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

HOWARD YOUNG,  
CDCR #F-44590,

Plaintiff,

vs.

LARRY SMALLS; G.J. JANDA; W.J.  
PRICE; RIGNEY; M. TAPIA; CDCR;  
MIDDLETON; T. OCHOA,

Defendants.

Civil No. 09cv2545 DMS (JMA)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS PURSUANT  
TO FED.R.CIV.P. 12(b)**

**[ECF No. 98]**

**I.**

**PROCEDURAL BACKGROUND**

Howard Young (“Plaintiff”), a prisoner currently incarcerated at Kern Valley State Prison in Delano, California, proceeding pro se and *in forma pauperis*, filed this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims his constitutional rights were violated when he was housed at Calipatria State Prison. The Court has conducted a number of sua sponte screenings pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b). The Court’s final screening Order dismissed several claims and Defendants from Plaintiff’s Fourth Amended Complaint (“FAC”). See Sept. 30, 2010 Order at 5-6. The Court then directed the United States Marshal to effect service of the FAC on the remaining Defendants. *Id.*

1 Defendants Ochoa, Rigney, Price, Small, Tapia and the California Department of  
2 Corrections and Rehabilitation (“CDCR”) filed a Motion to Dismiss pursuant to FED.R.CIV.P.  
3 12(b) and 12(b)(6) [ECF No. 98]. Plaintiff filed an Opposition to Defendants’ Motion [ECF No.  
4 108] . On April 25, 2011, Defendants Middleton and Janda filed a Joinder to the previous  
5 Motion to Dismiss to which Plaintiff filed an Objection [ECF Nos. 110, 111]. In light of  
6 Plaintiff’s Objection, the Court granted Plaintiff leave to file a supplemental Opposition to  
7 address any arguments pertaining to Defendants Middleton and Janda. Plaintiff has filed his  
8 supplemental Opposition and all Defendants have filed their Reply [ECF Nos. 109, 115].

9 The Court has determined that Defendants’ Motion is suitable for disposition upon the  
10 papers without oral argument and that no Report and Recommendation from Magistrate Judge  
11 Jan M. Adler is necessary. *See* S.D. CAL. CIVLR 7.1(d)(1), 72.3(e).

## 12 II.

### 13 PLAINTIFF’S FACTUAL ALLEGATIONS

14 On May 21, 2009, while housed at Calipatria State Prison, Plaintiff was placed in  
15 Administrative Segregation (“Ad-Seg”) by Defendants Janda, Criman, Middleton, Price, Tapia  
16 and Ochoa. (*See* FAC at 4.) While Plaintiff was in Ad-Seg, he was housed in a cell with  
17 constant illumination and denied outdoor exercise for a period of ten (10) months. (*Id.*) Plaintiff  
18 alleges that these Defendants knew of the conditions in Ad-Seg yet were deliberately indifferent  
19 to his health and safety. (*Id.*)

20 Plaintiff further alleges that Defendant Rigney placed him in a cell that had a “history of  
21 the toilet backflushing and overflowing.” (*Id.* at 3A.) As a result of these conditions, Plaintiff  
22 claims that he contracted a “MRSA/Staph infection.” (*Id.*) Plaintiff alleges that all of the named  
23 Defendants knew of the unsanitary conditions but refused to take any action to correct the  
24 problems. (*Id.*)

25 Finally, Plaintiff claims that he is a “Hebrew Israelite.” (*Id.* at 4.) As such, Plaintiff  
26 claims he requires a kosher diet but instead, prison officials have only provided him with a  
27 religious vegetarian diet. (*Id.*) However, Plaintiff contends that this diet violates his religious  
28 beliefs. (*Id.*)

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2 **III.**

3 **DEFENDANTS' MOTION TO DISMISS**

4 **A. FED.R.CIV.P. 12(b)(6) Standard of Review**

5 A Rule 12(b)(6) dismissal may be based on either a “lack of a cognizable legal theory”  
6 or “the absence of sufficient facts alleged under a cognizable legal theory.” *Johnson v.*  
7 *Riverside Healthcare System, LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting *Balistreri*  
8 *v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)). In other words, the plaintiff’s  
9 complaint must provide a “short and plain statement of the claim showing that [he] is entitled  
10 to relief.” *Id.* (citing FED.R.CIV.P. 8(a)(2)). “Specific facts are not necessary; the statement  
11 need only give the defendant[s] fair notice of what ... the claim is and the grounds upon which  
12 it rests.” *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007) (internal quotation  
13 marks omitted).

