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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRIAN DEVERICK LEWIS,
Plaintiff,
v.
MATHEW CATES, et al.,
Defendant.

Case No.: 15cv791-DMS-MDD

**REPORT AND
RECOMMENDATION ON
DEFENDANTS E. OJEDA AND D.
PARAMO’S MOTION FOR
SUMMARY JUDGMENT**

[ECF No. 27]

This Report and Recommendation is submitted to United States Districted Judge Dana M. Sabraw pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California.

For the reasons set forth herein, the Court **RECOMMENDS** Defendants Ojeda and Paramo’s Motion for Summary Judgment be **GRANTED.**

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I. PROCEDURAL HISTORY

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2 Brian Deverick Lewis (“Plaintiff”) is a state prisoner proceeding *pro se*
3 and *in forma pauperis*, with a civil complaint filed pursuant to 42 U.S.C. §
4 1983. (ECF Nos. 1, 4). Plaintiff also asserts jurisdiction under the
5 Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (“ADA”), the
6 Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §
7 2000cc, et seq. (“RLUIPA”), and 28 U.S.C. §§ 2201 and 2202. (ECF No. 1 at 1).
8 In his Complaint, Plaintiff set forth three claims alleging that his
9 constitutional rights were violated when prison personnel: (1) assigned him to
10 Administrative Segregation (“Ad-Seg”) for twenty days because the prison
11 lacked proper accommodations for his disability and denied release despite
12 his repeated requests; (2) denied him a Muslim religious meal despite his
13 repeated requests; and (3) returned him to Ad-Seg for an additional thirty-
14 two days because the prison again lacked proper accommodations for his
15 disability. (ECF No. 1 at 3-11). Following a Motion to Dismiss, Plaintiff’s
16 first and third claims for violations of due process and Defendant Cates were
17 dismissed. (ECF No. 16). Plaintiff’s only remaining claims are Claim Two for
18 violation of Plaintiff’s freedom of religion against Defendants Khan and
19 Ojeda; a state-law negligence claim against Khan and Ojeda; claims arising
20 under RLUIPA against Khan and Ojeda; and claims arising under the ADA
21 against Defendant Paramo.

22 On August 10, 2017, Defendants Ojeda and Paramo filed a motion for
23 summary judgment. (ECF No. 27). Following a requested extension,
24 Plaintiff was given until November 20, 2017, to file his opposition, but as of
25 the date of this Report and Recommendation, he has not done so.

II. FACTUAL BACKGROUND

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27 The Complaint alleges that on June 19, 2012, California Department of

1 Corrections and Rehabilitation (“CDCR”) staff designated Plaintiff as
2 disabled. (ECF No. 1 at 3). Plaintiff does not specify the exact nature of his
3 disability but claims he has a mental illness requiring medication. (*Id.* at 5).
4 Plaintiff was transferred from California Men’s Colony State Prison to
5 Richard J. Donovan Correctional Facility (“RJD”) due to his disabled
6 designation. (*Id.*). Plaintiff was placed in Ad-Seg upon arrival at RJD on
7 September 14, 2012. (*Id.*). Plaintiff claims he was placed in Ad-Seg because
8 RJD did not have the space available in the general prison population
9 housing to accommodate Plaintiff’s disability. (*Id.*). Plaintiff alleges his
10 disability requires him to be in “Lower Bunk Lower Tier” housing. (*Id.*).
11 Plaintiff does not allege that his Ad-Seg cell was not handicap accessible.

12 On September 15, 2012, Plaintiff filed a Form 3030 religious meal
13 request and a Form 22 appeal requesting a religious meal, clothing, reading,
14 and writing materials and release from Ad-Seg. (*Id.*). Plaintiff addressed
15 these appeals to Defendants RJD Warden Daniel Paramo and CDCR
16 Chaplain Alan Khan, neither of whom responded. (*Id.*).

17 On September 17, 2012, Captain Sanchez spoke with Plaintiff about his
18 Ad-Seg placement. (*Id.*). Plaintiff requested immediate release from Ad-Seg.
19 (*Id.* at 4). Sanchez told Plaintiff that due to RJD’s inability to properly
20 accommodate his disability in the general population he would remain in Ad-
21 Seg. (*Id.*).

