IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

Robert Hackworth, Plaintiff, vs. G. Torres; et al., Defendants.	1:06-CV-773-RCC **ORDER**

Plaintiff Robert Hackworth filed this civil rights action pursuant to 42 U.S.C. § 1983 and originally alleged claims of retaliation, excessive force, and various violations of procedural due process. (Doc. 1). In performing its statutory pre-screening duties, the Court determined that the action should only proceed as to Plaintiff's Eight Amendment claim for excessive force and First Amendment claim for retaliation against Defendants Torres, Morales, Grimsley, and Martinez. (Doc. 23). The Defendants filed a Motion for Summary Judgment (Doc. 33) as to Plaintiff's First Amendment claim, and the issue is now fully briefed. The Court will deny the motion for the reasons discussed below.

I. Factual Summary

Plaintiff is an inmate in the custody of the California Department of Corrections and Rehabilitation (CDCR) and is currently incarcerated in the California Substance Abuse and Treatment Facility (COR) in Corcoran, California. (Doc. 33-2, ¶ 1). Plaintiff arrived at COR on July 16, 2003 and was housed in facility 4A. (Id. at ¶ 2). He attended his Initial

Classification Committee (ICC) approximately two weeks later on July 30, 2003. (Id. at ¶5). During the hearing, Plaintiff took issue with the deadly force policy then in place at COR. (Id. at ¶ 8). Specifically, Plaintiff told the Committee that its deadly force policy was illegal. (Id. at Ex. A 22:6-22). Because of Plaintiff's remarks, Defendant Martinez ordered Defendants Morales and CO Cortez to remove Plaintiff from the committee room and escort him back to his cell. (Id. at ¶ 9).

As Plaintiff and the two officers approached the door to his housing unit, the door began to open, but Defendant Morales motioned for the door to be closed again. (Id. at Ex. A 26:22-25; Doc. 51, p. 18).[1] Defendant Morales then faced Plaintiff towards the wall just outside the door. (Id. at ¶ 11 & Ex. A 26:22-25; Doc. 51, p. 18). Defendant Torres arrived to take over for CO Cortez, took hold of Plaintiff's hair, and slammed Plaintiff's face into the door and wall with sufficient force to split it and require two stitches later, saying to Plaintiff, "You think you bad, you MF." (Id. at ¶¶ 12-13 & Ex. A 29:19-25 and 33:9-14; Doc. 51, p. 22 and 31). Plaintiff pushed away from the wall with his knees. (Id. at ¶ 14 & Ex. A 39:5-7). Defendants Morales and Torres then took Plaintiff to the ground. (Id. at Ex. A 40:12-24; Doc. 51, p. 20). Plaintiff moved his torso and kicked his legs while on the ground. (Id. at ¶ 18 & Ex. A 46:7-25). Defendants Morales and Torres kicked and punched Plaintiff and called him names during this time. (Id. at ¶18 & Ex. A 45:1-46:6; Doc. 51, p. 18 and 22). Plaintiff told Defendants Morales and Torres that he would file an administrative grievance. (Id. at ¶16).

Defendant Grimsley responded to the scene at some point and ordered Plaintiff to stop resisting. (Id. at ¶ 19). Defendants Torres and Morales were still calling Plaintiff names such as "a gang of MF's, black MF" and "nigger" and taunting him. (Id. at Ex. A 47:7-24). When Plaintiff did not comply with Defendant Grimsley's order, she sprayed a one-second

[1]Plaintiff testified as to what happened next at his deposition. Defendants do not specifically contradict his version of events except that none of them used or witnessed any staff member using unnecessary or unreasonable force, and if they had they would have intervened. (Doc. 33-2, p. 40, ¶¶ 17-18; p. 48, ¶¶ 11 and 17-18; p. 52, ¶¶ 15 and 18-19; p. 57, ¶¶ 11-12). Plaintiff offers affidavits of fellow inmates who witnessed the events outside the unit door in support of his version of events

burst of pepper spray into Plaintiff's face from two-and-a-half feet away. (Id. at ¶ 19 & Ex. E ¶ 6; Doc. 51, pp. 20 and 22).

