



1
2
3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 MARVIN NORDGAARDEN,

7 Plaintiff,

8 v.

9 ISIDRO BACA, et. al.,

10 Defendants.

Case No. 3:16-cv-00042-RCJ-WAGC

**REPORT & RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

11
12 This Report and Recommendation is made to the Honorable Robert C. Jones, Senior United
13 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to
14 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

15 Before the court is Defendant's Motion to Dismiss/Motion for Summary Judgment. (ECF
16 Nos. 20, 21.)¹ Plaintiff filed a response (ECF Nos. 24 (response), 25 (affidavit)²), Defendant filed
17 a reply brief. (ECF No. 26.)

18 After a thorough review, the court recommends that Defendant's motion be denied.

19 **I. BACKGROUND**

20 Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC),
21 proceeding pro se with this action pursuant to 42 U.S.C. § 1983. (Pl.'s Am. Compl., ECF No. 7.)
22 The events giving rise to this action took place while Plaintiff was housed at Northern Nevada
23 Correctional Center (NNCC). (*Id.*) Defendant is David Vest.

24 On screening, Plaintiff was allowed to proceed with a single retaliation claim against Vest.
25 (ECF No. 8.) This claim is based on allegations that on April 11, 2015, as he left the dining hall

26
27 ¹ These documents are identical.

28 ² The affidavit includes an argument concerning Plaintiff's free exercise claim, which District Judge Jones dismissed on screening.

1 with his Passover meal, Vest and an unknown officer approached Plaintiff and Vest confiscated
2 his meal. (ECF No. 7 at 8.) Plaintiff pointed to a sign that indicated inmates observing Passover
3 were permitted to eat their meals in their cells. (*Id.*) Vest then allegedly shoved Plaintiff against
4 the wall and ripped the sign off of the wall. (*Id.*) Plaintiff was then handcuffed, locked in a holding
5 cell and told, "I hope that your God is happy now!" (*Id.*) Plaintiff asserts he was denied food that
6 day and told he would be locked in the hole if he filed a complaint. (*Id.*)

7 Defendant Vest moves for summary judgment arguing that Plaintiff failed to properly
8 exhaust his administrative remedies before filing suit, and that Vest did not retaliate against
9 Plaintiff.

10 II. LEGAL STANDARD

11 As Defendant's motion relies on materials outside of the pleadings, the court will treat the
12 motion as one for summary judgment. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.
13 2001); *see also Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (the court
14 will "consider only allegations contained in the pleadings, exhibits attached to the complaint, and
15 matters properly subject to judicial notice.").

16 "The purpose of summary judgment is to avoid unnecessary trials when there is no dispute
17 as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468,
18 1471 (9th Cir. 1994) (citation omitted). In considering a motion for summary judgment, all
19 reasonable inferences are drawn in favor of the non-moving party. *In re Slatkin*, 525 F.3d 805, 810
20 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). "The court shall
21 grant summary judgment if the movant shows that there is no genuine dispute as to any material
22 fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On the other
23 hand, where reasonable minds could differ on the material facts at issue, summary judgment is not
24 appropriate. *See Anderson*, 477 U.S. at 250.

25 A party asserting that a fact cannot be or is genuinely disputed must support the
assertion by:

- 26 (A) citing to particular parts of materials in the record, including depositions,
27 documents, electronically stored information, affidavits or declarations,
stipulations (including those made for purposes of the motion only), admissions,
28 interrogatory answers, or other materials; or
(B) showing that the materials cited do not establish the absence or presence of a

1 genuine dispute, or that an adverse party cannot produce admissible evidence to
2 support the fact.

3 Fed. R. Civ. P. 56(c)(1)(A), (B).

4 If a party relies on an affidavit or declaration to support or oppose a motion, it "must be
5 made on personal knowledge, set out facts that would be admissible in evidence, and show that
6 the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

7 In evaluating whether or not summary judgment is appropriate, three steps are necessary:
8 (1) determining whether a fact is material; (2) determining whether there is a genuine dispute as
9 to a material fact; and (3) considering the evidence in light of the appropriate standard of proof.
10 See *Anderson*, 477 U.S. at 248-250. As to materiality, only disputes over facts that might affect
11 the outcome of the suit under the governing law will properly preclude the entry of summary
12 judgment; factual disputes which are irrelevant or unnecessary will not be considered. *Id.* at 248.

