

Plaintiff,

vs.
JEANNE WOODFORD, et al.,

Defendants.

CASE NO. 07cv57 WQH (JMA)
ORDER

HAYES, Judge:

The matters before the Court are the Motion to Dismiss Plaintiff's First Amended Complaint filed by Jeanne Woodford and Gerald Janda (Doc. # 33); the Motion to Dismiss Plaintiff's First Amended Complaint filed by Jeanne Woodford, Gerald Janda and M Bourland (Doc. # 44); the Motion to Dismiss Plaintiff's First Amended Complaint filed by Jeanne Woodford, Gerald Janda, M Bourland, and J Giurbino (Doc. # 58); and the Report and Recommendation filed by Magistrate Judge Jan M. Adler (Doc. # 69).

Background

On January 8, 2007, Plaintiff Gregory Norwood, a state prisoner, initiated this action by filing a complaint (Doc. # 1). On April 16, 2007, Plaintiff filed the First Amended Complaint ("FAC") (Doc. # 12), which is the operative pleading in this case. The FAC alleges that Defendants Woodford, Janda, Bourland and Giurbino deprived Plaintiff of outdoor exercise from November 7, 2005 to December 16, 2006, a period of 39 days, in violation of his rights as protected by the Eighth Amendment of the United States Constitution. The FAC

1 alleges that “Defendants motives were to use the deprivation period as a means to punish
2 Plaintiff.” *FAC*, p. 5. The *FAC* alleges that Woodford was the Director of California State
3 Prisons at the time of the deprivation and that she “knew that plaintiff’s period of deprivation
4 existed. And this defendant approved of it.” *Id.* The *FAC* alleges that Giurbino was Warden
5 of Calipatria State Prison and “is responsible for plaintiffs custody treatment and discipline and
6 had to approve the lockdown.” *Id.* The *FAC* alleges that Bourland was Chief Deputy Warden
7 of Calipatria State Prison and that Janda was Associate Warden. The *FAC* alleges that
8 Bourland and Janda knew of Plaintiff’s deprivation because they were served with an
9 institutional grievance filed by Plaintiff, yet did not provide Plaintiff with any outdoor exercise
10 opportunities. *Id.* at 6. The *FAC* also alleges that Defendants retaliated against him for
11 asserting his protected right to be free from harm, in violation of his rights as protected by the
12 First Amendment.

13 On November 13, 2007, January 7, 2008 and March 27, 2008, Defendants filed Motions
14 to Dismiss (Docs. # 33, 44, 58) pursuant to Rule 12(b)(6) of the Federal Rules of Civil
15 Procedure. The grounds for dismissing the *FAC* are the same in each Motion to Dismiss.
16 Specifically, Defendants move to dismiss the *FAC* on grounds that Plaintiff fails to state a
17 claim for violation of the Eighth Amendment because Plaintiff “has not satisfied either the
18 objective or subjective requirements of a claim for deprivation of outdoor exercise in that
19 Plaintiff was not denied the minimal civilized measure of life’s necessities, and there was no
20 deliberate indifference” by any Defendant. (Docs. # 33, p. 3; 44, p. 4; 58, p. 4). Defendants
21 also contend that they are entitled to qualified immunity. Plaintiff filed oppositions to the
22 Motions to Dismiss (Docs. # 45, 61).

23 On June 30, 2008, Magistrate Judge Jan M. Adler filed a Report and Recommendation
24 (“R&R”) recommending that the Court (1) deny the Motions to Dismiss the *FAC*, and (2)
25 dismiss all claims against Defendant Sergeant Rutledge. The R&R concludes that Plaintiff has
26 satisfied the objective requirement to state an Eighth Amendment claim because Plaintiff has
27 alleged that he was denied outdoor exercise for 39 days, and “Plaintiff’s alleged deprivation
28 is sufficiently close in duration to the deprivations . . . that Eighth Amendment protection may

1 be invoked.” *R&R*, p. 9. The R&R concludes that Plaintiff has satisfied the subjective
2 requirement to state an Eighth Amendment claim on grounds that Plaintiff alleges that each
3 Defendant acted with deliberate indifference because they knew that the lack of outdoor
4 exercise presented a risk to Plaintiff’s health and safety, yet either directed or approved of the
5 deprivation. The R&R concludes that Plaintiff has sufficiently alleged the objective and
6 subjective elements of an Eighth Amendment claim. The R&R further concludes that
7 Defendants are not entitled to qualified immunity because Plaintiff has alleged an Eighth
8 Amendment claim and “any reasonable official in Defendants’ positions would have
9 understood that the denial of outdoor exercise for an extended period of time was
10 unconstitutional. The Eighth Amendment may be violated even in a lockdown situation.”
11 *R&R*, p. 17.

