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

DWAYNE HARRIS,

Plaintiff,

v.

O. SHELLAND, et al.,

Defendants.

Case No.: 15cv2442-MMA-JLB

**ORDER GRANTING DEFENDANT O.
SHELLAND’S MOTION FOR
SUMMARY JUDGMENT**

[Doc. No. 29]

Plaintiff Dwayne Harris, a state prisoner proceeding *pro se*, commenced this civil rights action under 42 U.S.C. § 1983, alleging violations of his First, Eighth, and Fourteenth Amendment rights while incarcerated at Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California. *See* Doc. No. 1.¹ Plaintiff’s unverified

¹ Citations refer to the pagination assigned by the CM/ECF system.

1 complaint sets forth four causes of action against Defendant O. Shelland and three
2 unnamed defendants, Does 1-3, for violations of his constitutional rights.² *Id.* Defendant
3 Shelland, a Culinary Officer at RJD in the Facility where Plaintiff was housed, moves for
4 summary judgment as to all claims against him. *See* Doc. No. 34-1.

5 After the Court’s initial review, two causes of action remain viable: (1) deliberate
6 indifference to serious medical needs and excessive use of force in violation of the Eighth
7 Amendment against Defendant Shelland; and (2) racial harassment and intimidation in
8 violation of the Equal Protection Clause of the Fourteenth Amendment against Defendant
9 Shelland. For the reasons set forth below, the Court **GRANTS** Defendant Shelland’s
10 motion for summary judgment.

11 **BACKGROUND**

12 *1. Plaintiff’s Version of Facts as Set Forth in Unverified Complaint*

13 Plaintiff alleges that on January 22, 2015, at approximately 7:00 a.m., Defendant
14 Shelland closely followed him towards the exit of the RJD Facility “A” dining hall after
15 he picked up his special medical diet lunch. Defendant Shelland approached Plaintiff and
16 grabbed his upper left arm at the location where Plaintiff had a surgically implanted
17 arterio-venous (“AV”) graft and dialysis shunt. In an angry manner, he then asked why
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20 ² Generally, “Doe” pleading is disfavored. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir.
21 1980). A plaintiff must identify parties by their true names and substitute those individual persons by
22 amending the complaint before the United States Marshal is able to execute service upon him or her.
23 *See Aviles v. Village of Bedford Park*, 160 F.R.D. 565, 567 (1995) (Doe defendants must be identified
24 and served within 120 days of the commencement of the action against them); FED. R. CIV. P.
25 15(c)(1)(C) & 4(m). Ninth Circuit authority provides that the plaintiff be given an opportunity to pursue
26 appropriate discovery to identify the unknown Does, unless it is clear that discovery would not uncover
27 their identities, or that his Complaint should be dismissed for other reasons. *See Wakefield v. Thompson*,
28 177 F.3d 1160, 1163 (9th Cir. 1999) (citing *Gillespie*, 629 F.2d at 642).

25 In this case, it may be possible to identify Doe #1. However, Plaintiff did not amend his
26 complaint naming any of the Doe Defendants, nor indicate to the Court he made any attempt to learn
27 their identities. The Doe Defendants have not been properly served with the summons and complaint in
28 the required ninety days under Rule 4(m), and Plaintiff has provided no evidence, sworn affidavit, or
testimony alleging or supporting any cause of action against the Doe Defendants. For these reasons, and
the reasons set forth in this order, the Court will not consider the counts against Doe Defendants 1-3 on
the merits.

1 Plaintiff was taking two hot meals in violation of CDCR policy. While gripping his arm
2 very tightly, Defendant Shelland swung Plaintiff around, forcing him face-first against
3 the concrete wall in a violent manner. While holding Plaintiff against the wall,
4 Defendant Shelland grabbed or knocked Plaintiff's special diet meal out of his hand, and
5 smashed it with his foot. Plaintiff alleges that he repeatedly pleaded for Defendant
6 Shelland to let go of his arm at the location of the dialysis shunt, and that Defendant
7 Shelland not only maintained an injurious grip on his arm, but at times grabbed harder
8 and shook his arm while saying, "Oh. This arm." Doc. No. 1 at 4. Plaintiff alleges that
9 Defendant Shelland then proceeded to yell into his ear; making racist remarks about
10 Plaintiff's ethnicity as an African American, including calling Plaintiff, "Boy," "Black-
11 ass Bitch," and other racially offensive terms for at least two minutes. *Id.* at 3.

