IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Sherone Nealous, #226110, Plaintiff, v. Director Jon Ozmint; Warden Willie Eagleton, and Warden John Pate, Defendants.	)	Civil Action No. 9:06-1771-DCN-GCK **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The Plaintiff, Sherone Nealous, is an inmate currently confined at the South Carolina Department of Corrections. The Plaintiff has been incarcerated since 1999 for assault and battery with intent to kill, aggravated assault, and assault and battery on a police officer. *See*, Nealous Depo., p. 7.

The Plaintiff has filed this action pursuant to 42 U.S.C. § 1983 alleging that the enforcement of Paragraph 15.8 of SCDC Policy No. OP-22.14 entitled "Inmate Disciplinary System" (hereafter referred to as "pink jumpsuit policy") violates his Eighth and Fourteenth Amendment rights. The Plaintiff has brought no claim for money damages. He seeks prospective relief only. Specifically, the Plaintiff seeks a permanent injunction prohibiting the Defendants from "enforcing the policy requiring inmates convicted of Sexual Misconduct to be distinguished from

the rest of the prison population by forcing them to dress in a different colored jumpsuit." *See*, Amended Complaint.

On January 4, 2005, SCDC adopted an amendment to SCDC Policy No. OP-22.14 entitled "Inmate Disciplinary System," which amendment took effect on March 1, 2005. The amendment provides as follows:

> Inmates who are convicted of the infraction 822 "Sexual Misconduct (2.09)," and/or 802, "Sexual Assault," will be provided with three pink jumpsuits instead of the inmate uniform. (Note: Inmates in SMU [Special Management Unit] for Security Detention or Disciplinary Detention will wear the SMU uniform until their release from SMU.) Upon completion of the disciplinary process or after release from SMU, inmates will wear the pink jumpsuit for three months after the date of the conviction. Any subsequent violations of 822 or 802 will result in wear of the pink jumpsuit for an additional year from the conviction date. All inmates assigned pink jumpsuits will be required to report to their assigned areas (i.e., job, school, etc.).

See, SCDC Policy No. OP-22.14, § 15.8 (Added by Change 4, effective March 1, 2005, dated January 4, 2005). An inmate engages in infraction 822, Sexual Misconduct (2.09), by "(1) [e]ngaging in sexual acts or intimate physical contact of a sexual nature alone or with others; or (2) indecent and/or unnecessary exposure of private body parts; or (3) soliciting sexual acts from others." *See*, SCDC Policy No. OP-22.14, Appendix A (SCDC Disciplinary Offenses), Infraction 822 (May 14, 2004).

The Plaintiff was charged with Sexual Misconduct on August 26, 2005, as a result of masturbating where he could be observed by a correctional officer within the control room. *See*, Nealous Depo., Ex. 1. At a hearing held on September 20, 2005, the Plaintiff was convicted of infraction 822. *See*, Nealous Depo., Ex. 2. The Plaintiff did not appeal that conviction. The

Plaintiff thereby became subject to the policy mandating the wearing of a pink jumpsuit for a prescribed period of time by an inmate convicted of sexual misconduct.

The named Defendants are SCDC Director Jon Ozmint, who promulgated the pink jumpsuit policy; Willie Eagleton, who is the Warden at Evans Correctional Institution; and John Pate, who is an SCDC official at Allendale Correctional Institution (where the Plaintiff is currently incarcerated). These Defendants have moved for summary judgment on the grounds discussed below.

DISCUSSION

I. The Plaintiff Has Failed to State an Eighth Amendment Claim.

The initial issue for this Court is to determine the appropriate standard by which to review the constitutionality of the "pink jumpsuit" policy. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. Determination of whether the Eighth Amendment has been violated requires analysis of subjective and objective components. *Wilson v. Seiter*, 501 U.S. 294, 302 (1991). Specifically, an Eighth Amendment analysis necessitates inquiry as to whether the prison official acted with a sufficiently culpable state of mind (subjective component) and whether the deprivation suffered or injury inflicted on the inmate was sufficiently serious (objective component). *Id.* What must be established with regard to each component "varies according to the nature of the alleged constitutional violation." *Hudson v. McMillian*, 503 U.S. 1, 5 (1992).