At some point, Defendant Martinez arrived on scene and stepped on Plaintiff's back. (Id. at ¶ 21 & Ex. A 50:2-4). As Defendant Torres began to lift Plaintiff, Defendant Martinez again stepped in the middle of Plaintiff's back and forced him to the ground again. (Id. at Ex. A, 50:4-6). He then placed his foot on the side of Plaintiff's head and pressed his face into the floor. (Id. at Ex. A 50:6-8). He ordered an officer in the control room to get a pair of leg restraints and handed the restraints to Defendant Grimsley. (Id. at ¶ 22-23). She shackled Plaintiff, and Defendant Martinez ordered Defendants Morales and Torres to escort Plaintiff to the shower for decontamination. (Id. at ¶ 23 & Ex. B ¶ 10). After decontamination, Plaintiff was escorted outside, stripped, and sprayed with a water hose. (Id. at ¶ 34 & Ex. A 64:19-21; Doc. 51, p. 20).

MTA Lemos arrived on scene and examined Plaintiff in the yard. (Id. at ¶35). Plaintiff was escorted to the Correctional Treatment Center (CTC) for treatment of his split lip. (Id. at ¶ 36; Doc. 51, p. 30-31). He was given two stitches and pain medications and told to report back in two days "for the bruises and swelling all over [his] body." (Id. at Ex. A 71:11-20; Doc. 51, p. 31). When he returned to his housing unit his eye and lip were swollen and he seemed disoriented. (Doc. 51, p. 25). He was transported to and from the CTC in a wheelchair. (Doc. 33-2, Ex. A 71:6-9; Doc. 51, p. 25).

All named defendants were employed by the CDCR and worked at COR on the date in question. (Id. at ¶ 4).

II. Motion for Summary Judgment Standard

Summary judgment is appropriate when the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir.1994); Fed.R.Civ.P. 56(a). Substantive law determines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986);

Jesinger, 24 F.3d. at 1130. In addition, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. The dispute must be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The party opposing summary judgment may not rest upon the mere allegations or denials of the party's pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Brinson v. Lind Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995); Fed.R.Civ.P. 56(e)(3). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50. However, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his [or her] favor." Id. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)).

III. Retaliation in Violation of the First Amendment

A viable claim of First Amendment retaliation contains five basic elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights (or that the inmate suffered more than minimal harm) and (5) did not reasonably advance a legitimate correctional goal. Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005); see also Hines v. Gomez, 108 F.3d 265, 267 (9th Cir. 1997).

A. Adverse Acts

Defendants concede that "their use of force on Plaintiff during the July 30, 2003, escort constitutes an adverse act." (Doc. 33-1, 7:12-13). Plaintiff's removal from his ICC hearing is also an adverse act. "The purpose of the ICC was for committee members to determine proper placement of Plaintiff within COR, as well as to explain the regulations and policies of COR to Plaintiff." (Id. at 2:16-17). Plaintiff's removal from the ICC deprived

him of his opportunity to participate in the meeting and to have the regulations and policies of the institution fully explained to him; therefore, it was an adverse action.

B. Causation

The plaintiff has the burden of demonstrating that his exercise of his First Amendment rights was the but-for cause of defendants' conduct. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir.1989); Gross v. FBL Fin. Servs., Inc., 129 S.Ct. 2343, 2351 (2009). Timing of the adverse action as well as evidence showing that the action did not further a legitimate penological interest are probative of retaliatory intent. Bruce v. Ylst, 351 F.3d 1283, 1288-89 (9th Cir. 2003). If he meets his burden, "the burden shifts to the defendant to establish that it would have reached the same decision even in the absence of the protected conduct." Sorrano's Gasco, 874 F.2d at 1314.

1. Timing

In this case, Plaintiff was removed from his ICC hearing and subsequently beaten within minutes of challenging the validity of COR's deadly force policy. This alone may be enough to lead to an inference of retaliatory motive. See McDonald v. Hall, 610 F.2d 16, 17 (1st Cir. 1979).

