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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Michael Slowik,

10 Plaintiff,

11 v.

12 Frank Moreno; Marshall Bliss; C. Smith;
13 Cathy S. Grant; and DOES 1-10,

14 Defendants.

No. CV-12-01776-PHX-NVW

ORDER

15 Before the Court is the Defendants' Motion to Dismiss/Motion for Summary
16 Judgment (Doc. 39), Plaintiff's Response (Doc. 42), and the Reply (Doc. 47). For the
17 following reasons, the Defendants' Motion for Summary Judgment will be granted.

18 **I. LEGAL STANDARD FOR SUMMARY JUDGMENT**

19 Summary judgment is appropriate when the moving party carries its burden of
20 demonstrating that there is no genuine dispute as to any material fact and that it is entitled
21 to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S.
22 317, 322 (1986). A material fact is one that might affect the outcome of the suit under
23 the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual
24 issue is genuine if "the evidence is such that a reasonable jury could return a verdict for
25 the nonmoving party." *Id.*

26 Once the moving party has carried its burden under Rule 56, the party opposing
27 summary judgment must "set forth specific facts showing that there is a genuine issue for
28 trial." *Anderson*, 477 U.S. at 256. The fact are "viewed in the light most favorable to the

1 nonmoving party only if there is a genuine dispute as to those facts.” *Scott v. Harris*, 550
2 U.S. 372, 380 (2007). “Where the record taken as a whole could not lead a rational trier
3 of fact to find for the nonmoving party, there is no genuine issue for trial.” *Matsushita*
4 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

5 **II. FACTS**

6 Plaintiff Michael Slowik was incarcerated at Federal Correctional Institution
7 (“FCI”) Phoenix where he was assigned the job of electrician in the Facilities
8 Department. (DSOF ¶¶ 3-5). Slowik was assigned the job of electrician because he held
9 himself out as having experience splicing powered cable wires. (Doc. 40, Exb. 6).
10 Before taking the job, Slowik signed a form acknowledging that he participated in a
11 prison training which covered various safety topics pertinent to his position, but he claims
12 he was told to sign the form without actually participating in any orientation. (Doc. 40,
13 Exb. 6).

14 Slowik was initially assigned the job of Grade Four Electrician but quickly worked
15 his way up to Grade One, the top level in the prison. (DSOF ¶ 4). As a Grade One
16 Electrician, he worked on electrical problems in the kitchen affecting the dishwasher,
17 ovens, steam kettle, and helped install new ovens under the oversight of the Electrical
18 Foreman. (DSOF ¶ 5). His job duties included assisting the lead electrician in installing
19 and repairing electrical wiring, fixtures, and equipment. (Doc. 40, Exb. 6). Slowik also
20 served as the emergency electrician on-call during weekends. (Doc. 40, Exb. 6).

21 Defendant Fred Moreno is a Facilities Manager at FCI Phoenix and has
22 supervisory responsibility for the Facilities Department and for all repairs performed at
23 FCI Phoenix. (DSOF ¶ 1). Defendant Marshall Bliss is now retired, but worked at FCI
24 Phoenix as a Maintenance Foreman whose duties included maintaining the food service
25 equipment. (DSOF ¶ 2).

26 On Saturday September, 25, 2010, Slowik advised Moreno that he had attempted
27 to reset circuit breakers in the kitchen area of food services but they would not reset.
28 (Doc. 40, Exb. 6). Moreno told Slowik that Victor Martinez, the institution’s electrician,

1 would address the problem the following day. (DSOF ¶ 7). Martinez was not available
2 the next day and after Bliss approached Slowik about the broken electric panel, Slowik
3 offered to see if he could figure out what was wrong. (Doc. 40, Exb. 6). Bliss escorted
4 Slowik and another inmate to the power source behind the building. (DSOF ¶ 9). The
5 main power feed to the electrical panel was shut off, and Slowik located two blown fuses.
6 (DSOF ¶ 10). Slowik then returned to the food service area and took the front cover off
7 the electrical panel to check for a short. (DSOF ¶ 12). Slowik found no shorts and
8 turned off all the breakers. (DSOF ¶ 12).