14 A motion to dismiss should be granted if plaintiff fails to proffer “enough facts to state  
15 a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
16 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the  
17 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
18 *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S.Ct. 1937, 1949 (2009) .

19 In addition, factual allegations asserted by pro se petitioners, “however inartfully  
20 pleaded,” are held “to less stringent standards than formal pleadings drafted by lawyers.”  
21 *Haines*, 404 U.S. at 519-20. Thus, where a plaintiff appears in propria persona in a civil rights  
22 case, the Court must construe the pleadings liberally and afford plaintiff any benefit of the doubt.  
23 *See Karim-Panahi*, 839 F.2d at 623.

24 Nevertheless, and in spite of the deference the court is bound to pay to any factual  
25 allegations made, it is not proper for the court to assume that “the [plaintiff] can prove facts  
26 which [he or she] has not alleged.” *Associated General Contractors of California, Inc. v.*  
27 *California State Council of Carpenters*, 459 U.S. 519, 526 (1983). Nor must the court “accept  
28 as true allegations that contradict matters properly subject to judicial notice or by exhibit” or

1 those which are “merely conclusory,” require “unwarranted deductions” or “unreasonable  
2 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.) (citation omitted),  
3 *amended on other grounds*, 275 F.3d 1187 (9th Cir. 2001); *see also Iletto v. Glock Inc.*, 349 F.3d  
4 1191, 1200 (9th Cir. 2003) (court need not accept as true unreasonable inferences or conclusions  
5 of law cast in the form of factual allegations).

6 1. Claim against Warden Smalls

7 Defendant Smalls seeks dismissal of the claims against him on the grounds that Plaintiff’s  
8 allegations against him arise solely under a theory of supervisory liability. (*See* Defs.’ Mem. of  
9 Ps & As at 2-3.) Supervisory personnel are generally not liable under Section 1983 for the  
10 actions of their employees under a theory of respondeat superior. *Palmer v. Sanderson*, 9 F.3d  
11 1433, 1437-38 (9th Cir. 1993). Therefore, when a named defendant holds a supervisory  
12 position, a causal link between him and the claimed constitutional violation must be specifically  
13 alleged. *See Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d  
14 438, 441 (9th Cir. 1978). To state a claim for relief under Section 1983 based on a theory of  
15 supervisory liability, Plaintiff must allege some facts that would support a claim that the  
16 supervisor either: personally participated in the alleged deprivation of constitutional rights, knew  
17 of the violations and failed to act to prevent them, or promulgated or “implemented a policy so  
18 deficient that the policy ‘itself is a repudiation of constitutional rights’ and is ‘the moving force  
19 of the constitutional violation.’” *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989) (internal  
20 citations omitted); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

21 Here, the only allegation against Defendant Smalls is that, as Warden, “he is responsible  
22 for the conditions at Calipatria Prison.” (FAC at 4.) The Court agrees with Defendant Smalls  
23 that Plaintiff has not alleged any facts which show that Warden Smalls personally participated  
24 in the alleged deprivation of his Eighth Amendment rights, that he actually knew of any  
25 constitutional violations and failed to act to prevent them, or that he promulgated or implemented  
26 a policy so deficient that it repudiated Plaintiff’s constitutional rights or was “the moving force”  
27 behind any Eighth Amendment violation. *Hansen*, 885 F.2d at 646.

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1           Accordingly, Defendant Small’s Motion to Dismiss Plaintiff’s claims against him is  
2 **GRANTED** pursuant to FED.R.CIV.P. 12(b)(6) on respondeat superior grounds.