13 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
14 "When the party moving for summary judgment would bear the burden of proof at trial, 'it must
15 come forward with evidence which would entitle it to a directed verdict if the evidence went
16 uncontroverted at trial.'...In such a case, the moving party has the initial burden of establishing the
17 absence of a genuine [dispute] of fact on each issue material to its case." *C.A.R. Transp. Brokerage*
18 *Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations omitted). In
19 contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving
20 party can meet its burden in two ways: (1) by presenting evidence to negate an essential element
21 of the nonmoving party's case; or (2) by demonstrating the nonmoving party failed to make a
22 showing sufficient to establish an element essential to that party's case on which that party will
23 bear the burden of proof at trial. See *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

24 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
25 establish that a genuine dispute exists as to a material fact. See *Matsushita Elec. Indus. Co. v.*
26 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a genuine dispute of
27 material fact, the opposing party need not establish a genuine dispute of material fact conclusively
28 in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to
resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec.*

1 *Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quotation marks and citation omitted).
2 "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving
3 party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted). The
4 nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that
5 are unsupported by factual data. *Id.* Instead, the opposition must go beyond the assertions and
6 allegations of the pleadings and set forth specific facts by producing competent evidence that
7 shows a genuine dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

8 That being said,

9 [i]f a party fails to properly support an assertion of fact or fails to properly address
10 another party's assertion of fact as required by Rule 56(c), the court may: (1) give
11 an opportunity to properly support or address the fact; (2) consider the fact
12 undisputed for purposes of the motion; (3) grant summary judgment if the motion
and supporting materials—including the facts considered undisputed—show that
the movant is entitled to it; or (4) issue any other appropriate order.

13 Fed. R. Civ. P. 56(e).

14 At summary judgment, the court's function is not to weigh the evidence and determine the
15 truth but to determine whether there is a genuine dispute of material fact for trial. *See Anderson*,
16 477 U.S. at 249. While the evidence of the nonmovant is "to be believed, and all justifiable
17 inferences are to be drawn in its favor," if the evidence of the nonmoving party is merely colorable
18 or is not significantly probative, summary judgment may be granted. *Id.* at 249-50 (citations
19 omitted).

20 III. DISCUSSION

21 **A. Exhaustion**

22 **1. Standard**

23 The Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought with
24 respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner
25 confined in any jail, prison, or other correctional facility until such administrative remedies as are
26 available are exhausted." 42 U.S.C. § 1997e(a). An inmate must exhaust his administrative
27 remedies irrespective of the forms of relief sought and offered through administrative avenues.
28 *Booth v. Churner*, 532 U.S. 731, 741 (2001).

The failure to exhaust administrative remedies is "an affirmative defense the defendant

1 must plead and prove." *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v.*
2 *Bock*, 549 U.S. 199, 204, 216 (2007)), *cert. denied*, 135 S.Ct. 403 (Oct. 20, 2014). Unless the
3 failure to exhaust is clear from the face of the complaint, the defense must be raised in a motion
4 for summary judgment. *See id.* (overruling in part *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th
5 Cir. 2003) which stated that failure to exhaust should be raised in an "unenumerated Rule 12(b)
6 motion").

7 As such: "If undisputed evidence viewed in the light most favorable to the prisoner shows
8 a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts
9 are disputed, summary judgment should be denied, and the district judge rather than a jury should
10 determine the facts [in a preliminary proceeding]." *Id.*, 1168, 1170-71 (citations omitted).
11 "Exhaustion should be decided, if feasible, before reaching the merits of a prisoner's claim. If
12 discovery is appropriate, the district court may in its discretion limit discovery to evidence
13 concerning exhaustion, leaving until later—if it becomes necessary—discovery related to the
14 merits of the suit." *Id.* at 1170 (citing *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008)). If there
15 are disputed factual questions, they "should be decided at the very beginning of the litigation." *Id.*
16 at 1171.

