

1 **I. The Complaint²**

2 On March 18, 2011, plaintiff was assigned to the B-Facility kitchen at Mule Creek State
3 Prison (MCSP). ECF No. 1 at 7. He was sixty-one years old at the time and suffered from
4 several ailments including serious back and right leg injuries. *Id.* at 6. Upon assignment to the
5 kitchen, he was asked to provide copies of any medical chronos³ relating to limitations on his
6 ability to perform physical labor. *Id.* at 7. He provided defendant Bahadur, a correctional officer,
7 with a chrono from 2005 that listed under work limitations “no lifting over 25 pounds, no
8 excessive bending over, kneeling, crawling or stooping”; he also provided a chrono from 2011
9 that stated “no excessive walking, standing or carrying over 25 pounds.” *Id.* Days later, Bahadur
10 informed plaintiff that she had discarded the chronos because she considered them outdated. *Id.*
11 Bahadur also stated that until plaintiff obtained new chronos, she considered him fit to do any job
12 that she assigned in the kitchen. *Id.*

13 Plaintiff immediately submitted a request to see his primary care physician, Dr. Hawkins.
14 *Id.* at 8. Dr. Hawkins stated that one of the chronos discarded by Bahadur was only a few months
15 old, that the 2005 chrono was still valid, and that Bahadur should contact him if she had any
16 questions. *Id.* Dr. Hawkins also issued a new chrono. *Id.* Plaintiff provided Bahadur a copy of
17 the new chrono and a copy of a 2004 chrono (which listed the same physical limitations as the
18 2005 chrono). *Id.* Bahadur responded that she still considered the 2004 and 2005 chronos
19 outdated and that she needed updated chronos. *Id.* Plaintiff submitted another request to see Dr.
20 Hawkins. *Id.*

21 On June 3, 2011, plaintiff learned that he was to work in the kitchen scullery that day. *Id.*
22 at 8-9. Upon arrival, an inmate explained that plaintiff was to take meal trays (five to six at a
23 time) to a trashcan that was half-filled with hot water and soap, knock off the food, and stack the
24 trays so they could be run through the dishwasher’s conveyor belt. *Id.* at 9. The trashcan was

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26 ² This case proceeds on plaintiff’s original complaint. ECF No. 1. The following
27 statement of facts is based entirely on the allegations in plaintiff’s complaint.

28 ³ “A ‘chrono’ is a collection of informal notes taken by prison officials documenting
 medical orders.” *Akhtar v. Mesa*, 698 F.3d 1202, 1205 n.1 (9th Cir. 2012).

1 approximately two feet and three inches tall. *Id.* Plaintiff complained to the inmate that
2 explained the job assignment, then to an inmate clerk, and then to Bahadur. *Id.* Plaintiff
3 explained to Bahadur that the job she assigned him required repetitive bending, which he was
4 “medically prohibited from doing.” *Id.* at 9-10. Plaintiff noted that he was five feet and eleven
5 inches tall and that the repetitive bending would likely cause serious injury or great pain. *Id.* at
6 10. Despite knowing that other inmates had volunteered to switch jobs with plaintiff, Bahadur
7 refused to reassign plaintiff and insisted he do the assigned job. *Id.* Plaintiff asked for permission
8 to obtain a medical opinion from the medical department; Bahadur denied permission and ordered
9 plaintiff to return to his housing unit and to report back to work that evening. *Id.* Plaintiff asked
10 Bahadur if he would be disciplined if he returned to his unit, and Bahadur responded, “No.” *Id.* at
11 10-11. “Plaintiff obeyed the order and returned to his housing unit and reported to work that
12 evening.” *Id.* at 11.