9 Bliss then escorted the inmates back to the power source behind the building
10 where Slowik replaced the blown fuses and turned the unit back on. (Doc. 40, Exb. 6).
11 The group then returned to the kitchen so Slowik could flip the circuit breakers back on
12 one at a time. (Doc. 40, Exb. 6). As Slowik flipped the last breaker, it flashed due to a
13 ground short that Slowik had missed. (Doc. 40, Exb. 1). Later reports suggest Slowik
14 forgot to put the cover back over the flash panel in the kitchens, but Slowik stated that
15 mistake was not what caused the accident and that the explosion might have been much
16 worse if the cover had been on. (Doc. 40, Exb. 6).

17 The explosion injured Slowik, the other inmate, and Officer Bliss. (Doc. 40-7, Pg.
18 58). When asked to describe the incident, Slowik said, “There’s no way that anybody – it
19 – it was just – there’s no way that could have prevented from happening the way it
20 happened.” (Doc. 40, Exb. 6). The two injured inmates were immediately taken to the
21 institution’s Health Services Department for medical treatment and were later transferred
22 to a local hospital. (DSOF ¶ 20). Slowik was then transferred to Maricopa County Burn
23 Center. (DSOF ¶ 21). He returned to FCI Phoenix on October 13, 2010. (DSOF ¶ 20).

24 After returning to the prison, Slowik filed an administrative grievance, claiming he
25 was forced to work on a high voltage electric panel by Officer Bliss and was not properly
26 instructed on the job he was assigned to perform. (DSOF ¶ 22). He was awarded a
27 monthly sum of \$58.65, based on a 7% impairment to his whole body under the Inmate
28 Accident Compensation Act. (DSOF ¶ 29). Slowik believed his monthly sum should

1 have included more money to account for the overtime he worked before he was injured
2 and that Officer Moreno lowered the award to spite him. (Doc. 40, Exb. 6). Slowik
3 appealed his award but lost. (DSOF ¶ 29).

4 Slowik then filed this action under *Bivens v. Six Unknown Agents of the Federal*
5 *Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that Defendants Frank Moreno and
6 Marshal Bliss, among others, violated his constitutional rights when he suffered injuries
7 from a work-related incident while incarcerated at FCI Phoenix. (Doc. 16 ¶¶ 40-50). He
8 alleges violations of his Fifth Amendment right to due process and Eighth Amendment
9 right to be free from serious risk of harm because he was injured while being forced to
10 work on “energized circuits.” (*Id.* at ¶ ¶ 42-45). Slowik also alleges two named
11 defendants, who have been dismissed from this action, and other John Doe defendants
12 violated his Eighth Amendment rights when they chained, shackled and handcuffed him
13 to his hospital bed after he was injured. (*Id.* at ¶¶ 51-58). Finally, Slowik alleges that
14 Defendant Moreno violated his First and Fifth Amendment rights, depriving him of his
15 freedom of speech and retaliating against him for filing an administrative grievance. (*Id.*
16 at ¶¶ 59-66).

17 **III. LEGAL ANALYSIS**

18 **A. *Bivens* Claims against Federal Defendants**

19 Victims whose constitutional rights are infringed on by a federal officer,
20 employee, or agent have a right to recover damages against that officer, “despite the
21 absence of any statute conferring such a right.” *Carlson v. Green*, 446 U.S. 14, 18
22 (1980). That right extends to federal prisoners, who may bring an action against a federal
23 prison employee under *Bivens*. See *Agyeman v. Corrs. Corp. of Am.*, 390 F.3d 1101,
24 1104 (9th Cir. 2004) (holding that to the extent the plaintiff “sought recovery from
25 individual employees of the Corrections corporation, the case had to be brought as a
26 *Bivens* action”) (citations omitted). “The basis of a *Bivens* action is some illegal or
27 inappropriate conduct on the part of a federal official or agent that violates a clearly
28 established constitutional right.” *Balser v. Dep’t. of Justice*, 327 F.3d 903, 909 (9th Cir.

1 2003).

