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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 MARIO WILSON,

CASE NO. C19-5920 BHS

9 Plaintiff,

ORDER

v.

10 RICHARD POOR,

11 Defendant.

12
13 THIS MATTER is before the Court on Defendant Richard Poor's third motion for
14 summary judgment, Dkt. 153, and on pro se Plaintiff Mario Wilson's third motion for
15 appointment of counsel, Dkt. 162.

16 The case's factual and procedural history is thoroughly described in prior orders,
17 including most recently Magistrate Judge Theresa L. Fricke's January 3, 2023 Report and
18 Recommendation (R&R), Dkt. 81, and this Court's Order adopting that R&R, Dkt. 94.

19 The facts are not complicated, though the procedural history is long. On May 5,
20 2019, Wilson was a prisoner at Stafford Creek Correctional Center. Wilson's initial
21 complaint alleges he got into a verbal altercation with Poor, a cook in the prison's
22 kitchen, over the start date of Ramadan, and over Wilson's request for a Ramadan meal.

1 According to Wilson, Poor ordered Wilson to leave the kitchen, or Poor would “beat
2 [Wilson’s] ass.” Dkt. 5 at 3. *See also* Dkt. 94 at 2. Wilson’s contemporaneous grievance
3 is attached to his amended complaint:

4 I informed A/C Ronald Poor that his statement was incorrect & he didn’t
5 know what he was talking about. Upon hearing that, A/C Ronald Poor’s
6 whole face turned red as he screamed as loud as he could “GET THE
7 FUCK OUT OF MY KITCHEN!” In Mr. R. Poor’s rage, he went even
8 further and boldly stated that he would “BEAT MY ASS” if I didn’t leave
9 his (A/C Ronald Poor) kitchen.

10 Dkt. 37 at 18; *see also* Dkt. 43-3 at 2.

11 Wilson sued in September 2019, asserting that Poor had violated Wilson’s
12 constitutional right to free exercise of religion. Dkt. 5. Wilson’s amended complaint
13 asserts that Poor became “enraged” about Wilson’s request for a Ramadan meal and
14 “interrupted” Wilson’s speech, “subjecting him” to Poor’s religious interpretation, and
15 violating Wilson’s religious freedom. Dkt. 37 at 3. Wilson alleges that he then
16 “threatened to file a formal paper grievance” and Poor “became belligerent” and
17 threatened to cause Wilson bodily harm for exercising his rights. He asserts that Poor
18 retaliated further by sending Wilson back to his living unit, without a meal. *Id.*

19 The Court dismissed Wilson’s religious freedom claim because he did not exhaust
20 his administrative remedies. *See* Dkts. 66 and 73. Poor previously sought summary
21 judgment on Wilson’s retaliation claim, arguing that there was no evidence supporting it,
22 that Poor was entitled to qualified immunity, and that Wilson was not entitled to
damages. Dkt. 71.

1 Judge Fricke agreed that Poor was entitled to qualified immunity on Wilson's
2 claim that Poor retaliated against him by ordering him out of the prison kitchen based on
3 his religious meal request, and recommended that the Court grant summary judgment on
4 that claim. Dkt. 81 at 9. But she concluded there were questions of fact about whether
5 Poor threatened Wilson with violence in retaliation for Wilson threatening to file a
6 grievance, and that Poor was not entitled to qualified immunity on that claim. *Id.* Her
7 R&R recommended the Court deny Poor's summary judgment motion on that claim. *Id.*
8 at 11.

9 Poor objected to the R&R, arguing that Wilson's claim that Poor retaliated against
10 him for threatening to file a grievance was unsupported by any evidence, and was
11 contradicted by his own grievance. Dkt. 83. Poor claimed that the R&R did not address
12 all his arguments, or address his claim that Wilson was not entitled to compensatory
13 damages.

14 The Court adopted the R&R, concluding that because Poor's arguments about the
15 deficiencies in Wilson's second retaliation theory were raised for the first time in his
16 Objections to the R&R, and Wilson had no opportunity to respond. Dkt. 94 at 6. It denied
17 Poor's summary judgment motion on Wilson's "second" retaliation theory. It granted
18 Poor's motion and dismissed Wilson's claim for compensatory damages but denied
19 Poor's claim seeking dismissal of Wilson's claim for punitive damages. *Id.* at 10.

20 Wilson's only remaining claim is that Poor threatened Wilson with physical
21 violence because Wilson told Poor that he was going to "grieve" Poor's refusal to serve
22 him a Ramadan meal.

1 Poor again seeks summary judgment on this claim. Dkt. 153. He asserts there is no
2 evidence supporting Wilson’s claim that Poor retaliated against him by threatening him
3 with bodily harm and removing him from the prison kitchen because Wilson threatened
4 to file a grievance over the denial of his Ramadan meal, in violation of his First
5 Amendment rights. Dkt. 153.

