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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>TOMEKO MALONE,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>C/O PETERSON,</p> <p>Defendant - Appellee.</p>

No. 08-17451

D.C. No. 1:06-cv-00199-LJO-DLB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Submitted December 15, 2009**

Before: GOODWIN, WALLACE and CLIFTON, Circuit Judges.

Tomeko Malone, a California state prisoner, appeals pro se from the district court's summary judgment for defendants in his 42 U.S.C. § 1983 action alleging that a prison official used excessive force against him when removing him from his

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

prison cell. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo an order granting summary judgment, *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th Cir. 2004), and we affirm.

The district court properly granted summary judgment on the Eighth Amendment claim because Malone failed to raise a triable issue as to whether Peterson's use of physical force was more than *de minimis*, and whether the force was used maliciously and sadistically to cause harm. *See Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992).

AFFIRMED.