2 **1. Violation of Fifth and Eighth Amendment Rights by Defendants**
3 **Moreno and Bliss**

4 Plaintiff argues his Fifth and Eighth Amendment right to be “free from serious
5 injury or harm or risk of serious harm” were violated when he was ordered to work on
6 and repair an energized high-voltage circuit. (Doc. 16, ¶¶ 41-45). The rights Plaintiff
7 asserts are not lodged in the Fifth Amendment and are more accurately pled as violations
8 of the Eighth Amendment. To prevail on a claim challenging prison conditions under the
9 Eighth Amendment, Plaintiff must prove that his injury was caused by an officer’s
10 “deliberate indifference.” *Wilson v. Seiter*, 501 U.S. 294, 297, 302 (1991).¹ Deliberate
11 indifference “requires more than ordinary lack of due care for the prisoner’s interests or
12 safety,” but “less than acts or omissions [done] for the very purpose of causing harm or
13 with knowledge that harm will result.” *Farmer v. Brennan*, 511 U.S. 825, 835 (1994)
14 (internal citations and quotations omitted). A prison official cannot be liable

15 under the Eighth Amendment for denying an inmate humane conditions of
16 confinement unless the official knows of and disregards and excessive risk
17 to inmate health and safety; the official must both be aware of facts from
18 which the inference could be drawn that a substantial risk of serious harm
exists, and he must also draw the inference.

19 *Id.* at 837.

20 Slowik claims he suffered extensive burns because he was forced to work on a
21 high-voltage circuit he was not qualified to repair. To survive this Motion for Summary
22 Judgment, he must show there is at least a question of fact as to whether Defendants Bliss
23 and Moreno acted with “deliberate indifference” to his health and safety when assigning
24 him to work on the circuit. To support his case, Slowik asserts that the Defendants
25 should have known forcing him to work on the circuit posed a serious risk to his health

26
27 ¹ Because “[a]ctions under § 1983 and those under *Bivens* are the same save for
28 the replacement of a state actor under § 1983 by a federal actor under *Bivens*,” cases
discussing § 1983 claims apply to *Bivens* claims. *Van Strum v. Lawn*, 940 F.2d 406, 409
(9th Cir. 1991).

1 and safety because both Defendants were aware that he had never properly trained as an
2 electrician in the prison, only served as an assistant to the head electrician, and was not
3 permitted to work on energized circuits. (PSOF ¶¶ C-H).²

4 Slowik was assigned to the electric shop in the prison because he worked as a
5 cable splicer on powered cables before he was incarcerated. (Doc. 40, Exb. 6). Once he
6 was established in the electric shop, he quickly worked his way up to the highest level of
7 electrician, where his job duties included installing and repairing wiring, electrical
8 fixtures, apparatus and control equipment, and checking for compliance with the National
9 Electrical Code. (DSOF ¶ 5). Slowik's deposition demonstrates a working knowledge of
10 the duties outlined above. (Doc. 40, Exb. 6). It also demonstrates that he understood the
11 necessary safety measures when repairing a power source like the one that injured him.
12 (Doc. 40, Exb. 6) (demonstrating basic knowledge of lock-out/tag-out procedures,
13 National Electrical Code, and electrical repairs).

14 Although Slowik repeatedly asserts he was injured while working on an energized,
15 high-voltage circuit, his deposition verifies that the power was actually off while he was
16 working on the circuit and exhibits submitted by Defendant show the circuit was actually
17 a low-voltage one. (Doc. 40, Exb. 6; DSOF ¶¶ 23-24). Additionally, nothing suggests
18 the Defendants had any reason to know that replacing the circuit breakers would place
19 Slowik at substantial risk of serious harm. Slowik's own deposition demonstrates how
20 his words, actions, and position as a Grade One Electrician would have reasonably led the
21 Defendants to believe he was capable of handling the task assigned to him. (Doc. 40,
22 Exb. 6). That the Defendants did not anticipate any harm to Slowik is further evidenced
23 by Defendant Bliss standing so close to Slowik at the time of the explosion that he also
24 suffered burns.

25
26 ² Plaintiff disputes many of the Defendants' facts in his Statement of Facts and his
27 unsigned affidavit. Many of these conflicts are resolved by Plaintiff's deposition. When
28 Plaintiff's Statement of Facts and affidavit conflict with his deposition, the facts assumed
true on this Motion for Summary Judgment are drawn from his deposition. *See Kennedy*
v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991) (stating that a party cannot
create an issue of fact by submitting an affidavit that contradicts prior deposition
testimony).