12 Plaintiff further alleges that the first time he received dialysis following this
13 incident medical staff informed him something was wrong with his dialysis shunt, which
14 caused profuse bleeding when the dialysis needle was removed. Plaintiff claims he was
15 scheduled for emergency surgery in order to correct the damage to the shunt on January
16 23, 2015. On January 26, 2015, Plaintiff claims he was transported back to Alvarado
17 hospital to have the malfunctioning shunt completely replaced.³

18 2. *Undisputed Material Facts*⁴

19 In or about 2003, Plaintiff was diagnosed with kidney failure. In November 2012,
20 Plaintiff received an autologous AV fistula device inserted into his left arm to allow him
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22 ³ Plaintiff's medical records do not support this factual timeline. In his declaration, Dr. Thomas F.
23 Amato completed a comprehensive review of Plaintiff's medical files from CDCR, Alvarado Hospital,
24 and DaVita Health. Doc. 29-4 at 2. Dr. Amato testified that Plaintiff appeared for his regularly
25 scheduled dialysis treatments on three separate occasions following the incident with Defendant
Shelland. *Id.* at 3. A report was prepared by DaVita staff on each occasion indicating the AV graft was
functioning well. *Id.*

26 ⁴ These undisputed material facts are taken from Plaintiff's video recorded testimony included in the
27 Declaration of Lt. H. Asbury; Plaintiff's Deposition Testimony included in the Declaration of Andrew
28 M. Gibson; Defendant's Separate Statement of Uncontroverted Facts; Defendant's Declaration in
support of his Motion for Summary Judgment; and the Declaration of Dr. Thomas F. Amato. *See* Doc.
29. Where a material fact is in dispute, it will be so noted.

1 to receive dialysis treatments three times a week. Clots formed on the AV fistula on at
2 least three occasions before physicians implanted a fully synthetic AV graft into
3 Plaintiff's left arm on July 22, 2014. Clots also formed on the synthetic AV graft in
4 January 2015 and March 2016.

5 On January 22, 2015, the date of the incident giving rise to this action, Defendant
6 Shelland was supervising inmates entering and exiting the dining hall. At approximately
7 7:00 a.m., Plaintiff went to RJD's "A" Facility dining hall to eat breakfast. Prior to
8 entering the hall, Plaintiff picked up his regular meal of hot food, as well as a special diet
9 meal, which consisted of a brown paper bag and a second hot tray of food. Inmates are
10 permitted only one hot tray of food per meal service unless they receive a doctor's
11 approval, in the form of a medical chrono, to receive a special diet.

12 Defendant Shelland stopped and questioned Plaintiff after seeing he had two hot
13 trays. Plaintiff informed Defendant Shelland he had a medical chrono allowing him the
14 two meals. Defendant Shelland requested to see the chrono and Plaintiff handed him
15 both a handwritten, and an expired type-written chrono. Defendant Shelland contacted
16 the medical department at RJD to verify the handwritten chrono, and was informed that
17 Plaintiff's chrono had expired. Defendant Shelland then told Plaintiff he could not have
18 the second tray of food.

19 Defendant Shelland either took or knocked the tray of food from Plaintiff and
20 stepped on it prior to ordering him to submit to a routine pat-down search. Plaintiff did
21 not resist or speak to Defendant Shelland as he complied with the search. After the
22 search, Defendant Shelland ordered Plaintiff to leave the area, and Plaintiff went to the
23 program office to inform the sergeant about the incident as well as request an additional
24 meal. Plaintiff completed a written statement soon after the events occurred and,
25 pursuant to CDCR policy, participated in a video recorded interview regarding his
26 complaint later the same day.