The standard of proof in conditions of confinement claims differs from that applied in security-related or excessive force claims. For instance, "the appropriate inquiry when an inmate alleges that prison officials failed to attend to serious medical needs is whether the officials exhibited 'deliberate indifference.'" *Hudson v. McMillian*, 503 U.S. 1, 5 (1992). The deliberate indifference standard "is appropriate because the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns." *Id*. The same is generally true with other conditions cases because there are no competing administrative concerns.

However, the Supreme Court has recognized that the deliberate indifference standard is generally not applicable in security-related cases where there are competing administrative concerns. The Court has recognized that "officials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force." *Hudson v. McMillian*, 503 U.S. 1, 6 (1992). In those cases, "[w]here prison security measure is undertaken to resolve a disturbance ... that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986).

Typically, the balancing standard from *Whitley* is applied in cases where excessive force is alleged in reacting to and quelling a specific prison disturbance. The Supreme Court has not directly addressed the situation, as presented in the case at bar, where a policy is adopted to address an issue of prison discipline and order. In *Hudson*, the Supreme Court did recognize that the *Whitley* standard is applicable not only to prison disturbances but also to "lesser disruptions." The

Court recognized the need to accord to prison administrators "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Hudson v. McMillian*, 503 U.S. 1, 6 (1992). The Court also recognized that such deference extends as well "to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline." *Whitley v. Albers*, 475 U.S. 312, 322 (1986). The Supreme Court held that "[w]hether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates." *Id*. Thus, it appears that the Supreme Court would apply this balancing standard to any claims where the Eighth Amendment challenge is directed at a policy or practice implemented to preserve internal order and discipline or to maintain institutional security.

The Plaintiff has pled and maintained throughout the pre-trial phase of this litigation that his challenge to the constitutionality of the pink jumpsuit policy should be construed as a conditions case where the wantonness standard is one of deliberate indifference. While the Defendants assert that the policy is constitutional whether examined under the deliberate indifference standard or the *Whitley* standard, the Defendants submit that the Plaintiff's claim is more properly analyzed as a security claim rather than a conditions claim. Nonetheless, because the Plaintiff has brought this action as a conditions case, the Defendants will address initially the deliberate indifference standard.

A. Using the deliberate indifference standard as applied to conditions cases, the Plaintiff has failed to show that the pink jumpsuit policy violates the Eighth Amendment.

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the United States Supreme Court held that the Eighth Amendment requires prison officials to "provide humane conditions of confinement." 511 U.S. at 832. "[P]rison officials must take reasonable measures to guarantee the safety of inmates." *Id.* Recognizing that "not ... every injury suffered by one prisoner at the hands of another translates into constitutional liability for prison officials responsible for the victim's safety," the Court held that an Eighth Amendment violation is found only upon a showing of both an objective and a subjective requirement. 511 U.S. at 834.

1. The Plaintiff cannot satisfy the objective prong of the Eighth Amendment standard.

In addressing the objective prong, the Supreme Court has explained that "[f]or a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The objective prong "requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." *Helling v. McKinney*, 509 U.S. 25, 36 (1993). (Emphasis in original).

The Plaintiff has not presented proof to satisfy the objective prong of the analysis. The Plaintiff has not shown that the adoption and enforcement of the pink jumpsuit policy has resulted

in a substantial risk of serious harm to the Plaintiff. Despite a specific discovery request on this issue, the Plaintiff has not identified any specific incident or event occurring since the adoption of the pink jumpsuit policy that resulted in harm to any SCDC inmate and was causally connected to the wearing of a pink jumpsuit. Although the policy has been in effect since March 2005, there is no statistical or anecdotal evidence suggesting that the wearing of a pink jumpsuit increases an inmate's likelihood of assault.[1]

Furthermore, any assertion that the Plaintiff would be vulnerable to assault by wearing a pink jumpsuit in the general population is also unsupported by any evidence. The Plaintiff describes himself as 6' 8" and 220 pounds in size. *See*, Nealous Depo., p. 45. There is no previous history of him being a sexual assault victim or vulnerable to sexual assault or any assault. Based on his own testimony, the Plaintiff would qualify as a predator rather than the prey. Moreover, the inmate population fully understands the reason for an inmate to be wearing a pink jumpsuit. The wearing of a pink jumpsuit is not confused with an inmate's voluntary wearing of the color pink to suggest interest in homosexual sex. When the inmate population views an inmate wearing a pink jumpsuit, it is known that the clothing was assigned by SCDC as punishment for sexual misconduct and conveys no suggestion that the inmate wearing the jumpsuit is a willing participant in homosexual activity or otherwise vulnerable to any type of assault.