17 Once a defendant shows that the plaintiff did not exhaust available administrative remedies,
18 the burden shifts to the plaintiff "to come forward with evidence showing that there is something
19 in his particular case that made the existing and generally available administrative remedies
20 effectively unavailable to him." *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d 767, 778
21 n. 5 (9th Cir. 1996)); *Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016) (inmate plaintiff did
22 not meet his burden when he failed to identify any actions prison staff took that impeded his ability
23 to exhaust his administrative remedies, or otherwise explain why he failed to comply with the
24 administrative remedies process). The ultimate burden of proof, however, remains with the
25 defendant. *Id.*

26 The Supreme Court has clarified that exhaustion cannot be satisfied by filing an untimely
27 or otherwise procedurally infirm grievance, but rather, the PLRA requires "proper exhaustion."
28 *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). "Proper exhaustion" refers to "using all steps the agency

1 holds out, and doing so *properly* (so that the agency addresses the issues on the merits).” *Id.*
2 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original). Thus,
3 “[s]ection 1997e(a) requires an inmate not only to pursue every available step of the prison
4 grievance process but also to adhere to the ‘critical procedural rules’ of that process. *Reyes v.*
5 *Smith*, 810 F.3d 654, 657 (9th Cir. 2016) (quoting *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)). “[I]t
6 is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.”
7 *Jones v. Bock*, 549 U.S. 199, 218 (2007). That being said, an inmate exhausts available
8 administrative remedies “under the PLRA despite failing to comply with a procedural rule if prison
9 officials ignore the procedural problem and render a decision on the merits of the grievance at each
10 available step of the administrative process.” *Reyes*, 810 F.3d at 658.

11 To reiterate, an inmate need only exhaust “available” administrative remedies. *See Ross v.*
12 *Blake*, 136 S.Ct.1850, 1858 (2016). “Accordingly, an inmate is required to exhaust those, but only
13 those, grievance procedures that are ‘capable of use’ to obtain “some relief for the action
14 complained of.” *Id.* at 1859 (quoting *Booth*, 532 U.S. at 738).

15 If the court concludes that administrative remedies have not been properly exhausted, the
16 unexhausted claim(s) should be dismissed without prejudice. *Wyatt*, 315 F.3d at 1120, *overruled*
17 *on other grounds by Albino*, 747 F.3d 1162.

18 “If the district judge holds that the prisoner has exhausted available administrative
19 remedies, that administrative remedies are not available, or that a prisoner's failure to exhaust
20 available remedies should be excused, the case may proceed to the merits.” *Albino*, 747 F.3d at
21 1171.

22 **2. NDOC Exhaustion Requirements**

23 NDOC’s Administrative Regulation (AR) 740 governs the grievance process and
24 exhaustion of administrative remedies. (See ECF No. 20-4.) Inmates are required to attempt to
25 resolve grievable issues through discussion with their caseworker, and if unsuccessful, must
26 proceed through three levels of grievances to complete the process: the informal, first and second
27 levels. (ECF No. 20-4 at 5- AR 740.04-740.) An inmate dissatisfied with the response to a
28 grievance at any level may appeal to the next level. (ECF No. 20-4 at 4, AR 740.03.6.) If a

1 response is overdue, the inmate may proceed to the next grievance level. (ECF No. 20-4 at 5, AR
2 740.03.9.B.)