22 Plaintiff alleges San Diego, California experienced two heat waves
23 between September 14 and September 30, 2012. (*Id.*). RJD Ad-Seg does not
24 have an air-conditioning system and Plaintiff alleges that during the heat
25 waves, the temperature in Plaintiff’s cell would rise above ninety degrees for
26 several hours each day. (*Id.*). Plaintiff asserts that RJD had a heat plan to
27 mitigate heat problems but Ad-Seg staff failed to implement it. (*Id.*).

1 Plaintiff claims he began to experience migraine headaches, as reflected in
2 his medical records. (*Id.*).

3 On September 26, 2012, Plaintiff became “intensely distraught” about
4 his Ad-Seg confinement. (*Id.*). On September 27, 2012, Plaintiff submitted a
5 Form 22 appeal to Paramo requesting release from Ad-Seg and a religious
6 meal. (*Id.*). Plaintiff also submitted Form 602 grievances to the Ad-Seg
7 lieutenant and sergeant requesting release from Ad-Seg. (*Id.*). Plaintiff
8 contemplated suicide. (*Id.* at 5). Plaintiff notified Correctional Officer
9 Russell during a security check that he was suicidal but was ignored. (*Id.*).

10 On October 2, 2012, Plaintiff filed a petition for writ of habeas corpus in
11 state court complaining of his Ad-Seg confinement. (*Id.*). In his petition,
12 Plaintiff alleged that Defendants confined him to Ad-Seg, denied him a
13 religious meal, and were deliberately indifferent to his mental health. (*Id.*).
14 Plaintiff served Paramo with a copy of the petition on October 2, 2012, and
15 also filed a Form 602 grievance requesting immediate release from Ad-Seg
16 and a religious meal. (*Id.*).

17 After twenty days in Ad-Seg, Plaintiff was released into the general
18 prison population on October 2, 2012, and he reported to CDCR medical staff.
19 (*Id.*). Plaintiff claims medical staff determined his mental condition had
20 deteriorated during his stay in Ad-Seg and doubled his psychotropic
21 medications. (*Id.*).

22 Plaintiff further alleges that between September 15, 2012, and May 5,
23 2013, he submitted at least fifteen requests for religious meals. (*Id.* at 6).
24 Plaintiff submitted a Form 602 grievance on December 24, 2012, which
25 Defendant Khan interviewed him about on February 14, 2013. (*Id.*). Khan
26 granted Plaintiff’s Form 602 on February 14, 2013, and told Plaintiff he
27 would begin receiving his religious meals. Plaintiff did not receive a meal

1 and began to petition Defendant Ojeda to provide religious meals. (*Id.*)
2 Ojeda informed Plaintiff that Ojeda was unable to provide Plaintiff with a
3 meal and that Plaintiff would need to request his religious meals from
4 Defendant Khan. (*Id.*). Plaintiff alleges that he communicated with both
5 Defendants Ojeda and Khan several times about not receiving his religious
6 meals but a meal was never provided. (*Id.* at 6-7).

7 On May 5, 2013, Plaintiff wrote a 602 staff complaint against
8 Defendants Khan and Ojeda and indicated that he would begin a hunger
9 strike if he did not receive a religious meal. (*Id.* at 7). Khan again granted
10 Plaintiff's 602 and said Plaintiff would receive religious meals, but Plaintiff
11 alleges that during the entirety of his two stays in Ad-Seg, he never received
12 a religious meal. (*Id.*).

13 Defendants have produced evidence of the following facts.¹ Defendant
14 Ojeda worked, from September 2012 to June 2013, as the correctional
15 sergeant supervising Ad-Seg buildings 6 and 7 at RJD. (ECF No. 27-2 at 1).
16 As an Ad-Seg correctional officer, Ojeda was tasked with helping distribute
17 religious meals to those inmates on the approved meal list. (*Id.* at 2).

18 Defendant Ojeda did not have the authority to place inmates on the
19 religious meal list or determine if an inmate qualified to be on the list, as all
20 aspects of list management were the responsibility of the chaplains for the
21 individual religions. (*Id.*). Further, Defendant Ojeda did not have the
22 supervisory authority to order that a chaplain add an inmate's name to the
23 religious meals list, or provide a religious meal to an inmate who was not on
24 the list. (*Id.*) If an inmate requested, but was not approved for, a religious

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27 ¹ These facts are undisputed because Plaintiff has not filed an opposition or put forth any
evidence disputing them.