In sum, the Plaintiff has not presented credible evidence to support his premise that the enforcement of the pink jumpsuit policy against him will result in a substantial risk of serious harm. In fact, in the two years since the implementation of the policy, hundreds of inmates have safely worn pink jumpsuits. There is no evidence of a single instance of an inmate being harmed because

[1] Instead, there is both statistical and anecdotal evidence that the policy has resulted in fewer such assaults on female correctional staff.

he was wearing a pink jumpsuit. Additionally, the Plaintiff has not shown that the risk of harm, if any has been shown, is not one to be tolerated by society in response to the problems experienced by SCDC officials with sexual misconduct and in particular exhibitionism and public masturbation.

2. The Plaintiff cannot satisfy the subjective prong of the Eighth Amendment standard.

As to the subjective prong, the inmate must show that the state of mind of prison officials "is one of deliberate indifference to inmate health or safety." *Helling v. McKinney*, 509 U.S. 25, 36 (1993). As the Supreme Court explained, "[t]he question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial risk of serious damage to his future heath." *Farmer*, 511 U.S. at 843, *citing Helling v. McKinney*, 509 U.S. 25 (1993).

In *Helling*, the Supreme Court explained that "the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct." *Helling*, 509 U.S. at 36. The Court recognized that "[t]he inquiry into this factor also would be an appropriate vehicle to consider arguments regarding the realities of prison administration." *Id*. The *Farmer* Court was in accord:

> In a suit such as petitioner's, insofar as it seeks injunctive relief to prevent a substantial risk of serious injury from ripening into actual harm, the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct: their attitudes and conduct at the time suit is brought and persisting thereafter. An inmate seeking an injunction on the ground that there is a contemporary violation of a nature likely to continue, must adequately plead such a violation; to survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment,

> *knowingly and unreasonably disregarding an objectively intolerable risk of harm*, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future.

Farmer, 511 U.S. at 845-46. (Citations omitted; emphasis added).

Thus, even if the Plaintiff can demonstrate a substantial risk of serious harm, for prospective injunctive relief to be warranted, he must still demonstrate that the Defendants are "knowingly and unreasonably disregarding" that substantial risk of serious harm. The Supreme Court has held that there is no liability for prison officials who are aware of a substantial risk of inmate harm "if they responded reasonably to that risk." *Farmer*, 511 U.S. at 844. "Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Farmer*, 511 U.S. at 845.

The Defendants have acted reasonably in implementing and enforcing the pink jumpsuit policy. The policy was adopted to address a pervasive problem with inmates engaged in acts of sexual misconduct and in particular exhibitionism and public masturbation. As addressed at length in the testimony of SCDC Director Jon Ozmint and Robert Ward, numerous important penological interests are advanced by the pink jumpsuit policy.

Director Ozmint identified the "increasing problem with inmates exposing themselves and masturbating both within the institutions and while outside of the institutions in various public facilities such as courthouses." *See*, Ozmint Affidavit, para. 8. The existing sanctions for sexual misconduct were not working to reduce the incidence of sexual misconduct. The adoption and enforcement of the policy signified to the inmate population a new approach and consequence for the offending behaviors. In particular, existing sanctions including the loss of good time credits or loss of other privileges were not effective. *See*, Ozmint Affidavit, para. 26.

Likewise, the placement of the offending inmate in disciplinary detention was ineffective and a waste of resources. Not only are segregation units more expensive to construct and staff, but those units should be used to house more dangerous and violent inmates. Often circumstances dictated the early release of inmates sentenced to disciplinary detention for acts of exposure and public masturbation to allow space for other inmates. This removed all disincentive for the public masturbators thereby adding to the problem. *See*, Ozmint Affidavit, paras. 23-25.