6 Summary judgment is proper if the pleadings, the discovery and disclosure
7 materials on file, and any affidavits show that there is “no genuine dispute as to any
8 material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
9 P. 56(a). In determining whether an issue of fact exists, the Court must view all evidence
10 in the light most favorable to the nonmoving party and draw all reasonable inferences in
11 that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986);
12 *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact
13 exists where there is sufficient evidence for a reasonable factfinder to find for the
14 nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is “whether the evidence
15 presents a sufficient disagreement to require submission to a jury or whether it is so one-
16 sided that one party must prevail as a matter of law.” *Id.* at 251–52. The moving party
17 bears the initial burden of showing that there is no evidence which supports an element
18 essential to the nonmovant’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
19 Once the movant has met this burden, the nonmoving party then must show that there is a
20 genuine issue for trial. *Anderson*, 477 U.S. at 250. If the nonmoving party fails to
21 establish the existence of a genuine issue of material fact, “the moving party is entitled to
22 judgment as a matter of law.” *Celotex*, 477 U.S. at 323–24. There is no requirement that

1 the moving party negate elements of the non-movant's case. *Lujan v. Nat'l Wildlife*
2 *Fed'n*, 497 U.S. 871, 885 (1990). Once the moving party has met its burden, the non-
3 movant must then produce concrete evidence, without merely relying on allegations in
4 the pleadings, that there remain genuine factual issues. *Anderson*, 477 U.S. at 248.

5 To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1)
6 the defendant must be a person acting under color of state law, (2) and his conduct must
7 have deprived the plaintiff of rights, privileges or immunities secured by the constitution
8 or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*
9 *other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). Implicit in the second
10 element is a third element of causation. *See Mt. Healthy City School Dist. Bd. of Educ. v.*
11 *Doyle*, 429 U.S. 274, 286-87 (1977); *Flores v. Pierce*, 617 F.2d 1386, 1390-91 (9th Cir.
12 1980), *cert. denied*, 449 U.S. 875 (1980). Section 1983 is not merely a "font of tort law."
13 *Parratt*, 451 U.S. at 532, *overruled on other grounds by Daniels*, 474 U.S. 327 (quoting
14 *Paul v. Davis*, 424 U.S. 693, 701 (1976)). That a plaintiff may have suffered harm, even
15 if due to another's negligent conduct, does not in itself necessarily demonstrate an
16 abridgment of constitutional protections. *Davidson v. Cannon*, 474 U.S. 344, 347 (1986).


17 To prevail on his § 1983 retaliation claim, Wilson must provide evidence which,
18 viewed in the light most favorable to him, establishes that (1) he was subjected to an
19 adverse action; (2) the adverse action was imposed because he engaged in legally
20 protected conduct;; (3) the adverse action chilled the prisoner's exercise of his First
21 Amendment rights; and (4) the adverse action did not advance a legitimate penological
22 goal. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2004). In addition, Wilson must

1 show the retaliation was the substantial or motivating factor behind the conduct of the
2 prison official. *See Mt. Healthy*, 429 U.S. 274; *Brodheim v. Cry*, 584 F.3d 1262, 1271
3 (9th Cir. 2009).

4 Poor argues that because they are so easy to assert, prisoner retaliation claims must
5 be viewed with skepticism to avoid interfering with prison operations. Dkt. 153 at 5
6 (citing *Canell v. Multnomah Cnty*, 141 F. Supp. 2d. 1046, 1059 (D. Or. 2001)). He argues
7 Wilson’s current claim—that Poor became enraged and threatened him only after he
8 threatened to grieve the denial of his Ramadan meal—is not supported by Wilson’s own
9 grievance. Dkt. 153 at 5 (citing Dkt. 43-3; *see also* Dkt. 37 at 18)). It argues that instead,
10 Wilson consistently attributed Poor’s “rage” to Wilson’s request for a Ramadan meal,
11 and to the parties’ heated disagreement about when Ramadan started. Wilson’s
12 contemporaneous grievance does not mention that he threatened to file a formal
13 grievance at all; it instead asserts merely that Poor became red-faced with rage and
14 threatened to “beat his ass” after Wilson told Poor that Poor “did not know what he was
15 talking about.” Dkt. 43-3 at 2.

16 Wilson signed a type-written version of his grievance a week later. Dkt. 43-3 at 3.
17 In a follow-up interview a month later, Wilson confirmed that Poor became “pissed
18 highly upset” when Wilson told him he did not know what he was talking about:

- 19 5. During your conversation with A/C Poor did the conversation escalate? When I said you do not
20 know what you are talking about he got pissed highly upset about what I said A/C Poor shouted get
the fuck out of my kitchen, he also stated he would beat my ass.
21 6. Is there anything else you would like to add? nope

22 I Mario Wilson agree with interview questions
 5-5-19

1 Dkt. 43-3 at 6.

2 Wilson made no mention of his own threat to file a grievance, at all, much less that
3 it was the motivation for Poor threatening him. Poor also points out that none of the other
4 witnesses testified that the situation escalated when Wilson threatened to file a grievance.
5 Dkt. 153 at 6 (citing Dkt. 43-3 at 5-8). He argues that a retaliation claim is not plausible if
6 there are more likely explanations for the action. *Id.* at 5 (citing *Ashcroft*, 556 U.S. at
7 681).