13 On June 9, 2011, plaintiff received a Rules Violation Report (RVR) that charged him with
14 “refusing to perform assigned duties.” *Id.* at 11-12; *see also id.* at Ex. C (the RVR indicating
15 Bahadur was the reporting officer). Defendant Cherry acted as the senior hearing officer at a
16 disciplinary hearing that took place the following day. *Id.* at 12. Plaintiff pled not guilty to the
17 charge and informed Cherry of his physical limitations. *Id.* Cherry denied plaintiff’s request to
18 have Dr. Hawkins serve as a medical witness but granted plaintiff’s request to have an inmate
19 from the kitchen as a witness. *Id.* That inmate stated that plaintiff’s assigned job required
20 repetitive bending. *Id.*

21 Bahadur attended the disciplinary hearing and was questioned by Cherry. *Id.* Bahadur
22 replied to one question stating: “I want [plaintiff] removed because he has medical chronos
23 limiting what work he can do and that causes problems for me with the other inmates, because
24 inmates complain when they have to do jobs that other inmates don’t have to do.” *Id.* at 13.
25 Cherry stopped the proceedings and informed Bahadur that inmates cannot be removed from job
26 assignments solely because of their medical problems. *Id.* Cherry then asked Bahadur six or
27 seven additional questions, but Cherry did not include in the hearing report any of these questions

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1 or Bahadur’s responses—nor the statement of the inmate that the job required repetitive bending.
2 *Id.*

3 Cherry found plaintiff guilty of the charges and ordered thirty days loss of credits, thirty
4 days loss of phone and yard privileges, and removal from the kitchen assignment. *Id.* at 14.
5 Cherry’s report omits all questions and responses pertaining to plaintiff’s physical limitations; it
6 documents only questions and answers supporting the finding of guilt. *Id.* Plaintiff alleges that
7 Cherry was biased, telling plaintiff that he always believes the correctional officer where there is
8 a dispute between an officer and an inmate and that the truth did not matter. *Id.* at 15.

9 On January 16, 2013, plaintiff appeared before the California Board of Parole Hearings
10 for his eighth parole hearing. *Id.* The Board denied plaintiff parole and, according to plaintiff,
11 “[t]he sole reason cited by BPH Presiding Commissioner John Peck to deny parole was the June
12 3, 2011 disciplinary infraction.” *Id.* Plaintiff’s next parole hearing is scheduled for 2016. *Id.* at
13 15. The denial of parole “is the basis for” plaintiff’s claims against Bahadur and Cherry “and for
14 which damages are sought.” *Id.* at 15-16.

15 Upon screening the complaint, the court found that it stated a potentially cognizable
16 Eighth Amendment deliberate indifference claim against Bahadur and a potentially cognizable
17 Fourteenth Amendment due process claim against Cherry. ECF No. 7 at 2-3.

18 **II. Rule 12(b)(6) Standard**

19 In order to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a
20 complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell*
21 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55, 562-63, 570 (2007) (stating that the 12(b)(6)
22 standard that dismissal is warranted if plaintiff can prove no set of facts in support of his claims
23 that would entitle him to relief “has been questioned, criticized, and explained away long
24 enough,” and that having “earned its retirement,” it “is best forgotten as an incomplete, negative
25 gloss on an accepted pleading standard”). Thus, the grounds must amount to “more than labels
26 and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Id.* at 1965.
27 Instead, the “[f]actual allegations must be enough to raise a right to relief above the speculative
28 level on the assumption that all the allegations in the complaint are true (even if doubtful in

1 fact).” *Id.* (internal citation omitted). Dismissal may be based either on the lack of cognizable
2 legal theories or the lack of pleading sufficient facts to support cognizable legal theories.

3 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

4 The complaint’s factual allegations are accepted as true. *Church of Scientology of Cal. v.*
5 *Flynn*, 744 F.2d 694, 696 (9th Cir. 1984). The court construes the pleading in the light most
6 favorable to plaintiff and resolves all doubts in plaintiff’s favor. *Parks Sch. of Bus., Inc. v.*
7 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). General allegations are presumed to include
8 specific facts necessary to support the claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561
9 (1992).

10 The court may disregard allegations contradicted by the complaint’s attached exhibits.
11 *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987); *Steckman v. Hart Brewing,*
12 *Inc.*, 143 F.3d 1293, 1295-96 (9th Cir.1998). Furthermore, the court is not required to accept as
13 true allegations contradicted by judicially noticed facts. *Sprewell v. Golden State Warriors*, 266
14 F.3d 979, 988 (9th Cir. 2001) (citing *Mullis v. U.S. Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir.
15 1987)). The court may consider matters of public record, including pleadings, orders, and other
16 papers filed with the court. *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir.
17 1986) (abrogated on other grounds by *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104
18 (1991)). “[T]he court is not required to accept legal conclusions cast in the form of factual
19 allegations if those conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v.*
20 *Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Neither need the court accept
21 unreasonable inferences, or unwarranted deductions of fact. *Sprewell*, 266 F.3d at 988.