Director Ozmint discusses the previous lack of an effective sanction for such behavior. This contributed to the belief among many corrections personnel that they were powerless to respond effectively to control the exhibitionism and public masturbation. That belief contributed to morale problems among staff. *See*, Ozmint Affidavit, para. 27. Director Ozmint reports having "personally spoke[n] with staff members during my visits to institutions who complained about the conduct and were demoralized that the traditional method of placing inmates in lockup was not working." *See*, Ozmint Affidavit, para. 15. Ozmint also received reports that departing employees frequently cited such behavior during exit interviews as a factor in their decision to leave SCDC employment. *See*, Ozmint Affidavit, para. 16. As Ozmint testified, employee turnover continues to be an issue as SCDC struggles to recruit and keep qualified employees. The inability to control the sexual misconduct and its negative effect on staff morale contributed to this loss of employees and resulted in increased costs necessitated by the expense of recruitment and training of new employees. This presented a significant issue since a high percentage of the workforce, including specialized personnel such as nurses, is female. *See*, Ozmint Affidavit, para. 17.[2]

[2] Dr. Donna Schwartz-Watts, the Defendants' psychiatric expert who also treats SCDC patients, testified as to her experience as a female working in a correctional setting. She

Director Ozmint is also cognizant of the need to provide his employees with a safe work environment and his responsibility to prevent his employees, including female staff, from being subjected to a hostile work environment. Ozmint testified to his knowledge of Title VII hostile work environment lawsuits brought by female correctional staff in California and Florida. *See*, Ozmint Affidavit, para. 20. In the case of *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1918 (2007), female correctional officers prevailed in a Title VII action where the hostile work environment resulted from inmate sexual misconduct, including incidents of exhibitionism and public masturbation. The California Department of Corrections and three corrections administrators were held liable for failing to take appropriate steps to address the sexually hostile environment created by the pervasive practice of inmate exhibitionism and masturbation directed at female officers. More recently, in January 2007, twelve female nurses employed by the Florida Department of Corrections were awarded $990,000.00 by a federal jury in a sexual harassment case against the Department. *See*, *Rudolph v. Department of Corrections*, Civil Action Number 5:06-cv-0056-RS-MD. The nurses alleged that male inmates routinely exposed their genitals and masturbated at them while making sexually demeaning and degrading comments. The jury concluded that the Department was liable for sexual harassment because administrators failed to take steps to prevent the inmates' offensive conduct.[3] As the California

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testified to being a victim of exhibitionism and public masturbation by male inmates. She testified as follows: "... as a female that works in a correctional setting, having been exposed, you do develop fear and you do not feel comfortable in those situations. Of course, it's going to be individualized and it's going to depend on each and every situation, but it's a common activity. And females, and I can't speak for males, but females are commonly the targets of those exposures, and I have certainly had that happen to me." *See*, Schwartz-Watts Depo., p. 33.

[3] The Court is asked to take judicial notice of the pleadings, orders, and verdicts in *Rudolph v. Department of Corrections*, Civil Action Number 5:06-cv-0056-RS-MD, which are available using PACER.

and Florida litigation shows, it is critical for SCDC to take steps to address the inmates' sexual misconduct both to provide a safer work environment and to avoid liability under Title VII. Thus, the adoption and enforcement of the pink jumpsuit policy is an appropriate and reasonable response to inmate sexual misconduct which otherwise creates a hostile work environment for corrections staff and females in particular.[4]

From a safety perspective, Director Ozmint has also testified that the pink jumpsuit policy addresses the increased risk of transmitting serious blood-borne pathogens including HIV, hepatitis, and tuberculosis. *See*, Ozmint Affidavit, paras. 11-13. Perhaps more importantly, the use of the pink jumpsuits provides warning to correctional staff of inmates having a propensity to commit acts of exhibitionism and public masturbation. When staff is required to interact with these inmates, the staff is warned by the color of the inmate's jumpsuit that the inmate presents a threat for such behavior and to take appropriate precautions. The use of the color pink for these jumpsuits distinguishes the offending inmates from other types of inmates and provides for easy identification. The distinctive color also allows for staff to take appropriate precautions where the inmate and his disciplinary history is not readily known to that employee. *See*, Ozmint Affidavit, paras. 35-36.