Defendants argue that, as to the beating, there is a break in the causal chain, because the officers involved in the beating were not present at the ICC and, therefore, could not have known about Plaintiff's disagreement with the policy. This is inaccurate. Defendant Morales was present at the ICC and when Defendant Torres slammed Plaintiff's face into the wall. The Court is also required to believe Plaintiff's evidence, and Plaintiff testified during his deposition that Defendant Martinez reached for the telephone and called Defendants Torres and Grimsley and the unit office just before he ordered Plaintiff removed from the ICC. (Doc. 33-2, Ex. A 24:5-7). Finally, Defendant Torres admits he knew the reason for Plaintiff's removal from the ICC. (Id. at Ex. C ¶2). Therefore, there is not a break in the causal chain between Plaintiff's comments during the ICC and his subsequent beating, and

there is a genuine issue of material fact as to what motivated Defendants to slam Plaintiff's face into a wall, take him to the ground, kick him, and call him names.

In addition, while Defendants challenge the protected nature of Plaintiff's speech, they do not deny that he was removed from the ICC because of his speech. (Id. at Ex. B ¶¶ 3-4, and Ex. D ¶ 2). As discussed below, it is not clear that Plaintiff violated any prison regulation. Therefore, there is a genuine issue of material fact as to Defendant Martinez's motivation for removing Plaintiff from the ICC.

2. Legitimate Penological Interest & Protected Conduct

"A prisoner retains those First Amendment rights that are 'not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" Hargis v. Foster, 312 F.3d 404, 409 (9th Cir. 2002) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

The four-factor test set out in Turner v. Safley, 482 U.S. 78, 89-91 (1987), test applies to facial challenges to prison regulations that impact prisoners' First Amendment rights. Plaintiff here does not challenge the prison regulations on their face, but raises an as-applied challenge, which is analyzed under the test set out in Hargis v. Foster.

In Hargis, the Ninth Circuit Court of Appeals explained that when a prisoner brings a First Amendment as-applied challenge to a prison regulation, the courts should "examine whether applying the regulation to that speech-whatever its value-was rationally related to the legitimate penological interest asserted by the prison." 312 F.3d at 410. A prisoner brings an as-applied challenged when he argues that his conduct was not in violation of the prison regulation at issue, and, at the summary judgment stage, the court, viewing the facts in the light most favorable to the prisoner, "must determine whether there is a genuine dispute as to whether [the] statements in fact implicated legitimate security concerns." Id.

Defendants argue that Defendant Martinez had a legitimate penological interest in removing him from the ICC, because Plaintiff was "too hot-headed to listen to the

committee". (Doc. 33-1, 9:9-10). Defendants claim that Plaintiff was in violation of Title 15, CCR, § 3004(b), which states that:

> Inmates, parolees and employees will not openly display disrespect or contempt for others in any manner intended to or reasonably likely to disrupt orderly operations within the institutions or to incite or provoke violence.

Defendants cite to Plaintiff's description of the conversation just prior to his removal as evidence of his disorderly behavior. (Doc. 33-2, Ex. A 22:6-22). After the committee explained the deadly force policy, Plaintiff questioned the committee, saying, "So you're telling me you're going to shoot me if I ain't even got a weapon in my hand, you'll shoot me? That's against the law." Defendant Martinez, who was not a committee member, responded, "Well, you're in Corcoran now." The conversation between Defendant Martinez and Plaintiff continued in this vein until Plaintiff stated the he "didn't give a shit where I'm at, you cannot shoot me legally with a live-round weapon..." Defendant Martinez "jumped up and put his hand on his OC pepper spray" and again responded that Plaintiff was "in Corcoran." Plaintiff asked if he was "supposed to be scared", and Defendant Martinez ordered him out of the room.[2]

Plaintiff argues that he did not violate § 3004(b) during the ICC, because he did not "become argumentative with Martinez or Committee. Plaintiff asked questions in Committee and stated the facts of the law and Martinez got upset and had Plaintiff removed from Committee." (Doc. 51, 5:16-21).