8 Wilson's Response to reiterates that he was engaging in protected religious
9 activities "(i.e. the right to receive Ramadan meal(s), right to pray, etc.)." Dkt. 160 at 2.
10 He asserts that that Poor retaliated against him and threatened to beat his ass if he did not
11 leave the kitchen, again because he threatened to file a formal grievance. He cites only
12 his own amended complaint as support for that conclusion. Dkt. 160 at 2 (citing Dkt. 37
13 at ¶9).

14 But Wilson's newly-minted explanation for why Poor threatened him and removed
15 him from the kitchen is flatly inconsistent with Wilson's prior, contemporaneous
16 articulations of the events, and it is not supported by any evidence. Wilson consistently
17 reported and alleged that Poor became enraged after, and because, Wilson told him he did
18 not know what he was talking about, regarding the start of Ramadan and Wilson's
19 resulting right to a Ramadan meal. Dkt. 43-3 at 2, 3, 6. He did not claim at the time that
20 what set Poor off was instead his threat to file a grievance; neither he nor any of the
21 witnesses reported at the time that he even threatened to file a grievance. When he was
22 interviewed a month after the incident, Wilson again did not mention that he threatened

1 to file a grievance, or his threat was what motivated Poor to have him removed from the
2 kitchen. When asked if there was anything else he wanted to add, he said “nope.” Dkt.
3 43-3 at 6.

4 Wilson did not allege or suggest that Poor had some other motive for his rage or
5 his actions until Wilson filed his amended complaint—more than two years after the
6 incident. *See* Dkt. 37. Wilson sought and obtained leave to file an amended complaint
7 after Judge Fricke recommended that this Court dismiss his initial complaint, for failure
8 to state a plausible claim. Dkt. 20. Her R&R explained:

9 [T]he Ninth Circuit has held that the use of vulgar words, verbal
10 harassment and verbal abuse by prison administrators are insufficient,
11 without further conduct, to state a constitutional deprivation under
12 Section 1983. *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987);
13 *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996). Accordingly,
14 plaintiff’s allegations of vulgar language and verbal harassment are
15 insufficient without further factual development to state a cause of action
16 under Section 1983.

17 Dkt. 20 at 4.

18 The Court agrees with Poor that there is no evidence supporting Wilson’s second
19 retaliation claim. Wilson changed his story, and he has yet to explain why. The Court
20 also notes that there is a “more likely explanation” for the event, the one that Wilson
21 himself recognized in his initial grievance: Poor was angered because a prisoner
22 demanded a religious meal before the Ramadan start date formally recognized by the
prison, and Wilson continued to argue about it, telling the cook that he did not know what
he was talking about. *See* Dkt. 43-3 at 2, 3, 6. A retaliation claim is not plausible when
there are “more likely” explanations for the conduct at issue. *Ashcroft*, 556 U.S. at

1 681. Wilson's initial version of the events is consistent with Poor's explanation (at the
2 time and since) that he asked an officer to remove Wilson from his kitchen to preclude
3 escalation of the verbal dispute.

4 The Court also notes that, though Poor's current motion does not specifically
5 address the issue, it remains Wilson's burden in the face of a summary judgment motion
6 to affirmatively demonstrate that his removal from the kitchen had no valid penological
7 purpose. He has not done so, as a matter of law.

8 Finally, to comply with the Prison Reformed Litigation Act's exhaustion
9 requirement, a plaintiff must administratively exhaust each of the claims raised in the
10 complaint. *Jones v. Bock*, 549 U.S. 199, 219 (2007); *Cleveland v. Anderson*, 223 Fed.
11 Appx. 652, 652 (9th Cir. 2007). The Court also points out that, as was the case with his
12 religious freedom claim, Wilson has not exhausted his administrative remedies on this
13 revised version of his retaliation claim, as a matter of law. He did not ever "grieve" this
14 issue; he raised it first in his amended complaint.

15 For these reasons, Poor's summary judgment motion on Wilson's remaining,
16 second retaliation claim is **GRANTED**, and that claim is **DISMISSED** with prejudice.
17 Wilson's third motion for appointment of pro bono counsel is **DENIED** as moot.
18 Wilson's *in forma pauperis* status **SHALL CONTINUE** in the event of an appeal, for
19 the reasons articulated in Judge Fricke's R&Rs, Dkts. 66 and 81.

20 The clerk shall enter a **JUDGMENT** and close the case.

21 **IT IS SO ORDERED.**

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1 Dated this 13th day of November, 2023.

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4 BENJAMIN H. SETTLE
5 United States District Judge
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