1 meal, Defendant Ojeda instructed the inmate to contact the appropriate
2 chaplain through a Form 22. (*Id.*).

3 Defendant Paramo, RJD's warden, indicated that Plaintiff was housed
4 in Ad-Seg from September 14, 2012, to October 2, 2012, while awaiting
5 appropriate housing. (ECF No. 27-3 at 2). On October 22, 2012, Plaintiff was
6 caught with drugs and issued a rules violation report for possession of a
7 controlled substance for distribution. (*Id.*) As a result, Plaintiff was placed
8 in Ad-Seg during the pendency of his charge, which was ultimately forwarded
9 on to the San Diego District Attorney's Office for possible prosecution. (*Id.*).

10 While he is not typically involved in day-to-day housing decisions,
11 Paramo served as the chairperson for Plaintiff's Institutional Classification
12 Committee ("ICC"), which reviews the classification of those inmates housed
13 in Ad-Seg. (*Id.*) The ICC, along with the inmate, reviews the inmate's file
14 and case factors and ultimately determines the most appropriate housing and
15 programming for each inmate. (*Id.*) Plaintiff's May 9, 2013, ICC noted that
16 even though his state prosecution was pending, release from Ad-Seg would be
17 appropriate based on length of stay. (*Id.* at 3).

18 Due to his mental health issues, Plaintiff participated in the Enhanced
19 Outreach Patient ("EOP") program, which included grouped housing in a unit
20 separate from the general prison population. (*Id.*) As an EOP participant,
21 Plaintiff was unable to be housed outside of the program and the decision to
22 include or remove Plaintiff from the EOP rested not with Defendant Paramo
23 but with medical and psychiatric personnel. (*Id.*) Additionally, Plaintiff's
24 file included a medical accommodation chrono that called for a lower bunk in
25 a cell on a lower tier. These required accommodations limited the housing
26 available to Plaintiff. (*Id.*).

27 On May 22, 2013, Paramo was the chairperson for another ICC

1 regarding Plaintiff's continued housing in Ad-Seg. (*Id.*). This second ICC
2 met after the committee was informed that there was no appropriate housing
3 available for Plaintiff outside Ad-Seg. The ICC decided to release Plaintiff
4 from Ad-Seg as soon as appropriate housing became available and also
5 "endorsed Plaintiff for transfer to another prison that would be able to
6 accommodate his housing needs." (*Id.*).

7 III. LEGAL STANDARD

8 **A. Summary Judgment**

9 Rule 56(c) of the Federal Rules of Civil Procedure authorizes the
10 granting of summary judgment "if the pleadings, depositions, answers to
11 interrogatories, and admissions on file, together with the affidavits, if any,
12 show that there is no genuine issue as to any material fact and that the
13 moving party is entitled to judgment as a matter of law." The standard for
14 granting a motion for summary judgment is essentially the same as for the
15 granting of a directed verdict. Judgment must be entered, "if, under the
16 governing law, there can be but one reasonable conclusion as to the verdict."
17 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "If reasonable
18 minds could differ," however, judgment should not be entered in favor of the
19 moving party. *Id.* at 250-51.

20 The parties bear the same substantive burden of proof as would apply
21 at a trial on the merits, including plaintiff's burden to establish any element
22 essential to his case. *Liberty Lobby*, 477 U.S. at 252; *Celotex v. Catrett*, 477
23 U.S. 317, 322 (1986); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The
24 moving party bears the initial burden of identifying the elements of the claim
25 in the pleadings, or other evidence, which the moving party "believes
26 demonstrates the absence of a genuine issue of material fact." *Celotex*, 477
27 U.S. at 323; *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970);

1 *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “A material
2 issue of fact is one that affects the outcome of the litigation and requires a
3 trial to resolve the parties’ differing versions of the truth.” *S.E.C. v.*
4 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). More than a
5 “metaphysical doubt” is required to establish a genuine issue of material fact.
6 *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 586
7 (1986).