22 Pro se pleadings are held to a less stringent standard than those drafted by lawyers.
23 *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Unless it is clear that no amendment can cure its
24 defects, a pro se litigant is entitled to notice and an opportunity to amend the complaint before
25 dismissal. *Lopez v. Smith*, 203 F.3d 1122, 1127-28 (9th Cir. 2000) (en banc); *Noll v. Carlson*,
26 809 F.2d 1446, 1448 (9th Cir. 1987).

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1 **III. Analysis**

2 Bahadur argues that the court should dismiss plaintiff’s retaliation claim because (1)
3 plaintiff’s claims are barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), (2) the complaint
4 fails to state a viable retaliation claim; and (3) Bahadur is entitled to qualified immunity. ECF
5 No. 27. The *Heck* argument was considered and rejected by this court in response to defendant’s
6 previous motion to dismiss. ECF No. 24 at 6-9; ECF No. 37. It must again be rejected for the
7 same reason stated in the prior findings and recommendations: plaintiff’s claim, if successful,
8 would not necessarily mean that his release from prison would be accelerated. ECF No. 24 at 6-
9 9, adopted by ECF No. 37. The undersigned will accordingly limit discussion to defendant’s
10 remaining arguments.

11 **A. The Complaint Adequately Alleges Conduct Protected By the First Amendment**

12 To state a viable claim for retaliation in violation of the First Amendment, a plaintiff must
13 allege facts that, if true, would establish: (1) that a state actor took an adverse action against the
14 plaintiff (2) because of (3) the plaintiff’s protected conduct, and that the action (4) chilled the
15 plaintiff’s exercise of First Amendment rights (or would have chilled a person of ordinary
16 firmness) and (5) did not advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d
17 559, 567-69 (9th Cir. 2005).

18 Defendant Bahadur argues that plaintiff’s refusal to perform the work she assigned him
19 was not conduct protected by the First Amendment because it violated California Code of
20 Regulations, title 15, § 3041(a)⁴, citing various cases. None of the cited cases are controlling,
21 however, and none address a situation factually similar to the one presented by plaintiff’s
22 complaint. In *Smith v. Mosley*, 532 F.3d 1270 (11th Cir. 2008), the plaintiff made statements that
23 were determined to have been false and insubordinate in violation of two prison regulations. He
24 alleged that his discipline for making the statements was retaliation in violation of the First
25 Amendment, but he did not claim that the prison regulations could not validly apply to the
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27 ⁴ This regulation provides: “Inmates must perform assigned tasks diligently and
28 conscientiously. Inmates must not pretend illness, or otherwise evade attendance or avoid
performance in assigned work, education and programs, or encourage others to do so.”

1 statements. *Id.* at 1277 & n.19. The U.S. Court of Appeals for the Eleventh Circuit concluded
2 that the statements were not protected conduct because they violated legitimate (and legitimately-
3 applied) prison regulations. *Id.* at 1277.

4 In contrast, plaintiff here alleges that his conduct did not violate § 3041(a) and that the
5 administrative hearing in which he was found to have violated that regulation was essentially a
6 sham. ECF No. 1 at 11-15 (alleging that the hearing officer defendant Cherry conducted the
7 hearing in an unfair manner and told plaintiff that whenever there was a dispute between an
8 officer and an inmate, Cherry always went with the officer’s version of events). In addition,
9 plaintiff alleges that he was disciplined for protesting defendant’s attempt to force plaintiff to
10 perform work that would have violated his Eighth Amendment rights. In essence, the allegation
11 here is that Bahadur pretextually applied § 3041(a) to plaintiff in retaliation for his protest that
12 she (Bahadur) had assigned him a job which Bahadur had already been informed he was not
13 medically capable of performing. The Eleventh Circuit was not presented with such facts in
14 *Smith*.