3 For civil rights issues, the first level grievance must be initiated within six months. (ECF
4 No. 20-4 at 6, AR 740.05.4.A.) All documentation and factual allegations available to the inmate
5 must be submitted at the informal level. (ECF No. 20-4 at 7, AR 740.05.5.A.) The grievance
6 must also include the remedy sought by the inmate to resolve the claim. (ECF No. 20-4 at 7, AR
7 740.05.6.) Failure to submit a remedy is considered an improper grievance and the grievance will
8 be returned to the inmate using form DOC-3098, the improper grievance memorandum. (ECF
9 No. 20-4 at 7, AR 740.05.6.A.) The time limit for a response to an informal level grievance is
10 forty-five days from the date the grievance is received by the grievance coordinator to the date it
11 is returned to the inmate. (ECF No. 20-4 at 8, AR 740.05.12.) The inmate then has five days
12 from receipt of the response to proceed to the next grievance level. (ECF No. 20-4,
13 AR 740.05.12.A.)

14 At the first level, the inmate must provide a signed, sworn declaration of facts that form
15 the basis for his claim that the informal response to the grievance is incorrect, which should
16 include a list of persons with relevant knowledge or information and any additional relevant
17 documentation. (ECF No. 20-4 at 8, AR 740.06.2.) If the first level grievance does not comply
18 with procedural guidelines, it is to be returned to the inmate, unprocessed, with instructions using
19 form DOC-3098 (if applicable) for proper filing. (ECF No. 20-4 at 9, AR 740.06.3.) The prison
20 has forty-five days from the date the grievance is received by the grievance coordinator to give
21 the inmate a response to the first level grievance. (ECF No. 20-4 at 9, AR 740.06.4.) The inmate
22 then has five days from the date he receives the response to proceed to the next grievance level.
23 (ECF No. 20-4 at 9, AR 740.06.4.A.)

24 The time limit for a response to a second level grievance is sixty days, from the date the
25 grievance is received by the grievance coordinator to the date it is returned to the inmate. (ECF
26 No. 20-4 at 9, AR 740.07.3.) Administrators are required to respond to the second level
27 grievance, specifying the decision and reasons, and return it to the grievance coordinator. (ECF
28 No. 20-4 at 10, AR 740.07.4.)

1 AR 740 also discusses abuse of the inmate grievance process, stating that inmates are
2 prohibited from abusing the prison grievance system by “knowingly, willfully or maliciously
3 filing frivolous or vexatious grievances.” (ECF No. 20-4 at 11, AR 740.09.1.) Abuses of the
4 inmate grievance procedure include, *inter alia*: including specific claims or incidents previously
5 filed by the inmate, and a grievance that contains two or more appropriate issues. (ECF No. 20-4
6 at 11, AR 740.09.2.B, F.) If this is the case, the caseworker returns a copy of the improper
7 grievance to the inmate with form DOC-3098, noting the specific violation. (ECF No. 20-4 at 11,
8 AR 740.09.3.A.) This section of AR 740 implies that an inmate may re-submit the improper
9 grievance, but must do so within the prescribed timeframe. (ECF No. 20-4 at 11, AR
10 740.09.4.A.)

11 Defendant identifies two grievances where Plaintiff attempted to exhaust his
12 administrative remedies relative to this action: grievance 20062998812 and grievance
13 20063011050. With respect to grievance 20062998812, Defendant argues that Plaintiff
14 improperly submitted a second level grievance before he submitted the first level grievance, and
15 failed to correct the deficiency as instructed. (ECF No. 20 at 2-3, 8; ECF No. 26 at 3.) As to
16 grievance 20063011050, Defendant contends that Plaintiff failed to submit an informal level
17 grievance that complied with AR 740, after being instructed as such. (ECF No. 20 at 3, 7.)

18 **3. Grievance 20062998812**

19 Defendant acknowledges that Plaintiff filed an informal level grievance for grievance
20 20062998812 on April 21, 2015 (ECF No. 20 at 2:20-22), though Defendant did not actually
21 submit the grievance as evidence in support of his motion. (*See* ECF No. 20-3 at 2-6.) Plaintiff
22 did provide the informal level grievance in support of his opposition. (ECF No. 24 at 35-38.) The
23 first page is difficult to read, but the continuing pages assert that Plaintiff told Vest about a sign
24 posted in the culinary, and Vest went inside and in a rage, Vest ripped the sign down. (ECF No.
25 24 at 36.) Plaintiff asserts that his Passover meal was pre-approved and that every meal up to that
26 point had been allowed to be taken out of the culinary. (ECF No. 24 at 37.) He claimed that he
27 was punished as he could not eat around leavened bread and did not receive his meals. (*Id.*) He
28 references retaliation. (*Id.* at 38.)