1 The incident appears to have occurred from a ground short in the circuit. No
2 similar event had ever occurred in the prison before. Assigning an inmate to a job that
3 terminates in an unpredictable accident does not demonstrate the deliberate indifference
4 necessary to succeed on an Eighth Amendment claim. *See Wilson*, 501 U.S. at 300
5 (noting that, “for instance, that if a prison boiler malfunctions accidentally during a cold
6 winter, an inmate would have no basis for an Eighth Amendment claim, even if he suffers
7 objectively significant harm”). Although Slowik’s injuries were unfortunate, they were
8 not inflicted by the officers’ deliberate indifference.

9 The Defendants have carried their burden of proving there is no material question
10 of fact regarding whether they knew of, and then disregarded, a serious risk to Slowik’s
11 health and safety. Summary judgment will be granted to Defendants Bliss and Moreno
12 on this count.

13 **2. Violation of Eighth Amendment Rights by Smith, Grant, & John Does**

14 Because Defendants Smith and Grant were dismissed from this action on March
15 22, 2013, (Doc. 24), this count proceeds against only John Doe defendants. Although the
16 use of John Doe defendants is usually disfavored, a plaintiff must be given a chance to
17 identify John Doe defendants through discovery. *Gillespie v. Civiletti*, 629 F.2d 637,
18 642-43 (9th Cir. 1980). Slowik claims the John Doe defendants named in his second
19 count are “retired and/or avoiding service” and that the named defendants have been
20 unwilling to provide any means of locating the John Doe defendants. (Doc. 42).

21 But Slowik has been given ample opportunity to conduct discovery in this action.
22 He has received the Defendants’ Initial and Supplemental Disclosure Statements, two sets
23 of responses to his interrogatories and request for admissions, and chosen not to depose
24 Defendants Bliss or Moreno. (Docs. 27-28, 34-36). Additionally, Slowik has made no
25 allegations that the John Doe defendants remain unidentified because the named
26 defendants’ responses to his discovery requests were deficient. Slowik has been given a
27 sufficient opportunity to identify the unnamed defendants. Accordingly, the John Doe
28 defendants are dismissed from this action. It follows that the second count is also
dismissed, as all defendants named in it have been dropped as parties to this action.

1 **3. First Amendment Retaliation Against Defendant Moreno**

2 Slowik contends that that Officers Smith, Grant, Moreno, and John Does retaliated
3 against him for pursuing an administrative remedy for his injuries. (Doc. 16). Smith,
4 Grant, and the John Does, however, have been dismissed from this action, leaving Officer
5 Moreno as the only remaining defendant under this count. Accordingly, only Officer
6 Moreno’s actions can be considered when deciding whether Slowik’s First Amendment
7 rights were violated.

8 Inmates have a First Amendment right to file prison grievances and may file a
9 claim if a public officer retaliates against them for exercising that right. *Rhodes v.*
10 *Robinson*, 408 F.3d 559, 567 (9th Cir. 2004). For a claim for First Amendment
11 retaliation, a prisoner must show: (1) that a state actor took an adverse action against the
12 inmate (2) because of (3) that prisoners’ protected conduct, and that such action (4)
13 chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not
14 reasonably advance a legitimate correctional goal. *Id.* at 568.

15 Slowik contends Officer Moreno attempted to quash or chill his right to file a
16 prison grievance. (Doc. 16). He asserts that Moreno issued him a disciplinary write-up
17 stating that he had failed to put the cover on the electrical panel when it blew up. (Doc.
18 40, Exb. 6). This write-up, however, was signed nearly five months after Slowik had
19 filed his administrative claim and was titled “Injury – Lost – Time Follow Up.” (Doc.
20 40, Exb. 1). The document verifies that Slowik’s injuries were the result of a work-
21 related incident and is not disciplinary in nature. (Doc. 40, Exb. 1).

22 Slowik also contends that when he applied for a subsidy to make up for lost wages
23 in prison due to injuries, Officer Moreno told him he would make sure he didn’t have to
24 pay Slowik any more money than he had to. (Doc. 40, Exb. 6). Slowik was upset
25 because his monetary award did not include additional funds to account for the overtime
26 he was used to working and believes the lowered compensation was due to Officer
27 Moreno’s actions. (Doc. 40, Exb. 6). He appealed his monetary award within the prison
28 and lost. (DSOF ¶ 28).