27 Approximately two hours after the incident, Plaintiff underwent a physical
28 examination by a Licensed Vocational Nurse ("LVN"). The LVN did not make note of

1 any observable injury or indicate that Plaintiff mentioned experiencing any pain or injury
2 apart from stating that “[Defendant Shelland] grabbed [his] left arm.” Doc. 29-6 at 2.
3 Plaintiff was not referred for any further medical attention. At approximately 12:05 p.m.
4 the same day, Plaintiff was seen by his primary care physician for a previously scheduled,
5 unrelated appointment. The doctor prepared a detailed medical report and renewed
6 Plaintiff’s chrono. The doctor made no notation of injury to Plaintiff’s upper left arm or
7 complaint of pain.

8 According to Plaintiff’s medical records, he appeared for his regularly scheduled
9 dialysis treatments at DaVita Health Care on January 23, 26, and 28, 2015. DaVita staff
10 made no mention of problems with Plaintiff’s AV graft in their reports. On January 30,
11 2015, a DaVita staff member noted that Plaintiff’s AV graft clotted. Plaintiff was
12 transferred immediately to Alvarado Hospital to declot the graft. The attending physician
13 reported that Plaintiff’s AV graft suffered from high-grade stenosis (narrowing) at the
14 connection between the graft and the vein. After the declotting procedure, Plaintiff
15 returned to DaVita to complete his dialysis treatment.⁵

16 DEFENDANT’S MOTION

17 Defendant Shelland moves for summary judgment, arguing there is no genuine
18 issue of material fact as to Plaintiff’s Eighth Amendment claims of deliberate
19 indifference to Plaintiff’s serious medical needs and use of excessive force. In addition,
20 Defendant Shelland argues Plaintiff’s Fourteenth Amendment Equal Protection claim
21 fails as a matter of law. Consequently, Defendant Shelland contends he is entitled to
22 summary judgment as to all claims.

23 *1. Legal Standard*

24 “A party may move for summary judgment, identifying each claim or defense – or
25 the part of each claim or defense – on which summary judgment is sought. The court
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28 ⁵ Dr. Amato testified there was no evidence in Plaintiff’s medical records that his dialysis shunt was ever replaced despite Plaintiff’s allegation in his unverified Complaint. Doc. 29-4 at 4.

1 shall grant summary judgment if the movant shows that there is no genuine dispute as to
2 any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV.
3 P. 56(a). A fact is material if it could affect the outcome of the suit under applicable law.
4 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A dispute about a
5 material fact is genuine if there is sufficient evidence for a reasonable jury to return a
6 verdict for the non-moving party. *Id.* at 248.

7 The party seeking summary judgment bears the initial burden of establishing the
8 basis of its motion and of identifying the portions of the declarations, pleadings, and
9 discovery that demonstrate absence of a genuine issue of material fact. *Celotex Corp. v.*
10 *Catrett*, 477 U.S. 317, 323 (1986). If the moving party does not bear the burden of proof
11 at trial, he may discharge his burden of showing no genuine issue of material fact remains
12 by demonstrating that “there is an absence of evidence to support the nonmoving party’s
13 case.” *Id.* at 325.

14 The burden then shifts to the opposing party to provide admissible evidence
15 beyond the pleadings to show that summary judgment is not appropriate. *Id.* at 324. The
16 party opposing summary judgment cannot “rest upon the mere allegations or denials of
17 [its] pleading but must instead produce evidence that sets forth specific facts showing that
18 there is a genuine issue for trial.” *Estate of Tucker v. Interscope Records*, 515 F.3d 1019,
19 1030 (9th Cir.), cert. denied, 555 U.S. 827 (2008) (internal quotation marks omitted).