3           2.       Eighth Amendment claims - Count 1 and Count 2

4           Defendants seek dismissal of Plaintiff’s Eighth Amendment claims on the grounds that  
5 Plaintiff “has not alleged facts supporting his claim that the Committee members had knowledge  
6 of the allegedly inhumane conditions in Administrative Segregation.” (Defs.’ Mem. Ps & As  
7 at 3.) “Whatever rights one may lose at the prison gates, ... the full protections of the eighth  
8 amendment most certainly remain in force. The whole point of the amendment is to protect  
9 persons convicted of crimes.” *Spain v. Proconier*, 600 F.2d 189, 193-94 (9th Cir. 1979) (citation  
10 omitted). The Eighth Amendment, however, is not a basis for broad prison reform. It requires  
11 neither that prisons be comfortable nor that they provide every amenity that one might find  
12 desirable. *Rhodes v. Chapman*, 452 U.S. 337, 347, 349 (1981); *Hoptowit v. Ray*, 682 F.2d 1237,  
13 1246 (9th Cir. 1982). Rather, the Eighth Amendment proscribes the “unnecessary and wanton  
14 infliction of pain,” which includes those sanctions that are “so totally without penological  
15 justification that it results in the gratuitous infliction of suffering.” *Gregg v. Georgia*, 428 U.S.  
16 153, 173, 183 (1976); *see also Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Rhodes*, 452 U.S.  
17 at 347. This includes not only physical torture, but any punishment incompatible with “the  
18 evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*,  
19 356 U.S. 86, 101 (1958)

20           To assert an Eighth Amendment claim for deprivation of humane conditions of  
21 confinement, a prisoner must satisfy two requirements: one objective and one subjective.  
22 *Farmer*, 511 U.S. at 834; *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1994). “Under the  
23 objective requirement, the prison official’s acts or omissions must deprive an inmate of the  
24 minimal civilized measure of life’s necessities.” *Id.* This objective component is satisfied so  
25 long as the institution “furnishes sentenced prisoners with adequate food, clothing, shelter,  
26 sanitation, medical care, and personal safety.” *Hoptowit*, 682 F.2d at 1246.

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1 Here, Plaintiff alleges that he was denied outdoor exercise for a period of ten (10) months.  
2 (See FAC at 3.) “[O]rdinarily the lack of outside exercise for extended periods is a sufficiently  
3 serious deprivation” for Eighth Amendment purposes. *LeMaire v. Maass*, 12 F.3d 1444, 1457  
4 (9th Cir. 1993). A prohibition on outdoor exercise of six weeks is a “sufficiently serious”  
5 deprivation to support an Eighth Amendment claim. See, e.g., *Lopez v. Smith*, 203 F.3d 1122,  
6 1132-33 (9th Cir. 2000) (en banc); *Allen v. Sakai*, 48 F.3d 1082, 1086 (1994). Plaintiff also  
7 alleges that he was placed in a cell with constant illumination. See *Keenan v. Hall*, 83 F.3d  
8 1083, 1090 (9th Cir. 1996). Finally, Plaintiff alleges that he was placed in a cell that was so  
9 unsanitary it caused him to contract a staph infection. (See FAC at 3 - 3A.) All of these  
10 allegations are sufficient to find that Plaintiff has adequately stated the objective prong of an  
11 Eighth Amendment claim. In addition, Plaintiff alleges that Defendants Janda, Criman,  
12 Middleton, Price, Tapia, Ochoa and Rigney were all aware of these conditions but failed to do  
13 anything to protect Plaintiff from harm he claims to have suffered. (*Id.*) In addition, Plaintiff  
14 alleges that they “intentionally placed Plaintiff into the Ad-Seg knowing the conditions.” (FAC  
15 at 4.) At this stage of the proceedings the Court finds that Plaintiff has adequately alleged facts  
16 sufficient to state an Eighth Amendment claim against the above referenced Defendants.  
17 Accordingly, Defendants Janda, Criman, Middleton, Price, Tapia, Ochoa and Rigney’s Motion  
18 to Dismiss Plaintiff’s Eighth Amendment claims is **DENIED** pursuant to FED.R.CIV.P. 12(b)(6).