 Neither of the above allegations support a First Amendment retaliation claim. The

1 first, an incident report, could not be construed as an adverse action and had no impact on
2 Slowik's right or ability to file an administrative appeal. As for the second, although
3 Moreno's alleged words may have been negative, Slowik still received the compensation
4 he was entitled to. He may have hoped to be granted extra, but the failure of the
5 committee to award him more than he was entitled to based on his ordinary wages does
6 not constitute an adverse action. Slowik was also able to appeal the initial decision,
7 showing that Moreno's actions did not chill the exercise of his First Amendment rights.

8 Slowik alleges additional instances of retaliation under this count, but none were
9 perpetrated by Moreno. He admits that Officer Moreno was not present at the time he
10 felt ridiculed in the hospital by prison guards, (Doc. 40, Exb. 6), and the incident report
11 he contends was filed purely to harass him was signed by Officer Bliss, not Moreno.
12 (Doc. 40, Exb. 8). Because Slowik has alleged no way to attribute the actions to Officer
13 Moreno, they are not considered under this count. Accordingly, Defendant Moreno has
14 carried his burden of showing there is no material question of fact surrounding whether
15 his actions chilled Slowik's legitimate exercise of his First Amendment rights. Summary
16 judgment will be granted for Officer Moreno on this count.

17 **4. Administrative Exhaustion of Claims Defendant Moreno**

18 The Prisoner Litigation Reform Act ("PLRA") requires that a prisoner filing a
19 *Bivens* action exhaust all available administrative remedies prior to filing a civil action in
20 federal court. *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (citing 42 U.S.C. § 1997). This
21 exhaustion requirement applies to all civil suits filed by prisoners about any aspect of
22 prison life, regardless of the remedies sought. *Booth v. Churner*, 532 U.S. 731, 741
23 (2001). It is undisputed that Slowik did not mention Officer Moreno in any of his
24 requests for administrative remedies. (DSOF ¶ 30, PSOF ¶ 30). But "exhaustion [under
25 the PLRA] is not *per se* inadequate simply because an individual later sued was not
26 named in the [administrative] grievances." *Jones v. Bock*, 549 U.S. 199, 219 (2007).
27 Because summary judgment will be granted for Defendants on the merits of this action,
28 we do not decide whether Slowik has properly exhausted his administrative remedies
with respect to Officer Moreno.

1 **B. Other Issues Raised**

2 Slowik claims the Defendants' deposition excerpts are not admissible because a
3 copy of the reporter's certification was filed after the Motion for Summary Judgment was
4 filed. Slowik misinterprets Federal Rule of Civil Procedure 30(f)(1). Rule 30(f)(1) only
5 requires the certificate to accompany the final copy of a deposition. Nothing in the rule
6 requires the deposition to be certified at the time a motion is filed. Furthermore, not only
7 does Slowik rely on the same depositions he claims are inadmissible, the delay in
8 certification was because Slowik failed to appear to review and sign the deposition in a
9 timely manner. (Doc. 41-1). Defendants properly submitted the reporter's certification
10 as soon as it was available, and Slowik has not demonstrated that he was in any way
11 prejudiced by this delay.

12 Slowik also claims that the Defendants' exhibits and declarations are not properly
13 authenticated. (Doc. 42). All of the Defendants' documents were either properly signed
14 under penalty of perjury pursuant to 28 U.S.C. § 1746, as permitted by Federal Rule of
15 Evidence 901(b)(10), authenticated by Slowik is his deposition, authenticated in the
16 Defendants' depositions, or provided to the Defendants by Slowik. (Doc. 27).
17 Accordingly, Slowik's objections to the Defendants' exhibits and declarations are
18 unfounded.

19 IT IS THEREFORE ORDERED that the Defendants' Motion for Summary
20 Judgment (Doc. 39) is granted.

21 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of the
22 Defendants and against Plaintiff and that Plaintiff take nothing. The Clerk shall terminate
23 this case.

24 Dated this 5th day of December, 2013.

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27 _____
28 Neil V. Wake
 United States District Judge