The record of this conversation alone is not enough to demonstrate that Plaintiff was so agitated that he could not participate in the ICC any longer. Specifically, no committee member asked for Plaintiff's removal, and it was Defendant Martinez who injected himself into the conversation and who made the first physically aggressive movement, by reaching

[2]In their reply brief, Defendants assert that Plaintiff made additional comments as he was leaving the hearing, including "threatening the Defendants by stating: 'You better shoot me! It's on now!' and several vulgarities." (Doc. 52, 2:22-25). The Court declines to consider this evidence and any arguments based on this evidence, because raising these issues for the first time in a reply brief is procedurally improper. Miller v. Glenn Miller Productions, Inc., 454 F.3d 975, 978 n.1 (9th Cir. 2006); Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996).

for his pepper spray. While Defendant Martinez generally alleges that Plaintiff was "agitated and unruly" he does not provide specific facts supporting this statement.

The phrase "in any manner intended to or reasonably likely to" clearly links "openly display disrespect or contempt for others" with " disrupt orderly operations within the institutions or to incite or provoke violence." Therefore, in order to be in violation of the code, a prisoner must speak both (i) with disrespect or contempt, and (ii) with intent to disrupt or incite/provoke violence or the reasonable likelihood that he will. There is no evidence that Plaintiff's speech was intended to disrupt or provoke violence, or that it was reasonably likely to disrupt or provoke violence.

The Court's conclusion is informed by other decisions interpreting the very prison regulation at issue here and its application to various forms of prisoner speech. The District Court for the Central District of California found a prisoner-plaintiff violated § 3004(b) and was not engaged in protected speech when she complained during a Christmas party about the music in a confrontational and threatening manner to fellow inmates. Torricellas v. Poole, 954 F.Supp. 1405, 1412-13 (C.D.Cal. 1997). The Christmas party was held in a waiting room, which was operating at capacity, and the prisoner-plaintiff's complaints upset her fellow inmates enough that several of them complained to prison staff. Id.

The Ninth Circuit Court of Appeals in Brodheim, 584 F.3d at 1271-73, also addressed whether application of § 3004(b) to a prisoner-plaintiff's complaints served a legitimate penological interest. The Court in Brodheim did not rule specifically on whether the prisoner-plaintiff's submission of a written grievance containing disrespectful language[3] aimed at the official responsible for processing his grievance violated § 3004(b). Rather, the Court held that the link between its interest in peaceable operations and the prisoner-plaintiff's language in the written grievance was too weak to support the conclusion that the written complaint "posed a substantial threat to security and discipline" at the prison.

[3] The grievance stated, in part, as follows: "You're such a 'stickler' for the rules as you 'see' them. Why not teach staff that they are required to respond informally to 602's w/in 10 working days-or is it your position that Title 15 applies only 'against' inmates? Or, is it your position that I am not entitled to the information I request? What exactly is your position, Mr. Cry-obstruct 602's at all costs? ? ?"

Here, Plaintiff's speech was not so offensive as that in Torricellas. The only people present to hear Plaintiff's words were prison staff, and there is no evidence that Plaintiff threatened prison staff with anything other than litigation, or that he raised his voice or spoke in an aggressive tone. Rather, the situation was more like that present in Brodheim, because even if Plaintiff's speech were disrespectful, the possibility that his speech would incite violence or disturb the peaceable operations of the prison is so remote that Defendants cannot rely on § 3004(b) to shield them from constitutional scrutiny.

Defendants next argue that all of the actions taken to restrain Plaintiff outside of the ICC, except Defendant Torres's slamming Plaintiff's face into the wall, were necessary "to prevent Plaintiff from harming himself or other Correctional staff." (Doc. 33-1, 9:10-13). While prison officials have an interest in preventing harm to inmates and staff, Defendants' conduct in this case was not reasonably calculated to attain this goal.