20 In applying the standard set forth under Rule 56, district courts must “construe
21 liberally motion papers and pleadings filed by *pro se* inmates and . . . avoid applying
22 summary judgment rules strictly.” *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir.
23 2010). A court must consider as evidence in opposition to summary judgment all
24 contentions “offered in motions and pleadings, where such contentions are based on
25 personal knowledge and set forth facts that would be admissible in evidence, and where
26 [the party appearing *pro se*] attested under penalty of perjury that the contents of the
27 motions or pleadings are true and correct.” *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir.
28 2004). However, neither an unverified complaint nor unsworn statements made in the

1 parties' briefs can be considered as evidence at this stage. *Moran v. Selig*, 447 F.3d 748,
2 759 & n. 16 (9th Cir. 2006) (unverified complaint cannot be considered as evidence on
3 motion for summary judgment).

4 The Local Civil Rules for the Southern District of California permit a district court
5 to construe an opposing party's failure to file its opposition papers as consent to the
6 granting of summary judgment for the opposing party on its merits. S.D. CAL. CIVLR
7 7.1(f)(3)(c). The Ninth Circuit has qualified this rule, however, by holding that "a
8 nonmoving party's failure to comply with local rules does not excuse the moving party's
9 affirmative duty under Rule 56 to demonstrate its entitlement to judgment as a matter of
10 law." *Martinez v. Stanford*, 323 F.3d 1178, 1182 (9th Cir. 2003). Summary judgment
11 must therefore be decided on the merits, and it "must be denied on no other grounds than
12 that the movant has failed to meet its burden of demonstrating the absence of triable
13 issues." *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 950 (9th Cir. 1993).

14 However, in deciding whether to grant summary judgment, the court will not
15 undertake the task of formulating arguments on behalf of a plaintiff who has abdicated
16 his responsibility to defend himself against a defendant's motion for summary judgment.
17 A *pro se* litigant, like the plaintiff in the case at bar, must assume the responsibility of
18 presenting his own legal theories and arguments; he cannot rely on the court to do so on
19 his behalf. Thus, when a motion is unopposed as it is here, the Court will make its
20 determination based solely on the facts, law, and arguments that have been presented to
21 it.

22 **2. Eighth Amendment Claims**

23 a) Deliberate Indifference to Serious Medical Needs

24 The Eighth Amendment prohibits "the unnecessary and wanton infliction of pain."
25 *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The deliberate indifference to serious
26 medical needs of prisoners constitutes the unnecessary and wanton infliction of pain. *Id.*
27 A prison official is deliberately indifferent whenever the official "knows of and
28 disregards an excessive risk to inmate health and safety." *Toguchi v. Chung*, 391 F.3d

1 1051, 1057 (9th Cir. 2004) (quoting *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1187 (9th
2 Cir. 2002)) (internal quotation marks omitted). The prison official “must have a
3 sufficiently culpable state of mind.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)
4 (quotations and citations omitted). The prison official must not only “be aware of facts
5 from which the inference could be drawn that a substantial risk of serious harm exists,”
6 but he “must also draw the inference.” *Id.* at 837. “If a person should have been aware
7 of the risk, but was not, then the person has not violated the Eighth Amendment, no
8 matter how severe the risk.” *Gibson*, 290 F.3d at 1188. Thus, in order for deliberate
9 indifference to be established, there must be a purposeful act or failure to act on the part
10 of the defendant and resulting harm. *See McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th
11 Cir.1992).

12 It is undisputed that Plaintiff was diagnosed with kidney failure in or about 2003
13 and that he has a fully synthetic AV graft dialysis shunt inserted in his upper left arm for
14 his weekly dialysis treatments. It is also undisputed that Plaintiff and Defendant Shelland
15 did not know each other and had never spoken more than a passing greeting to each other
16 before the incident giving rise to this action. It may be true that Defendant Shelland
17 knew or reasonably should have known generally that Plaintiff had some medical
18 condition after he confirmed with CDCR medical staff that Plaintiff at one time had a
19 medical chrono. However, Defendant Shelland testified that he had no specific
20 knowledge of Plaintiff’s dialysis shunt or its location on Plaintiff’s upper left arm.
21 Contrary to Plaintiff’s allegations in his unverified complaint, Plaintiff testified during his
22 deposition that he did not say a single word to Defendant Shelland during their
23 interaction on January 22, 2015, much less advise him regarding the existence and
24 location of his shunt. Doc. 29-3 at 55. Given this testimony, no reasonable jury could
25 find that Defendant Shelland acted with the type of deliberate indifference that satisfies
26 the legal standard of Plaintiff’s Eighth Amendment Claim. As such, summary judgment
27 in Defendant Shelland’s favor is appropriate.