12 On July 17, 2008, Defendants filed objections to the R&R (Doc. # 72). On July 30,
13 2008, Plaintiff filed a response to Defendants’ objections (Doc. # 77).

14 **Standard of Review**

15 A. **Rule 72 - Review of a Report and Recommendation**

16 The duties of the district court in connection with the Report and Recommendation of
17 a Magistrate Judge are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28
18 U.S.C. § 636(b). The district judge “must make a de novo determination of those portions of
19 the report . . . to which objection is made,” and “may accept, reject, or modify, in whole or in
20 part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b).

21 B. **Rule 12(b)(6) - Motion to Dismiss for Failure to State a Claim**

22 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests
23 the legal sufficiency of the pleadings. *See De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir.
24 1978). A complaint may be dismissed for failure to state a claim under Rule 12(b)(6) where
25 the factual allegations do not raise the right to relief above the speculative level. *See Bell*
26 *Atlantic v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Conversely, a complaint may not be
27 dismissed for failure to state a claim where the allegations plausibly show that the pleader is
28 entitled to relief. *See id.* (citing Fed R. Civ. P. 8(a)(2)). In ruling on a motion pursuant to Rule

1 12(b)(6), a court must construe the pleadings in the light most favorable to the plaintiff, and
2 must accept as true all material allegations in the complaint, as well as any reasonable
3 inferences to be drawn therefrom. *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003);
4 *see also Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996). The court looks not at whether the
5 plaintiff will “ultimately prevail but whether the claimant is entitled to offer evidence to
6 support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

7 Where a plaintiff appears *pro se*, the court must construe the pleadings liberally and
8 afford the plaintiff any benefit of the doubt. *Karim-Panahi v. Los Angeles Police Dept.*, 839
9 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is “particularly important in
10 civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

11 Analysis

12 Defendants object to the R&R on three grounds. First, Defendants contend that the
13 Magistrate Judge incorrectly concluded that the objective component of the Eighth
14 Amendment claim had been met. Second, Defendants contend that the Magistrate Judge
15 incorrectly concluded that the subjective component of the Eighth Amendment claim had been
16 met. Third, Defendants contend that the Magistrate Judge incorrectly concluded that
17 Defendants were not entitled to qualified immunity.

18 “[R]egular outdoor exercise is extremely important to the psychological and physical
19 well being of” prison inmates. *Spain v. Procnier*, 600 F.2d 189, 193-94 (9th Cir. 1979).
20 Exercise is one of the basic human necessities protected by the Eighth Amendment of the
21 United States Constitution. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). To assert an Eighth
22 Amendment claim for deprivation of human necessities, a prisoner must satisfy two
23 requirements, one of which is objective and the other of which is subjective. *Farmer v.*
24 *Brennan*, 511 U.S. 825, 834 (1994). “Under the objective requirement, the prison officer’s acts
25 or omissions must deprive an inmate of the minimal civilized measure of life’s necessities.”
26 *Allen v. Sakai*, 48 F.3d 1082, 1088 (9th Cir. 1995) (internal citations omitted). The subjective
27 requirement, relating to the prison official’s state of mind, requires “deliberate indifference.”
28 *Id.* at 1087.

1 A. Objective Component of the Eighth Amendment Claim

2 Defendants “object that in the R&R the Court declines to consider the difference in an
3 emergency lockdown situation in deciding the objective component.” *Opposition*, p. 2.

4 Defendants state:

5 [T]his case’s 39-day deprivation of outdoor exercise falls between the 28-day
6 deprivation allowed [in the Ninth Circuit] and the 42-day deprivation not
7 allowed [in the Ninth Circuit]. The scales, however, should tip in favor of
8 allowing the deprivation because this deprivation occurred in the context of a
lockdown of the entire general population following an alleged assault by
inmates on staff, as opposed to simply not making provisions for Administrative
Segregation inmates to get exercise under normal prison conditions.