15 Defendant next cites *Watkins v. Kasper*, 599 F.3d 791 (7th Cir. 2010). There, the court
16 held that “confrontational” and “disorderly” manner in which the plaintiff presented his grievance
17 “removed” the grievance from the First Amendment’s protection. *Id.* at 798-99. As in *Smith*, the
18 plaintiff in *Watkins* did not dispute that the manner in which he made his protest violated a prison
19 regulation against disorderly conduct. *Id.* at 799. Again, plaintiff here has not conceded as much
20 and it remains an issue to be decided in this case whether plaintiff was legitimately found in
21 violation of § 3041(a). Moreover, there is nothing in the complaint suggesting that plaintiff
22 protested the work assignment in a confrontational, disorderly, or otherwise offensive manner.

23 Defendant relies next on *Smith v. Campbell*, 250 F.3d 1032 (6th Cir. 2001), another case
24 in which the manner of the plaintiff’s protests violated prison regulations “because of his
25 aggressive attitudes . . . and his attempts to intimidate staff members.” *Id.* at 1037. This case is
26 of limited relevance here for the same reasons discussed above; that is, plaintiff does not allege
27 any facts showing that his protest was disorderly and he disputes whether his refusal to work
28 legitimately violated § 3041(a).

1 Lastly, defendant relies on *Brown v. Lirios*, 391 F. App'x 539 (7th Cir. 2010), in which
2 the plaintiff alleged that officials had retaliated against him because he refused to comply with a
3 restitution payment plan. *Id.* at 541-42. The Court of Appeals concluded that the plaintiff's
4 refusal to comply with the payment plan was not protected conduct because the regulation
5 providing for the payment plan was legitimate. *Id.* Unlike the present case, there was no
6 allegation that the regulation was applied in an unconstitutional manner to the plaintiff.

7 This case is more in line with *Smith v. Villapando*, 286 F. App'x 682 (11th Cir. 2008).
8 There, the plaintiff alleged that defendants had retaliated against him by filing a disciplinary
9 report for disorderly conduct after he verbally protested when they attempted to assign him a
10 roommate. *Id.* at 684. The Court of Appeals reversed the district court's dismissal of the claim,
11 concluding that the plaintiff had adequately alleged that he engaged in protected conduct (his
12 verbal protest of defendants' actions). *Id.* at 685. Moreover, his conduct did not become
13 unprotected simply because he had been found guilty of disorderly conduct in the resulting prison
14 disciplinary hearing, because the plaintiff did not admit to the disorderly conduct. *Id.* at 685-86.

15 As in *Smith*, although plaintiff did not prevail, he disputed the charge against him and he
16 had every right to do so free of retaliation. Plaintiff has alleged that he exercised his First
17 Amendment right to verbally protest Bahadur's job assignment, and he has not admitted that his
18 conduct violated § 3041(a). Accordingly, his retaliation claim should not be dismissed on the
19 basis of the disciplinary sanction. Plaintiff has adequately alleged that defendant disciplined him
20 for engaging in protected conduct.

21 **B. Defendant Should Be Afforded Qualified Immunity**

22 Bahadur argues that she is entitled to qualified immunity. "The doctrine of qualified
23 immunity protects government officials 'from liability for civil damages insofar as their conduct
24 does not violate clearly established statutory or constitutional rights of which a reasonable person
25 would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v.*
26 *Fitzgerald*, 457 U.S. 800, 818 (1982)). Resolving the defense of qualified immunity involves a
27 two-step process; the court must determine (1) whether the plaintiff has alleged or shown a
28 violation of a constitutional right, and (2) whether the right at issue was clearly established at the

1 time of defendant's alleged misconduct. *Pearson*, 555 U.S. at 232 (citing *Saucier v. Katz*, 533
2 U.S. 194, 201-02 (2001)). These steps may be analyzed in any order. *Id.* at 236.