8 The burden then shifts to the non-moving party to establish, beyond the
9 pleadings, that there is no genuine issue for trial. *See Celotex*, 477 U.S. at
10 324. To successfully rebut a properly supported motion for summary
11 judgment, the nonmoving party “must point to some facts in the record that
12 demonstrate a genuine issue of material fact and, with all reasonable
13 inferences made in the plaintiff[’s] favor, could convince a reasonable jury to
14 find for the plaintiff[.]” *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736,
15 738 (9th Cir. 2000) (citing Fed. R. Civ. P. 56; *Celotex*, 477 U.S. at 323; *Liberty*
16 *Lobby*, 477 U.S. at 249).

17 While the district court is “not required to comb the record to find some
18 reason to deny a motion for summary judgment,” *Forsberg v. Pacific N.W.*
19 *Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988), *see also Nilsson v.*
20 *Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988), the court may
21 nevertheless exercise its discretion “in appropriate circumstances,” to
22 consider materials in the record which are on file but not “specifically
23 referred to.” *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026,
24 1031 (9th Cir. 2001). However, the court need not “examine the entire file for
25 evidence establishing a genuine issue of fact, where the evidence is not set
26 forth in the opposing papers with adequate references so that it could be
27 conveniently found.” *Id.*

1 In ruling on a motion for summary judgment, the court need not accept
2 legal conclusions “cast in the form of factual allegations.” *Western Mining*
3 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). “No valid interest is
4 served by withholding summary judgment on a complaint that wraps
5 nonactionable conduct in a jacket woven of legal conclusions and hyperbole.”
6 *Vigliotto v. Terry*, 873 F.2d 1201, 1203 (9th Cir. 1989).

7 Moreover, “[a] conclusory, self-serving affidavit, lacking detailed facts
8 and any supporting evidence, is insufficient to create a genuine issue of
9 material fact.” *F.T.C. v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1171
10 (9th Cir. 1997). Nevertheless, “the district court may not disregard a piece of
11 evidence at the summary stage solely based on its self-serving nature.” *Nigro*
12 *v. Sears, Roebuck & Co.*, 784 F.3d 495, 497-498 (9th Cir. 2015) (finding
13 plaintiff’s “uncorroborated and self-serving” declaration sufficient to establish
14 a genuine issue of material fact because the “testimony was based on
15 personal knowledge, legally relevant, and internally consistent.”).

16 A district court may not grant a motion for summary judgment solely
17 because the opposing party has failed to file an opposition. *Cristobal v.*
18 *Siegel*, 26 F.3d 1488, 1494-95 & n. 4 (9th Cir. 1994). A court may,
19 nonetheless, “grant an unopposed motion for summary judgment if the
20 movant’s papers are themselves sufficient to support the motion and do not
21 on their face reveal a genuine issue of material fact[.]” *Williams v. Santa*
22 *Cruz Cnty. Sheriff’s Dep’t*, 234 F. App’x 522, 523 (9th Cir. 2007) (citing *Henry*
23 *v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993)).

24 IV. DISCUSSION

25 In their motion, Defendants argue that Defendants Ojeda and Paramo
26 are entitled to summary judgment because (1) Ojeda did not have personal
27 involvement in any alleged violation, and (2) Paramo is entitled to summary

1 judgment as a matter of law because suits against individual prison
2 employees in their personal capacities are precluded under the ADA.

3 I. Sergeant Ojeda

4 Defendants argue that as Ojeda did not personally participate in the
5 alleged religious freedom violation, he is therefore entitled to summary
6 judgment. (ECF No. 27-1 at 4.)

7 Section 1983 liability “arises only upon a showing of personal
8 participation by the defendant.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th
9 Cir.1989). Causation must be established by showing acts and omissions of
10 each defendant. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). This
11 requires “a very individualized approach which accounts for the duties,
12 discretion, and means of each defendant.” *Id.* There is no vicarious liability
13 in Section 1983 lawsuits. *Ashcroft v. Iqbal*, 556 U.S. 665, 676 (citing, inter
14 alia, *Monell v. New York City Department of Social Services*, 436 U.S. 658,
15 691 (1978)). Hence, a government official—whether subordinate or
16 supervisor—may be held liable under Section 1983 only when his or her own
17 actions have caused a constitutional deprivation. *OSU Student Alliance v.*
18 *Ray*, 699 F.3d 1053, 1069 (9th Cir. 2012) (“[E]ach government official, his or
19 her title notwithstanding, is only liable for his or her own misconduct.”)
20 (quoting *id.*; internal quotation marks omitted), cert. denied, 134 S. Ct. 70
21 (2013).