9 *Id.*

10 In *Hayward v. Proconier*, 629 F.2d 599, 603 (9th Cir. 1980), the Ninth Circuit held that
11 a five-month lockdown and 28-day deprivation of outdoor exercise in response to a genuine
12 emergency did not satisfy the objective element of the Eighth Amendment analysis. In so
13 holding, the Ninth Circuit stated: “The present case . . . confronts us with . . . unusual
14 circumstances . . . ; this lockdown was in response to a genuine emergency. The measure was
15 temporary and plaintiffs here were allowed approximately the minimum exercise mandated in
16 [Spain, 600 F.2d 189] within a month after the imposition of the lockdown.” *Hayward*, 629
17 F.2d at 603. In *Allen*, the Ninth Circuit held that permitting a prisoner 45 minutes per week
18 of outdoor recreation during a six-week period satisfied the objective element of the Eighth
19 Amendment analysis. 43 F.3d at 1088. The Ninth Circuit stated that “defendants cannot
20 legitimately claim that their duty to provide regular outdoor exercise to Smith was not clearly
21 established. [Plaintiff] has met the objective requirement of the Eighth Amendment analysis
22 by alleging the deprivation of what this court has defined as a basic human need.” *Id.*
23 Similarly, in *Lopez v. Smith*, 203 F.3d 1122, 1133 (9th Cir. 2000), the Ninth Circuit held that
24 the objective element of the Eighth Amendment analysis was satisfied by a prisoner who was
25 denied all access to outdoor exercise during a six-and-one-half week period of time.

26 The FAC alleges that the lockdown was implemented to punish Plaintiff and was
27 “utilize[d] as a deterrent to future staff assaults by subjecting inmates to such extreme
28 suffering[] that they would dread another lockdown.” *FAC*, p. 5, 7. According to the FAC,

1 Plaintiff was denied any outdoor exercise for 39 days. This is a longer period of time than the
2 28-day period held to be constitutionally permissible in *Hayward*. The amount of time during
3 which Plaintiff was deprived of outdoor exercise is much closer to the periods of time held to
4 satisfy the objective element in *Lopez* and *Allen*. Construing the allegations in the FAC in the
5 light most favorable to Plaintiff, the Court concludes that dismissal of this action on grounds
6 that the alleged 39-day deprivation of outdoor action does not satisfy the objective component
7 of an Eighth Amendment claim is improper at this stage of the proceedings.

8 B. Subjective Component of the Eighth Amendment Claim

9 Defendants contend that the totality of the circumstances indicate that the deprivation
10 of outdoor exercise was “not instituted simply to cause harm” because “Plaintiff’s allegations
11 and documents he attached to his First Amended Complaint” show that the lockdown was in
12 response to incidents of attempted murder on prison staff by inmates other than Plaintiff, and
13 that the decision regarding reinstatement of outdoor exercise was being reviewed on a daily
14 basis. *Objections*, p. 3. Defendants contend that they

15 do not argue that the subjective element is only satisfied if an inmate is
16 specifically targeted. Rather, the lack of targeting an inmate (or a small well-
17 defined group of inmates) is part of the totality of circumstances to consider, and
shows, when coupled with other factors, the lack of maliciousness - i.e. that the
deprivation was not instituted simply to cause harm.

18 *Objections*, p. 3. Defendants contend that the documents attached to the Complaint, which
19 demonstrate that the deprivation was in response to multiple attempted murders upon staff and
20 that the prison was evaluating reinstatement of outdoor exercise on a daily basis, refute
21 Plaintiff’s “conclusory allegation that the deprivation of outdoor exercise served no security
22 purpose but was simply instituted to cause extreme suffering.” *Id.* at 4.

23 The subjective element of the Eighth Amendment requires “deliberate indifference.”
24 *Allen*, 48 F.3d at 1087. Deliberate indifference is found when a prison official knows of and
25 disregards an excessive risk to inmate health or safety. *Farmer*, 511 U.S. at 837.