C. Protected Conduct

Defendants argue that since the courts recognize the filing of inmate grievances as one form of protected activity, it must be the only protected activity. (Doc. 33-1, 7:23-28). Defendants conclude that since Plaintiff did not file any inmate grievances prior to the ICC, he was not engaged in protected conduct. (Id. at 7:23-26). This argument is clearly without merit, since courts have recognized many other forms of protected activity. See Hargis, 312 F.3d 404 (making oral request to guard and mentioning court action); Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001) (acting as law clerks); Vignolo v. Miller, 120 F.3d 1075 (9th Cir. 1997) (refusal to sign fiscal agreement).

Defendants also argue that "Plaintiff's Claim of a First Amendment right to argue with an Initial Classification Committee over the COR deadly force policy violates CDCR regulations and is not protected conduct." (Doc. 33-1, 7:28-8:2). As discussed above, there is a genuine issue of material fact as to whether Plaintiff actually violated § 3004(b). Even if Plaintiff's words were in violation of § 3004(b), the Court also notes that violation of a legitimate prison regulation is not sufficient to show that Plaintiff was not engaged in

protected conduct. See Brodheim, 584 F.3d at 1271-73; contra Lockett v. Suardini, 526 F.3d 866, 874 (6th Cir. 2008).

D. Injury

"[A] retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights." Gomez, 255 F.3d at 1127. To show that the prison authorities chilled a plaintiff's exercise of his first amendment rights, a plaintiff need only show that the adverse action taken by the defendant "would chill a person of ordinary firmness from continuing to engage in the protected activity." Blair v. Bethel School Dist., 608 F.3d 540, 543 (9th Cir. 2010). A plaintiff is not required to show that he was actually deterred from exercising his rights, Id. at 543 n. 1, and "an objective standard governs the chilling inquiry." Brodheim, 584 F.3d at 1271. Courts have found a chilling effect based on the mere threat of harm. Therefore, removal from an ICC and a subsequent beating would definitely deter "a person of ordinary firmness:" See Brodheim, 584 F.3d at 1271; Gomez, 255 F.3d 1127-28. Plaintiff has sufficiently alleged a chilling effect.

IV. Qualified Immunity

The qualified immunity analysis is a two-part inquiry. The court must consider whether the facts "[t]aken in the light most favorable to the party asserting the injury . . . show [that] the [defendant's] conduct violated a constitutional right, and the court must determine whether the right was clearly established at the time of the alleged violation. Saucier v. Katz, 533 U.S. 194, 201 (2001). The court is not required to perform the analysis in any particular order. Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808, 818 (2009).

Defendants argue only that they are entitled to qualified immunity, because Defendants did not violate Plaintiff's constitutional rights. (Doc. 33-1, 9:26-10:13). As discussed above, there is a genuine issue of material fact regarding whether Defendants did retaliate against Plaintiff because he engaged in speech protected by the First Amendment. Since it is clearly established that retaliation against a prisoner for exercise of his First Amendment rights is prohibited, Brodheim, 584 F.3d 1269, resolving whether Defendants in fact retaliated against Plaintiff is central to determining the qualified immunity issue.

Therefore, summary judgment based on qualified immunity is precluded at this stage. Serrano v. Francis, 345 F.3d 1071, 1077 (9th Cir. 2003).

V. Conclusion

The Court finds that there are genuine issues of material fact as to Plaintiff's First Amendment retaliation claim. Therefore, summary judgment and a finding of qualified immunity are inappropriate. Accordingly,

IT IS ORDERED denying Defendants' Motion for Summary Judgment (Doc. 33).

IT IS FURTHER ORDERED granting Plaintiff's Motions for Extension of Time (Docs. 47 & 49) and granting Plaintiff's motions requesting a ruling, hearing, and/or status update (Docs. 53 & 54) to the extent that this Order apprises Plaintiff of the status of his action and disposes of all pending motions.

DATED this 10th day of May, 2011.

Raner C. Collins
United States District Judge