1 b) Excessive Force

2 The use of excessive force by a prison official violates the Eighth Amendment.
3 *Hudson v. McMillan*, 503 U.S. 1, 6-7 (1992). However, the use of force does not run
4 afoul of the Constitution if “[the] force was used in a good-faith effort to maintain or
5 restore discipline.” *Wilkins v. Gaddy*, 559 U.S. 34, 40 (2010) (per curiam). To determine
6 whether the force applied is excessive, the court must examine: (1) the need for
7 application of force; (2) the relationship between the need and the amount of force used;
8 (3) the threat reasonably perceived by the responsible officials; (4) any efforts made to
9 temper the severity of the forceful response; and (5) the extent of the injury suffered by
10 the inmate. *Hudson*, 503 U.S. at 9.

11 It is undisputed that Defendant Shelland conducted a routine pat-down search of
12 Plaintiff. Plaintiff testified during his deposition that everything he stated in his video
13 recorded interview on January 22, 2015 was true. During that interview Plaintiff stated
14 that he did not sustain any injuries during his interaction with Defendant Shelland, and
15 that “it didn’t do nothing” when Defendant Shelland grabbed his arm. Doc. 29-7 at 5.
16 Plaintiff also stated that he didn’t mean that Defendant Shelland “body slammed [him]”
17 as described in his complaint, but that it was “protocol for [him] to get against the wall in
18 order for [Defendant Shelland] to search [him].” *Id.* at 6. Based on Plaintiff’s own
19 sworn testimony, there is no genuine dispute of material fact regarding whether
20 Defendant Shelland used excessive force in his routine search of Plaintiff. As such,
21 summary judgment in Defendant Shelland’s favor is appropriate.

22 **3. Fourteenth Amendment Equal Protection Claim**

23 The Equal Protection Clause of the Fourteenth Amendment commands that no
24 State shall deny to any person within its jurisdiction the equal protection of the laws. A
25 plaintiff may establish an equal protection claim by showing that he was intentionally
26 discriminated against on the basis of his membership in a protected class. *Flores v.*
27 *Morgan Hill Unified School Dist.*, 324 F.3d 1130, 1134 (9th Cir. 2003). Verbal
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1 harassment is insufficient to state a constitutional deprivation under § 1983. *Oltarzewski*
2 *v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987).

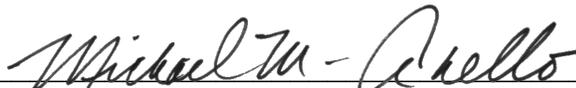
3 Plaintiff alleges in his unverified complaint that Defendant Shelland used racially
4 offensive and derogatory language towards African Americans. Defendant Shelland
5 alludes to this language by citing Plaintiff's deposition, as well as the unverified
6 complaint. However, neither Defendant Shelland nor Plaintiff provide the relevant pages
7 of deposition testimony cited in Defendant's briefing. Despite this failure to provide
8 relevant testimony, the alleged use of vulgarity does not rise to the level of a
9 constitutional violation under the applicable law, and Plaintiff has not provided any
10 further evidence to support an Equal Protection claim. As such, summary judgment in
11 Defendant Shelland's favor is appropriate.⁶

12 **CONCLUSION**

13 Based on the foregoing, the Court **GRANTS** Defendant Shelland's motion for
14 summary judgment as to all remaining claims in this action. The Clerk of Court is
15 instructed to enter judgment accordingly, and close the case.

16 **IT IS SO ORDERED.**

17 DATE: June 9, 2017

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20 HON. MICHAEL M. ANELLO
21 United States District Judge
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28 ⁶ The Court notes that Defendant Shelland raised an additional defense of qualified immunity. Because no constitutional violation was found, the Court will not review the merits of this defense.