3 "Qualified immunity is applicable unless the official's conduct violated a clearly
4 established constitutional right." *Pearson*, 555 U.S. at 232. To be clearly established "[t]he
5 contours of the right must be sufficiently clear that a reasonable official would understand that
6 what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).
7 "[E]xisting precedent must have placed the statutory or constitutional question beyond debate."
8 *Ashcroft v. al-Kidd*, 563 U.S. ___, 131 S. Ct. 2074, 2083 (2011); *see also Clement v. Gomez*, 298
9 F.3d 898, 906 (9th Cir. 2002) ("The proper inquiry focuses on . . . whether the state of the law [at
10 the relevant time] gave 'fair warning' to the officials that their conduct was unconstitutional.")
11 (quoting *Saucier*, 533 U.S. at 202).

12 Here, there is no doubt that in general retaliation for an inmate's exercise of First
13 Amendment rights clearly violates the First Amendment. But the inquiry is more focused than
14 that. It does not appear from the case law that, at the time of the incident underlying this action
15 (2011), it was firmly established that a prisoner's verbal protest (as opposed to a written
16 grievance or lawsuit) constituted conduct protected by the First Amendment. As was recently
17 well-stated by another magistrate judge of this court:

18 To date, neither the Supreme Court nor the Ninth Circuit has held that mere oral
19 complaints by a prisoner can form the basis of a retaliation claim within the prison
20 context. *See, e.g., Teahan v. Wilhelm*, No. 06cv15 JM (PCL), 2007 U.S. Dist.
21 LEXIS 97539, 2007 WL 5041440 at *9 (S.D. Cal. Dec. 21, 2007) ("the Ninth
22 Circuit has never had cause to determine whether oral complaints concerning a
23 prisoner's individual circumstances are protected by the First Amendment."). In
24 addition, although some unpublished decisions from this court have recognized
25 that a prisoner's oral complaint constitute such protected conduct, there is by no
26 means "a robust 'consensus of cases of persuasive authority'" so recognizing. *al-*
27 *Kidd*, 131 S. Ct. at 2084. *Compare West*, 2014 U.S. Dist. LEXIS 25537, 2014
28 WL 794335 at *5-*6 (protected speech includes a prisoner's verbal expression of
an intent to submit a formal written grievance); *Hackworth*, 2011 U.S. Dist.
LEXIS 5476, 2011 WL 1811035 at *1 (rejecting defendant's argument that
prisoner's verbal objections to a prison policy during housing classification
committee meeting with prison staff was not protected by the First Amendment
because the inmate had not filed a written grievance); *Uribe*, 2011 U.S. Dist.
LEXIS 133, 2011 WL 9640 at *12 (prisoner's attempt to report a prison official's
misconduct, either "verbally or in writing, constitutes speech or conduct entitled
to First Amendment protection."), *with Johnson v. Carroll*, No. 2:08-cv-1494
KJN P, 2012 U.S. Dist. LEXIS 79380, 2012 WL 2069561 at *34 (E.D. Cal. June
7, 2012) (a prisoner's verbal statements and challenges made to defendant

1 incident to challenged strip search fall outside of First Amendment protection and
2 therefore plaintiff failed to state a First Amendment retaliation claim). *See also*
3 *McElroy v. Lopac*, 403 F.3d 855, 858-59 (7th Cir. 2005) (to support a retaliation
4 claim a prisoner’s speech “must relate to a public concern and not just a personal
5 matter to receive First Amendment protection”).

6 *Ahmed v. Ringler*, No. 2:13-cv-1050 MCE DAD P, 2015 U.S. Dist. LEXIS 14139, at *16-18
7 (E.D. Cal. Feb. 5, 2015). Because it was not well-established in 2011 that a verbal protest
8 constituted conduct protected by the First Amendment, plaintiff’s retaliation claim against
9 defendant Bahadur, which is based solely on his verbal protest of her job assignment, must be
10 dismissed on the basis of qualified immunity.

11 **IV. Order and Recommendation**

12 Accordingly, it is hereby ORDERED that defendants’ July 2, 2015 motion to strike (ECF
13 No. 32) is denied as moot.

14 Further, it is RECOMMENDED that defendant Bahadur’s May 9, 2015 motion to dismiss
15 plaintiff’s retaliation claim (ECF No. 27) be granted.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
21 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
22 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

23 DATED: February 25, 2016.

24 
25 EDMUND F. BRENNAN
26 UNITED STATES MAGISTRATE JUDGE
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