The enforcement of the pink jumpsuit policy also serves the important penological interest of deterrence of the misconduct. *See*, Ozmint Affidavit, para. 37. Many SCDC inmates, the Plaintiff included, have expressed a dislike of the pink jumpsuits. These inmates do not want

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[4] In a related context, the Fourth Circuit has recognized that equal employment opportunities for females within the prison setting is a legitimate penological objective. In *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981), the Fourth Circuit recognized that "the general employment of guards may be required to be open to persons of both sexes under equal employment opportunity legislation." 641 F.2d at 1119-1120. The Court balanced a male inmate's privacy interests with the need to provide employment opportunities for females in male prisons.

to wear pink. The simple fact that the inmates do not like the color contributes to its deterrent effect. Simply stated, if inmates do not want to wear pink, then they are less likely to engage in acts of exhibitionism, public masturbation and other offenses whose sanction is placement in a pink jumpsuit. That deterrent effect is lost if a different color were used. Dr. Donna Schwartz-Watts, a psychiatric expert in treating sexually deviant persons, has opined that "having an inmate wear a colored uniform for sexual offending behavior is what's called negative reinforcement and that is certainly a common treatment used in decreasing sexually deviant behavior in medicine." *See*, Schwartz-Watts Depo., p. 5. Thus, the pink jumpsuit policy represents a reasonable and effective means to decrease the incidence of sexual misconduct.[5]

In sum, the Defendants are not "knowingly and unreasonably disregarding" any substantial risk of serious harm to the Plaintiff by the continued enforcement of the pink jumpsuit policy. There must be a balancing of the interests including the many and important penological interests served by this policy and the interest of the inmate to be protected from assault by other inmates. Therefore, even if there were an increased risk of harm to inmates who have worn pink jumpsuits, an increase in the risk of harm is not unreasonable in light of the penological interests served by the policy. In addition, the Plaintiff controls whether he is placed in a pink jumpsuit. Likewise, by correcting his behavior and not engaging in the acts of sexual misconduct punishable by placement in a pink jumpsuit, the Plaintiff can avoid the increased risk of harm of which he alleges.

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[5] The use of different colored uniforms has a long history in corrections not only in South Carolina but throughout the country. In fact, for inmates working outside of an institution, the South Carolina General Assembly requires by statute that the uniform be "of such a design and color as to easily be identified as a prisoner's uniform." *See*, S.C. Code Ann. § 24-13-640.

Finally, in assessing the constitutionality of the pink jumpsuit policy, the Court is urged to give substantial deference to the prison administrators in adopting policies and practices designed to preserve internal order and discipline and to maintain institutional security. In *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Supreme Court explained:

> We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.

539 U.S. at 132 Likewise, the Fourth Circuit Court of Appeals frequently emphasizes that great deference must be given to prison administrators with regard to security matters. The Fourth Circuit explained these limitations on judicial oversight as follows:

> In the difficult and dangerous business of running a prison, frontline officials are best positioned to foresee threats to order and to fashion responses to those threats. Hence, the evaluation of penological objectives is committed to the considered judgment of prison administrators, who are actually charged with and trained in the running of the particular institution under examination. When a state correctional institution is involved, the deference of a federal court is even more appropriate. Prison officials should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

In re Long Term Administrative Segregation of Inmates Designated as Five Percenters, 174 F.3d 464, 469 (4th Cir. 1999). (Citations omitted).

In the case at bar, the corrections officials have concluded that the pink jumpsuit policy is "an effective means of deterring the misconduct, preventing repeat conduct, providing inmates with immediate consequences to their misconduct, increasing staff morale, decreasing staff turnover, increasing institutional security and safety, reducing budgetary strain, allowing for more violent inmates to be housed in segregation units while still providing consequences to this

inmate misconduct, and allowing these inmates to live in a far less restrictive custody level where they can obtain educational programming and other rehabilitation services." *See*, Ozmint Affidavit, para. 39. Consequently, the continued enforcement of the pink jumpsuit policy against the Plaintiff is not in violation of his Eighth Amendment rights.

B. Likewise, if analyzed as a security-related case rather than a conditions case, the Plaintiff has failed to show that the pink jumpsuit policy violates the Eighth Amendment.

