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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

David L. Gossett,

Plaintiff,

vs.

Robert Stewart, et al.,

Defendants.

) No. CV 08-2120-PHX-DGC (ECV)

) **ORDER**

Plaintiff David L. Gossett, who is confined in the Arizona State Prison Complex-Eyman, Meadows Unit, in Florence, Arizona, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983. (Doc.# 4.)¹ The Court ordered Defendants Fernandez, Bollweg, and Daters to answer Plaintiff’s retaliation, excessive force, and failure to protect claims against them in the Complaint and dismissed the remaining claims and Defendants without prejudice. Plaintiff has filed a motion for reconsideration regarding the dismissal of claims against Warden Robert Stewart and Deputy Warden Alex Davenport. (Doc.# 6.) The motion will be denied.

Generally, motions to reconsider are appropriate only if the Court “(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.” School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). A

¹ “Doc.#” refers to the docket number of filings in this action.

1 motion for reconsideration should not be used to ask a court “to rethink what the court had
2 already thought through, rightly or wrongly.” Above the Belt, Inc. v. Mel Bohannon
3 Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983)). Rather, such arguments should be
4 directed to the court of appeals. Sullivan v. Faras-RLS Group, Ltd., 795 F. Supp. 305, 309
5 (D. Ariz. 1992).

6 In his Complaint, Plaintiff sued Warden Robert Stewart and Deputy Warden Alex
7 Davenport. As stated in the prior Order, Plaintiff alleged the following facts:

8 Plaintiff is 55 years old. He has been diagnosed with a “chronic respiratory
9 disorder” and must use a cane or wheelchair due to multiple back injuries.
10 Since 2000, Plaintiff has been assigned to special medical needs housing that
11 units based on his medical conditions. On November 17, 2007, Plaintiff was
12 transferred to the Cook Unit and assigned to building 5, which complies with
13 the Americans with Disabilities Act (ADA). Plaintiff had a Special Need
14 Order (SNO) from his treating physicians for assignment to a lower bunk.

15 In March 2008, Plaintiff was taken to the infirmary for a respiratory
16 problem and was initially examined by a nurse. When the nurse left the room
17 momentarily, Defendant Fernandez ordered Plaintiff to return to his housing
18 unit. Plaintiff explained to Fernandez that he was waiting to see the doctor,
19 but Fernandez escorted him out of the infirmary and put him in a fenced
20 enclosure. While in the enclosure, Plaintiff complained to Defendant
21 Davenport about Fernandez’s interference with his medical care. Plaintiff was
22 then returned to the infirmary. While Plaintiff received a breathing treatment
23 in the infirmary, Fernandez appeared, looking angry, and told Plaintiff that he
24 was putting him “on report” for disobeying a direct order. Following
25 completion of the treatment, Fernandez put Plaintiff back in the enclosure and
26 told him that he was going to be transferred to the Special Management Unit
27 (SMU) and placed in isolation. While confined at SMU, Plaintiff complained
28 in writing to Defendants Stewart and Davenport about Fernandez’s actions and
requested an investigation, but they failed to take action. Plaintiff was found
guilty of disobeying a direct order, but the charge was dismissed on appeal.

On July 3, 2008, Plaintiff was transferred back to the Cook Unit and
assigned to Building 5. On July 8, 2008, he was informed that he was being
transferred to an upper bunk in a building without ADA accommodations.
Plaintiff informed staff of the SNO that required his assignment to a lower
bunk in an ADA-compliant facility. Fernandez was summoned and Plaintiff
repeated that he had a SNO and that his record documented his need to be
housed in an ADA-compliant facility. Stating that Plaintiff did not have a
reason to remain in the medical housing unit, Fernandez escorted Plaintiff to
the transportation enclosure. Without warning, Fernandez and Defendant
Bollweg snatched Plaintiff’s cane and violently twisted Plaintiff’s hands and
wrists behind his back for cuffing, causing Plaintiff to fall in extreme pain and
resulting in serious physical injury. Fernandez “drove” his knee into
Plaintiff’s back while he, Bollweg, and others continued to twist Plaintiff’s
hands, wrists, and arms beyond that necessary to cuff him. Defendant Dater
and other corrections staff witnessed the excessive use of force, but failed to
intervene to protect Plaintiff. Fernandez then ordered that Plaintiff be

1 shackled. The shackles were so tightly applied, despite the absence of
2 resistance by Plaintiff, that he again suffered extreme and unnecessary pain.
3 Shortly after his placement in the transportation enclosure, Lieutenant Sutton
4 and Officer Madsen approached the enclosure and confirmed that Plaintiff had
5 a verified need to be housed in Building 5 and Plaintiff was taken to the
6 infirmary. There, Plaintiff received injections for pain and the physician
7 ordered Plaintiff's meals to be delivered to him in Building 5. Fernandez and
8 housing unit staff charged Plaintiff with disobeying direct orders and
9 Fernandez also charged Plaintiff with using his cane as a weapon. Plaintiff
10 was found guilty of disobeying a direct order for which he received a verbal
11 reprimand and 15 days loss of phone privileges. The other charge was
12 dismissed. Plaintiff spoke to Stewart and Davenport regarding this incident
13 and requested that Fernandez, Bollweg, and others be disciplined, but they
14 took no action.

15 (Doc.# 5.)

16 Plaintiff contends that "Stewart and Davenport were clearly put on notice and knew
17 of Fernandez's [retaliatory] propensities *before* the second incident involving excessive force
18 and retaliation occurred." (Doc.# 6 at 3.) Essentially, Plaintiff asks the Court to reconsider
19 what it has already thought through. At most, Plaintiff alleges that these Defendants were
20 aware of one incident involving Fernandez that occurred months prior to the later incident.
21 One prior incident does not establish a propensity or give rise to an inference that Fernandez
22 was likely to use excessive force or retaliate. Plaintiff's motion for reconsideration will be
23 denied.

24 **Warnings**

25 **A. Address Changes**

26 Plaintiff must file and serve a notice of a change of address in accordance with Rule
27 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
28 relief with a notice of change of address. Failure to comply may result in dismissal of this
action.

29 **B. Copies**

30 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy
31 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
32 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit
33 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply

1 may result in the filing being stricken without further notice to Plaintiff.

2 **C. Possible Dismissal**

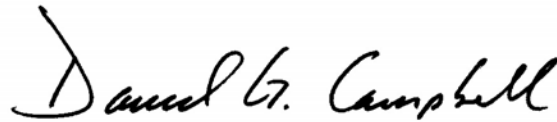
3 If Plaintiff fails to timely comply with every provision of this Order, including these
4 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
5 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
6 comply with any order of the Court).

7 **IT IS ORDERED:**

8 (1) Withdrawing the reference from the Magistrate Judge as to Plaintiff's motion
9 for reconsideration (doc.# 6).

10 (2) Plaintiff's motion for reconsideration is **denied**. (Doc.# 6.)

11 DATED this 20th day of January, 2009.

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16 David G. Campbell
17 United States District Judge
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