26 The FAC alleges “Defendants motives were to use the deprivation period as a means
27 to punish Plaintiff.” *FAC*, p. 5. With respect to Woodford and Giurbino, the FAC alleges that
28 they were responsible for Plaintiff’s deprivation because they knew that Plaintiff’s period of

1 deprivation existed and “had to approve the deprivation period.” *Id.* at 2. With respect to
2 Janda and Bourland, the FAC alleges that they were made aware of Plaintiff’s deprivation
3 through Plaintiff’s institutional grievance, and that they could have therefore “prevented
4 plaintiff’s suffering by providing outdoor[] exercise opportunities.” *Id.* at 6. Viewing the
5 allegations in the light most favorable to Plaintiff, the Court concludes that the FAC alleges
6 that Woodford and Giurbino acted with deliberate indifference because they knew of and
7 approved of the deprivation period. The Court concludes that the FAC alleges that Janda and
8 Bourland acted with deliberate indifference because they knew of the deprivation and could
9 have prevented the deprivation by providing Plaintiff with outdoor exercise opportunities, but
10 failed to do so. The Court concludes that dismissal on grounds that Plaintiff has failed to
11 allege facts that satisfy the subjective requirement of the Eight Amendment analysis is
12 improper at this stage of the proceedings.

13 C. Qualified Immunity

14 Defendants contend that “[g]iven the important reason the institution had for instituting
15 the lockdown (i.e. the multiple attempted murder of staff by inmates), the unlawfulness of the
16 39-day deprivation under these facts would not have been clear to a reasonable officer.”
17 *Opposition*, p. 5. Defendants object to the R&R’s conclusion that it was clearly established
18 in 2005 that the denial of outdoor exercise for an extended period of time was unconstitutional.
19 *Id.*

20 The Supreme Court has articulated a two-part test for courts to apply in determining
21 whether a government official is entitled to qualified immunity. “The threshold inquiry a court
22 must undertake in a qualified immunity analysis is whether [the] plaintiff’s allegations, if true,
23 establish a constitutional violation.” *Hope v. Pelzer*, 536 U.S. 730, 736 (2002) (citing *Saucier*
24 *v. Katz*, 533 U.S. 194, 201 (2001)). “[T]he next, sequential step is to ask whether the right was
25 clearly established.” *Saucier*, 533 U.S. at 201. “If the law did not put the officer on notice that
26 his conduct would be clearly unlawful,” a finding of qualified immunity is proper. *Id.* It is not
27 required that “courts must have agreed upon the precise formulation of the standard.” *Id.* at
28 202. An officer is not entitled to qualified immunity so long as courts have found that certain

1 conduct constitutes a constitutional violation “under facts not distinguishable in a fair way
2 from the facts presented in the case at hand.” *Id.* at 202-203.

3 As discussed above, the Complaint adequately alleges an Eight Amendment claim
4 against Defendants for denying Plaintiff any outdoor exercise for a period of 39 days. The
5 Court further concludes that it was clearly established when Plaintiff’s deprivation allegedly
6 occurred that the denial of outdoor exercise for prison inmates for an extended period of time
7 could constitute an Eighth Amendment violation, and that the Eight Amendment may be
8 violated even in a lockdown situation. The Court concludes that Defendants are not entitled
9 to qualified immunity with respect to Plaintiff’s Eighth Amendment claims at this stage of the
10 proceedings.


11 D. Defendant Rutledge

12 Neither party objected to the Magistrate Judge’s conclusion that any claims against
13 Rutledge be dismissed. The Court has reviewed this portion of the R&R and concludes that
14 the Magistrate Judge’s conclusion is correct.

15 Conclusion

16 IT IS HEREBY ORDERED that the Report and Recommendation (Doc. # 69) is
17 **ADOPTED**. The Motion to Dismiss Plaintiff’s First Amended Complaint filed by Jeanne
18 Woodford and Gerald Janda (Doc. # 33); the Motion to Dismiss Plaintiff’s First Amended
19 Complaint filed by Jeanne Woodford, Gerald Janda and M Bourland (Doc. # 44); and the
20 Motion to Dismiss Plaintiff’s First Amended Complaint filed by Jeanne Woodford, Gerald
21 Janda, M Bourland, and J Giurbino (Doc. # 58) are **DENIED**. All claims against Sergeant
22 Rutledge are **DISMISSED**.

23 DATED: September 5, 2008

24 
25 **WILLIAM Q. HAYES**
26 United States District Judge