1 According to Defendant, Plaintiff received a response denying this informal level
2 grievance. (ECF No. 20 at 2:23, citing Exhibit B at 1.) The document Defendant relies on—the
3 first page of Defendant’s Exhibit B—is an improper grievance memorandum dated
4 September 25, 2015, which advised Plaintiff he had to complete a first level grievance before
5 proceeding to the second level. (ECF No. 20-3 at 2.) It appears that this refers to the second level
6 grievance Plaintiff later filed, and not the informal level grievance as Defendant suggests.

7 According to Plaintiff, he did not receive a response to the informal level grievance
8 within AR 740’s forty-five-day timeline, and so, as he is permitted to do under the regulation, he
9 moved to the next level and filed his first level grievance. He submits a copy of this grievance,
10 which appears to be dated July 9, 2015. (ECF No. 24 at 39.) The first level grievance states: “As
11 previously stated in my informal that has of yet been answered and is overdue to be answered
12 and as is stated in NRS 740.03-I may proceed to the next level.” (*Id.*) This document
13 corroborates Plaintiff’s statement that he did not timely receive a response to the informal level
14 grievance, and did in fact file a first level grievance. He says he never got a response to the first
15 level grievance, and his caseworker, Ms. Moses, asked him about it the first level grievance and
16 advised him to move on to the next level. (ECF No. 24 at 34.)

17 According to Defendant, Plaintiff tried to appeal the decision on the *informal level*
18 *grievance* by skipping the first level grievance and filing a second level grievance related to the
19 same issue. (ECF No. 20 at 2:23-25, citing Exhibit B at p. 2.) Defendant points to the second
20 level grievance Plaintiff filed dated September 21, 2015. (ECF No. 20-3 at 3; *see also* ECF No.
21 24 at 40-45.)³ The second level grievance stated that during Passover he is not supposed to eat
22 his meal near unleavened bread, and Ms. Moses had volunteered her time to supervise the
23 inmates when they took some meal items to chapel. (ECF No. 24 at 41.) On the Friday evening
24 meal, however, Plaintiff was told he could not take his meal out of the culinary. (*Id.*) He was

25
26 ³ A comparison of the second level grievance submitted by Defendant with that submitted by Plaintiff reveals
27 that Defendant did not provide the court with the entirety of the grievance, but only the first page. In the future, defense
28 counsel shall provide all of the relevant grievance documentation. This is important because if, for example, a
defendant argues that a grievance was rejected for improperly containing more than one appropriate issue, the court
needs the entirety of the grievance to review in order to determine whether the grievance did in fact contain more than
one appropriate issue in addressing whether the plaintiff properly exhausted administrative remedies and whether
those remedies were in fact available to the plaintiff.

1 cuffed and taken to operations by the officer who put him in a cell and stated: "I hope your God
2 is proud of you now." (*Id.*) He also states that staff "wanted my informal to disappear,"
3 presumably referring to his informal level grievance (which he claims went unanswered). (*Id.*)
4 He referred to the incident where he told the officer of the sign posted on the wall stating that the
5 inmates were allowed to take their meals out of the culinary, and that Defendant Vest tore the
6 sign down. (*Id.* at 43.)

7 This second level grievance is dated September 21, 2015, which corresponds with the
8 September 25, 2015 improper grievance memorandum advising Plaintiff he had to complete the
9 first level grievance proceeding to the second level. (ECF No. 20-3 at 2.) It also corroborates
10 Plaintiff's claim that he never received a response to the first level grievance, as it was filed after
11 the forty-five-day timeframe would have expired and allowed him to move to the second level
12 pursuant to AR 740.