### 19 3. Fourteenth Amendment Due Process claims

20 Defendants also seek dismissal of Plaintiff’s Fourteenth Amendment due process claims.  
21 (See Defs.’ Memo of Ps & As at 3.) Defendants apparently concede, as they do not make any  
22 argument in their moving papers, that Plaintiff has stated a liberty interest in remaining free from  
23 Ad-Seg. See *Wilkinson v. Austin*, 545 U.S. 209, 125 S.Ct. 2384 (2005); *Sandin v. Conner*, 515  
24 U.S. 472 (1995) (Holding that in order to invoke the protection of the Due Process Clause, a  
25 plaintiff must first establish the existence of a liberty interest.) When a prisoner is placed in Ad-  
26 Seg, prison officials are required to: (1) conduct an informal nonadversary review of the  
27 evidence justifying the decision to segregate the prisoner within a reasonable time of placing the  
28 prisoner in administrative segregation; (2) provide the prisoner with some notice of the charges

1 before the review; and (3) give the prisoner an opportunity to respond to the charges. *Toussaint*  
2 *v. McCarthy*, 801 F.3d 1080, 1100 (9th Cir. 1986), *abrogated in part on other grounds by*  
3 *Sandin*, 515 U.S. 472. The Court agrees with Defendants that Plaintiff’s Fourth Amended  
4 Complaint is completely devoid of any factual allegations sufficient to allege a Fourteenth  
5 Amendment due process claim. Thus, Defendants’ Motion to Dismiss Plaintiff’s Fourteenth  
6 Amendment due process claims is **GRANTED** pursuant to FED.R.CIV.P. 12(b)(6).

7 4. Fourteenth Amendment equal protection claim

8 Defendants also seek dismissal of Plaintiff’s Fourteenth Amendment equal protection  
9 claims. The “Equal Protection Clause of the Fourteenth Amendment commands that no State  
10 shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is  
11 essentially a direction that all persons similarly situated should be treated alike.” *City of*  
12 *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Shaw v. Reno*, 509 U.S. 630  
13 (1993). Prisoners are protected by the Equal Protection Clause from intentional discrimination  
14 on the basis of their religion. *See Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997).

15 However, conclusory allegations of discrimination are insufficient to withstand a motion  
16 to dismiss, unless they are supported by facts that may prove invidious discriminatory intent or  
17 purpose. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).  
18 Therefore, when an equal protection violation is alleged, the plaintiff must plead facts to show  
19 that the defendant “acted in a discriminatory manner and that the discrimination was  
20 intentional.” *FDIC v. Henderson*, 940 F.2d 465, 471 (9th Cir. 1991) (citations omitted).  
21 “‘Discriminatory purpose’ . . . implies more than intent as volition or intent as awareness of  
22 consequences. It implies that the decision maker . . . selected or reaffirmed a particular course  
23 of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon  
24 an identifiable group.” *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

25 Here, Plaintiff’s Fourth Amended Complaint lacks any factual allegation that any of the  
26 named Defendants acted with intentional discrimination. Accordingly, Defendants’ Motion to  
27 Dismiss Plaintiff’s Fourteenth Amendment Equal Protection claims is **GRANTED** pursuant to  
28 FED.R.CIV.P. 12(b)(6).





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**IT IS FURTHER ORDERED THAT:**

Defendants Janda, Price, Rigney, Tapia, CDCR, Middleton and Ochoa shall file and serve their Answer to the claims that remain in Plaintiff’s Fourth Amended Complaint within twenty one (21) days of the date this Order is “Filed” pursuant to FED.R.CIV.P. 12(a)(4)(A).

**IT IS SO ORDERED.**

DATED: August 22, 2011

  
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U.S. DISTRICT JUDGE  
DANA M. SABRAW