In analyzing the Plaintiff's claim using the standard announced in *Whitley v. Albers*, 475 U.S. 312 (1986), which is more appropriate for security-related claims, the Defendants submit that the analysis of the objective prong is the same as in a conditions case, which is discussed at length above.

With respect to the subjective prong, the *Whitley* standard requires the Court to balance the need to maintain or restore discipline against the risk of injury to the inmates. The *Whitley* Court has explained that the force, or in this case, the policy implemented to preserve internal order and discipline and to maintain institutional security, is constitutional where "applied in a good faith effort to maintain or restore discipline." 475 U.S. at 321. Such a policy is unconstitutional only where applied "maliciously and sadistically for the very purpose of causing harm." *Id*.

The balancing test to be employed in the case at bar has been addressed above in the discussion of the reasonableness of the Defendants' response to the alleged risk of harm to the Plaintiff. The Defendants have demonstrated that the pink jumpsuit policy serves numerous legitimate and important penological interests that outweigh any increased risk of harm to the Plaintiff. Moreover, in application of the *Whitley* standard, the Court must also assess whether the

pink jumpsuit policy has been applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. The evidence in the record clearly shows that the policy has been enforced in a good faith effort to maintain discipline and to foster institutional safety and security as well as the other penological interests identified.

Consequently, whether the Court applies the deliberate indifference standard or the *Whitley* standard, the result is the same -- the enforcement of the pink jumpsuit policy against the Plaintiff does not constitute cruel and unusual punishment prohibited by the Eighth Amendment. As a result, the Plaintiff's claim for injunctive relief should be denied.

II. The Plaintiff Has Failed to State an Equal Protection Claim.

The Plaintiff has also alleged that the pink jumpsuit policy violates his rights under the Equal Protection Clause. The Plaintiff alleges that inmates who have been convicted of sexual misconduct are treated differently than other inmates. The Plaintiff specifically alleges that "Plaintiff and other inmates who have been convicted of sexual misconduct are a class of persons who are treated differently from inmates who have not been convicted of sexual misconduct." *See*, Amended Complaint, para. 27.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The equal protection guarantee "does not take from the States all power of classification," *Personnel Administrator v. Feeney*, 442 U.S. 256, 271 (1979), but "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). To succeed on an equal protection claim,

the Plaintiff "must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). If he makes this showing, "the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Id.* To make out an equal protection claim, the Plaintiff must plead and prove sufficient facts to satisfy each requirement. *See*, *Veney v. Wyche*, 293 F.3d 726, 731 (4th Cir. 2002).

The Plaintiff claims that he will be required to wear a pink jumpsuit after being released to the general prison population from the Special Management Unit because he was charged with and convicted of Sexual Misconduct, while for all other infractions except Sexual Assault, inmates who are convicted of such infractions are not required to wear a pink jumpsuit. The Plaintiff, however, is not similarly situated to these other inmates, as he has been convicted of a entirely different type of offense, one involving proof of having performed one or more acts of a sexual nature. *See*, *Veney v. Wyche*, 293 F.3d at 731, n.2 ("the similarity inquiry includes consideration of factors such as the prison population size, average length of sentence, security classification, and types of crimes") (citation omitted). In view of this significant distinction, the Plaintiff has failed to make out the first element of his equal protection claim, namely that he has been treated differently from other similarly situated inmates. *See also, Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977) ("There is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence"); *In re Long*

Term Administrative Segregation of Inmates Designated as Five Percenters, 174 F.3d 464, 469 (4th Cir. 1999) (same).[6]

Even assuming that the Plaintiff has shown that he has been treated differently from other similarly situated inmates, the Plaintiff has failed to demonstrate that this disparity in treatment is not justified under the applicable level of judicial scrutiny. "Ordinarily, when a state regulation or policy is challenged under the Equal Protection Clause, unless it involves a fundamental right or a suspect class, it is presumed to be valid and will be sustained 'if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Veney*, 293 F.3d at 731, *citing Heller v. Doe*, 509 U.S. 312, 319-320 (1993). The Plaintiff's claim does not involve a fundamental right. An inmate does not have a fundamental right to choose which color jumpsuit or clothing he will wear, nor does an inmate have a fundamental right to engage in sexual acts. *See, Veney*, 293 F.3d at 731 n. 4. The Plaintiff further does not allege that he is a member of a suspect class.

At any rate, equal protection challenges that arise in the prison context require the courts to "adjust the level of scrutiny to ensure that prison officials are afforded the necessary discretion to operate their facilities in a safe and secure manner." *Veney*, 293 F.3d at 732, citing *Morrison v. Garraghty*, 239 F.3d at 654-55. In a prison context, the court "must determine whether the disparate treatment is 'reasonably related to [any] legitimate penological interests.'" *Id.*, *citing Shaw v. Murphy*, 532 U.S. 223, 225 (2001). This deferential standard is applied "even when the

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[6] Sex offender registry laws mandating that those convicted of sex-related crimes be registered in a Sex Offender Registry provide a useful analogy. Equal protection challenges to those laws have failed because similarly situated inmates, namely sex offenders, are treated alike under similar circumstances and because the laws rest on a rational basis. *See e.g., Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999). The same is true with respect to the pink jumpsuit policy.

alleged infringed constitutional right would otherwise warrant higher scrutiny." *Morrison*, 239 F.3d at 655.

To evaluate the reasonableness of the pink jumpsuit policy, the Court must apply the factors set forth in *Turner v. Safley*, 482 U.S. 78 (1987). "Three of the four factors are relevant to [plaintiff's] equal protection claim." *Veney*, 293 F.3d at 732. "First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89. Second, the Court must consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. Third, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Turner*, 482 U.S. at 90-91 ("This is not a 'least restrictive alternative' test: prison officials need not set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint").

In applying the *Turner* factors to the present case, SCDC certainly has a legitimate penological interest in deterring acts of sexual misconduct and sexual assault by inmates. Among other concerns, the Fourth Circuit has recognized that "sexual activity between cellmates ... would jeopardize prison security" and "also raises concerns about the transmission of diseases, such as HIV." *Veney v. Wyche*, 293 F.3d at 733. As discussed at length above, SCDC also has legitimate penological interests in promoting the safety and security of the correctional staff, including providing for quick identification of inmates with a history of sexual misconduct including exhibitionism and public masturbation, enhancing staff morale, taking steps to eliminate hostile work environments, reducing staff turnover, and preserving financial resources.

As demonstrated by the evidence, the pink jumpsuit policy has a valid, rational connection to the advancement of legitimate penological interests.

The second *Turner* factor the Court is required to consider is the impact of accommodating the asserted constitutional right. By allowing the Plaintiff to wear a regular inmate uniform in the general population (a tan jumpsuit), SCDC would lose the deterrent effect resulting from the pink jumpsuit policy. More importantly, SCDC would be deprived of the means to provide clear, visual identification of the offenders of the sexual misconduct policy and would be deprived of a means to enhance staff morale and safety, eliminate hostile work environments, reduce staff turnover, and preserve financial resources. In fact, it is important to recognize that the Defendants have a competing constitutional and statutory duty to protect members of a protected class, namely women, from being subjected to sexual harassment in their employment.

Finally, there is no ready alternative to the policy of requiring inmates convicted of sexual misconduct and sexual assault to wear a pink jumpsuit for a prescribed period of time. As Director Ozmint has testified, the traditional sanctions used for other offenses, including confinement to disciplinary detention, loss of good time credits, and loss of other privileges, have been used in the past and were not effective in slowing the growth in the number of incidents of sexual misconduct. *See*, Ozmint Affidavit, paras. 23-26.

In sum, the Plaintiff cannot show that the enforcement of the pink jumpsuit policy violates his equal protection rights. The Plaintiff has not shown that he is treated differently than other inmates who are similarly situated. Moreover, the Plaintiff has not shown that the pink jumpsuit policy is not reasonably related to legitimate penological interests.

CONCLUSION

Based on the foregoing discussion, the Defendants respectfully request that this Court grant their motion for summary judgment, dismiss the Plaintiff's complaint with prejudice, and the deny the Plaintiff's claim for injunctive relief.

Respectfully submitted,

DAVIDSON, MORRISON AND
LINDEMANN, P.A.

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