13 Defendant does not address Plaintiff's argument that his informal grievance was never
14 responded to, but his claim is corroborated by the fact that Defendant did not produce a response
15 to the informal grievance (or the informal grievance itself) in support of his motion. Nor does
16 Defendant discuss Plaintiff's claim that he did in fact file a first level grievance when he did not
17 get a response to the informal level grievance after forty-five days. Defendant's reply brief does
18 not acknowledge the actual first level grievance document Plaintiff submitted in support of his
19 opposition. Therefore, the court has no evidence contradicting that Plaintiff did file the first level
20 grievance and that he received no response and proceeded with his second level grievance.

21 Plaintiff apparently resubmitted his second level grievance three more times, and each time
22 it was rejected as improper because he did not file his first level grievance. (Improper grievance
23 memoranda dated October 16, 2015, November 17, 2015, and December 10, 2015 at ECF No. 20-
24 3 at 4, 5, 6.)

25 The evidence before the court indicates that Plaintiff filed his informal grievance on
26 April 21, 2015. He did not receive a response and filed his first level grievance on July 9, 2015.
27 Again, he received no response, and he filed his second level grievance on September 21, 2015.
28 The second level grievance was erroneously rejected (several times) for not being preceded by a

1 first level grievance. Accordingly, the court concludes Plaintiff did exhaust available
2 administrative remedies with respect to grievance 20062998812. Therefore, Defendant's motion
3 for summary judgment should be denied insofar as he argues Plaintiff failed to exhaust his
4 administrative remedies. As a result of this finding, the court need not address whether Plaintiff
5 exhausted his administrative remedies via grievance 20063011050.

6 **B. Retaliation**

7 To reiterate, on screening, Plaintiff was allowed to proceed with a retaliation claim based
8 on the allegations that Defendant Vest confiscated his meal, shoved him, placed him in a holding
9 cell and threatened him because Plaintiff was exercising his First Amendment right to practice
10 his religious faith. (*See* ECF No. 8 at 6.)

11 "Section 1983 provides a cause of action for prison inmates whose constitutionally
12 protected activity has resulted in retaliatory action by prison officials." *Jones v. Williams*, 791
13 F.3d 1023, 1035 (9th Cir. 2015); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Such a
14 claim consists of five elements:

15 (1) An assertion that a state actor took some adverse action against an inmate (2)
16 because of (3) that prisoner's protected conduct, and that such action (4) chilled
17 the inmate's exercise of his First Amendment rights, and (5) the action did not
18 reasonably advance a legitimate correctional goal.

19 *Jones*, 791 F.3d at 1035 (quoting *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

20 "[A] claim for retaliation can be based upon the theory that the government imposed a burden on
21 the plaintiff, more generally 'because he exercise[d] a constitutional right.'" *Blaisdell v.*
22 *Frappiea*, 729 F.3d 1237 (9th Cir. 2013) (citations omitted).

23 According to Defendant, on April 11, 2015, several Jewish inmates requested to take
24 their meals to their assigned housing unit, and were directed to a posted memo that allowed them
25 to take their meal to the chapel on April 9 and 10, 2015, in observance of Passover. (ECF No.
26 20-2, Vest Decl. at ¶ 4.) The memo stated that on April 11 and 12, 2015, the Passover meal was
27 to be eaten in the culinary and not removed. (*Id.*) Defendant asserts that the Jewish inmates were
28 not allowed to take their meals outside of the culinary on April 11 and 12, 2015, because there
were no staff members who could oversee the inmates eating in the Chapel on those dates. (*Id.* ¶
5.) Defendant claims that he directed Plaintiff to the memo, but Plaintiff attempted to remove his

1 meal from the culinary, and when Defendant questioned him about it, he stated the memo was
2 wrong and confusing because he had been allowed to eat his meal outside the culinary on April 9
3 and 10, 2015. (*Id.* ¶ 6.) Defendant asserts that Plaintiff became irate and loud, and Defendant told
4 him he could sit down and eat or throw the meal away. (*Id.* ¶ 7.) Plaintiff responded that the
5 memo was wrong and was breaking the law. (*Id.*) At that point, Defendant took the posted memo
6 down and again asked Plaintiff to sit and eat or return to his unit. (*Id.*) Plaintiff said he wanted to
7 file a grievance with shift command, and in response Defendant restrained Plaintiff and
8 transferred him to another officer who escorted him to the cell to wait to speak with shift
9 command. (*Id.* ¶¶ 7-8.)