22 Here, the signed declaration filed with defendants’ motion indicates
23 that Defendant Ojeda had no authority or responsibility for any aspect of the
24 religious meals program, except physically delivering the food. When
25 Plaintiff reported to Ojeda that he was not receiving religious meals, Ojeda
26 informed Plaintiff that he was not on the religious meal list and gave
27 Plaintiff the information necessary to obtain religious meal eligibility from

1 Defendant Khan.

2 Plaintiff has not supported his contention that it was Ojeda's
3 responsibility to provide him with a meal, or that Ojeda supervised
4 Defendant Khan. In fact, Ojeda's declaration indicates that he did not have
5 the authority to order Khan to take any action regarding Plaintiff's religious
6 meal eligibility. Further, Plaintiff has not established that Ojeda's actions
7 caused a constitutional deprivation.

8 Plaintiff's claims against Defendant Khan are not at issue in the
9 instant motion and they will be addressed either in their own summary
10 judgment motion, at trial, or through a settlement. That some of Plaintiff's
11 claims survive, however, does not implicate Defendant Ojeda in the alleged
12 violation. Although Plaintiff alleges in the Complaint that Ojeda was directly
13 involved in denying Plaintiff religious meals, Plaintiff has presented no
14 evidence of that or any purposeful act or failure on the part of Ojeda.

15 Accordingly, the Court **RECOMMENDS** that Defendants' Motion for
16 Summary Judgment be **GRANTED** as to Plaintiff's claims against
17 Defendant Ojeda.

18 II. Warden Paramo

19 Plaintiff alleges that Defendant Paramo was personally responsible for
20 Plaintiff's custody and well-being and that he and previously dismissed
21 Defendant Cates "created a dangerous classification process that resulted in
22 Plaintiff be[ing] placed into Ad-Seg based solely on his disability" in violation
23 of the ADA. (ECF No. 1 at 10-11). The Complaint names Paramo in his
24 individual capacity only. (*Id.* at 2). Defendants argue Paramo is entitled to
25 summary judgment as a matter of law. (ECF No. 27-1 at 5).

26 Plaintiff is precluded from holding Paramo liable in his individual
27 capacity for violations of Plaintiff's rights under the ADA. "[A] plaintiff

1 cannot bring an action under 42 U.S.C. § 1983 against a State official in [his]
2 individual capacity to vindicate rights created by Title II of the ADA or
3 section 504 of the Rehabilitation Act.” *Vinson v. Thomas*, 288 F.3d 1145, 1156
4 (9th Cir.2002).

5 Accordingly, the Court **RECOMMENDS** that Defendants’ Motion for
6 Summary Judgment be **GRANTED** as to Plaintiff’s claim against Defendant
7 Paramo.

8 V. CONCLUSION

9 For the reasons outlined above, **IT IS RECOMMENDED** that the
10 District Court issue an Order: (1) Approving and Adopting this Report and
11 Recommendation; and (2) **GRANTING** Defendants’ motion for summary
12 judgment.

13 If the Court’s recommendations are adopted, the following claims will
14 remain PENDING:

- 15 • Claim Two for violation of Plaintiff’s freedom of religion against
16 Defendant Khan arising out of the denial of his religious meal;
- 17 • Plaintiff’s negligence claim against Khan arising out of the denial
18 of his religious meal; and
- 19 • Plaintiff’s claims arising under RLUIPA against Defendant Khan.

20 **IT IS HEREBY ORDERED** that any written objections to this Report
21 must be filed with the Court and served on all parties no later than **January**
22 **3, 2018**. The document should be captioned “Objections to Report and
23 Recommendation.”

24 **IT IS FURTHER ORDERED** that any reply to the objection shall be
25 filed with the Court and served on all parties no later than **January 10,**
26 **2018**. The parties are advised that the failure to file objections within the
27 specified time may waive the right to raise those objections on appeal of the

1 Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998).

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3 **IT IS SO ORDERED.**

4 Dated: December 18, 2017



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6 Hon. Mitchell D. Dembin
United States Magistrate Judge

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