10 Defendant argues that he is entitled to dismissal or summary judgment because Plaintiff
11 alleges that Vest threatened to lock Plaintiff in the hole if he filed a complaint, and this verbal
12 threat is not an act, but merely a threat to act in the future which cannot state a retaliation claim.
13 (ECF No. 20 at 9:23-27.)

14 Plaintiff takes issue with Defendant's recitation of the facts. He contends that he was
15 trying hard to explain that there was a posted memo inside the culinary that had Plaintiff's name
16 and number on it and stated that Plaintiff was allowed to take his meal out during Passover. (ECF
17 No. 24 at 2.) He claims that he was cuffed so violently that his cup fell out of his hand, and was
18 told he would regret going to operations. (*Id.*) When he was attempting to exercise his religious
19 rights, he was told he had to eat in the culinary or throw his meal away. (*Id.*) He says that there
20 was no reason why Plaintiff was stopped from taking his meal out of the culinary. (*Id.* at 5.) He
21 claims that Defendant is misleading the court into believing that the meals brought out of the
22 culinary are eaten at the chapel, implying the meal could be eaten in the cell. (*Id.* at 7-8.)

23 As a result, the court finds a genuine dispute exists as to various material facts
24 surrounding the retaliation claim.

25 In addition, Defendant's argument that a mere threat does not constitute retaliation
26 ignores Plaintiff's claim that Vest did not just threaten to throw him in the hole, but confiscated
27 his meal, shoved him and placed him in a holding cell because he was exercising his right to
28 practice his religion by leaving the culinary to eat his meal, which he contends is required during

1 Passover. Moreover, Defendant’s argument is directly contradicted by the Ninth Circuit. “[T]he
2 mere *threat* of harm can be an adverse action, regardless of whether it is carried out because the
3 threat itself can have a chilling effect.” *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009).
4 “By its very nature, a statement that ‘warns’ a person to stop doing something carries the
5 implication of some consequence of a failure to heed that warning.” *Id.* “The power of a threat
6 lies not in any negative actions eventually taken, but in the apprehension it creates in the
7 recipient of the threat.” *Id.* at 1271. The district court case Defendant relies on, *Walker v. Kebler*,
8 3:08-cv-00495-LRH-VPC, 2009 WL 837879 (D. Nev. Mar. 27, 2009)⁴, was decided *before*
9 *Brodheim*.

10 Finally, insofar as Defendant implies he is entitled to summary judgment because his
11 conduct was supported by a legitimate penological interest (safety and security because there
12 was no one to monitor the chapel on that date), Plaintiff raises a genuine dispute of material fact
13 as to this element of his claim. Plaintiff disputes the assertion that Defendant’s conduct was
14 supported by a legitimate penological interest as he states that the meal did not need to be eaten
15 in the chapel, but could have been eaten in his cell (which is consistent with his allegation in the
16 Amended Complaint that he pointed to a sign that said those observing Passover were permitted
17 to eat their meals in their cells (*see* ECF No. 7 at 8)).

18 Because there are disputed issues of material fact and Defendants’ legal argument
19 concerning the threat is unfounded, Defendant’s motion for summary judgment as to the merits
20 of Plaintiff’s retaliation claim should be denied.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 _____

28 ⁴ Defendant’s citation to *Walker* (2009 WL 837979) is incorrect. The correct citation is *Walker v. Kebler*,
3:08-cv-00495-LRH-VPC, 2009 WL 837879 (D. Nev. Mar. 27, 2009).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order DENYING Defendant's motion (ECF Nos. 20/21.)

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the district judge.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment by the district court.

DATED: June 23, 2017



WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE