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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

FRED PRICE,)	Case No.: 1:08-cv-00425-AWI-BAM (PC)
Plaintiff,)	FINDINGS AND RECOMMENDATIONS
v.)	REGARDING DEFENDANTS' MOTION FOR
S. R. CUNNINGHAM, et al.,)	SUMMARY JUDGMENT
Defendants.)	(ECF No. 72)
)	TWENTY-ONE DAY DEADLINE
)	
)	

Findings and Recommendations

I. Background

Plaintiff Fred Price (“Plaintiff”) is a state prisoner proceeding pro se in this civil rights action pursuant to [42 U.S.C. § 1983](#). This action proceeds on the complaint, filed March 24, 2008, against Defendants Cunningham and Mullins for deliberate indifference to a serious threat to Plaintiff’s safety and use of excessive force in violation of the Eighth Amendment; and against Defendant Cunningham for retaliation against Plaintiff’s exercise of his First Amendment rights. (ECF No. 14.)

Currently pending before the Court is Defendants’ motion for summary judgment filed on October 8, 2012. (ECF No. 72.) Plaintiff filed an opposition to the motion on November 19, 2012. (ECF Nos. 87, 89, 90.) Defendants filed a reply on November 28, 2012, and Plaintiff filed a surreply on December 10, 2012. (ECF No. 92.) The motion is deemed submitted. Local Rule 230(1).

1 **II. Legal Standard for Summary Judgment**

2 Pursuant to [Federal Rule of Civil Procedure 56\(a\)](#) summary judgment is appropriate when the
3 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
4 judgment as a matter of law. Summary judgment must be entered, “after adequate time for discovery
5 and upon motion, against a party who fails to make a showing sufficient to establish the existence of
6 an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”
7 [Celotex Corp. v. Catrett, 477 U.S. 317, 322 \(1986\)](#). However, the court is to liberally construe the
8 filings and motions of pro se litigants. [Thomas v. Ponder, 611 F.3d 1144, 1150 \(9th Cir. 2010\)](#). The
9 “party seeking summary judgment always bears the initial responsibility of informing the district court
10 of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to
11 interrogatories, and admissions on file, together with the affidavits, if any, which it believes
12 demonstrate the absence of a genuine issue of material fact.” [Celotex, 477 U.S. at 323](#) (internal
13 quotations and citations omitted).

14 If the moving party meets its initial responsibility, the burden then shifts to the opposing party
15 to establish that a genuine issue as to any material fact actually does exist. [Matsushita Elec. Indus. Co.](#)
16 [v. Zenith Radio Corp., 475 U.S. 574, 586 \(1986\)](#). In attempting to establish the existence of this
17 factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to
18 tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in
19 support of its contention that the dispute exists. [Fed. R. Civ. P. 56\(c\)](#); [Matsushita, 475 U.S. at 586](#)
20 [n.11](#).

21 The parties bear the burden of supporting their motions and oppositions with the papers they
22 wish the Court to consider and/or by specifically referencing any other portions of the record for
23 consideration. [Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 \(9th Cir. 2001\)](#).
24 The Court will not undertake to scour the record for triable issues of fact. [Simmons v. Navajo County,](#)
25 [Arizona, 609 F.3d 1011, 1017 \(9th Cir. 2010\)](#).

26 In arriving at these findings and recommendations, the Court carefully reviewed and
27 considered all arguments, points and authorities, declarations, exhibits, statements of undisputed facts
28 and responses thereto, if any, objections, and other papers filed by the parties. Omission of reference

1 to an argument, document, paper, or objection is not to be construed to the effect that this Court did
2 not consider the argument, document, paper, or objection. This Court thoroughly reviewed and
3 considered the evidence it deemed admissible, material, and appropriate.

4 **A. Summary of Relevant Allegations in Complaint**

5 Plaintiff is currently housed at Salinas Valley State Prison in Soledad, California. The events
6 at issue are alleged to have occurred while Plaintiff was housed at the California Correctional
7 Institution in Tehachapi, California (“CCI-Tehachapi”). In relevant part, Plaintiff alleges as follows:

8 On November 9, 2006, Plaintiff was told by inmate Foster, Plaintiff’s cell-mate at the time,
9 that if he did not move, his life would be in danger. Plaintiff told Defendants Cunningham and
10 Mullins that he needed a cell move to avoid being attacked by inmate Foster. (ECF No. 1, p. 9.)
11 Defendants Cunningham and Mullins laughed at him and denied his request.

12 On November 12, 2006, inmate Foster packed Plaintiff’s property and told Sailor that Plaintiff
13 needed a cell move because Plaintiff would be in danger. Plaintiff agreed. Later that day, Plaintiff
14 was still not moved from his cell. Foster “stated that Plaintiff thinks this prison life is a joke.” (ECF
15 No.1, p. 11.) Foster grabbed a shiny object from between his mattress, which prompted Plaintiff to
16 start kicking and hitting the cell door. The control booth officer ordered Plaintiff to stop kicking the
17 door. Defendant Cunningham and another officer, Hartman, arrived and ordered Plaintiff to stop
18 kicking the door. Plaintiff attempted to explain that Foster had a weapon, but Defendant Cunningham
19 told Plaintiff that he was not moving. Plaintiff told Foster “to do what he said he would do” but Foster
20 said he would do it later. (ECF No. 1, p. 11.) Defendant Cunningham then opened the food slot and
21 ordered Plaintiff to cuff up. Defendant Cunningham closed the food slot and nodded at inmate Foster.
22 Foster then stood up and punched Plaintiff in the forehead. Plaintiff, in an attempt to defend himself,
23 kicked inmate Foster one time in the face. (ECF No. 1, p. 12.) As Plaintiff struggled with Foster,
24 Defendant Cunningham stated “again, again.” (ECF No. 1, p. 12.) Defendant Cunningham then
25 opened the cell door and ordered Foster to cuff up. Defendant Cunningham then told Foster to step
26 aside from the food slot and pepper sprayed Plaintiff.

27 Plaintiff also alleges that Defendant Cunningham violated his rights by giving away Plaintiff’s
28 property to another inmate in retaliation for a staff complaint filed by Plaintiff. Defendant

1 Cunningham allegedly gave some of Plaintiff's property to inmate Foster after they were removed
2 from their cell. (ECF No. 1, pp. 28-29.)

3 **B. Statement of Undisputed Material Facts**

4 Procedural Compliance with Local Rule 260

5 Despite receiving notice of the requirements for opposing summary judgment, Plaintiff failed
6 to file a statement admitting or denying the facts set forth by Defendants as undisputed. Local Rule
7 260(b). Instead, Plaintiff simply stated that he disputed each of Defendants' undisputed facts. (ECF
8 No.87, p. 2.) Plaintiff also filed a separate statement of disputed facts. (ECF No. 90.)

9 Defendants have requested entry of summary judgment based on Plaintiff's failure to comply
10 with Local Rule 260(b). The Court does not find that entry of summary judgment is warranted on that
11 basis given Plaintiff's filing of a separate statement of disputed facts. However, as Plaintiff did not
12 file a statement admitting or denying the facts set forth by Defendants, the Court shall accept
13 Defendants' statement of undisputed facts except where brought into dispute by Plaintiff's separate
14 statement of disputed facts or by his verified complaint. [Jonas v. Blanas, 393 F.3d 918, 923 \(9th Cir.](#)
15 [2004](#)) (verified complaint may be used as an opposing affidavit if it is based on pleader's personal
16 knowledge of specific facts which are admissible in evidence).

17 Undisputed Material Facts ("UMF")

- 18 1. Plaintiff was incarcerated at CCI-Tehachapi from 2002 to 2008. (Ex. A to Declaration of
19 Ochoa.)
- 20 2. In 2006, Defendants Mullins and Cunningham were employed as correctional officers at
21 CCI-Tehachapi. (Declaration of Mullins ("Mullins Dec."), ¶ 1; Declaration of
22 Cunningham ("Cunningham Dec."), ¶ 1; ECF No. 90, Plaintiff's Undisputed Material Fact
23 No. 1.)
- 24 3. In the early part of November 2006, Plaintiff was moved into a cell with an inmate named
25 Foster. (Deposition of Plaintiff, 13:4-14:1; Ex. A to Declaration of Wilson ("Wilson
26 Dec."))
- 27 4. The cell was in building (or housing unit) number three. (Deposition of Plaintiff, 14:11-24,
28 Ex. A to Wilson Dec.)

- 1 5. Plaintiff began to have problems with Foster two or three days after being moved into the
2 new cell. (Deposition of Plaintiff, 15:20-23, Ex. A to Wilson Dec.)
- 3 6. In November 2006, Defendant Mullins was assigned as an officer in housing unit number
4 four (a.k.a. “building four”). (Mullins Dec. ¶ 2.)
- 5 7. On November 9, 2006, Defendant Mullins went to building three to help staff in that unit
6 with the distribution of meals. (Mullins Dec. ¶ 2)
- 7 8. On that day, Plaintiff expressed to Defendant Mullins a desire to move to a different cell.
8 (Mullins Dec. ¶ 2; ECF No. 90, Plaintiff’s Undisputed Material Facts Nos. 4, 7.)
- 9 9. Defendant Mullins informed Plaintiff that he could not move him to another cell. (Mullins
10 Dec. ¶ 7.)
- 11 10. Plaintiff allowed inmate Foster to pack up his property for him. (Deposition of Plaintiff,
12 33:8-10, Ex. A to Wilson Dec.)
- 13 11. Foster packed Plaintiff’s property into sheets and plastic bags. (Deposition of Plaintiff,
14 33:8-10; Plaintiff’s Undisputed Material Fact No. 4.)
- 15 12. On November 12, 2006, Plaintiff informed Defendant Cunningham of his desire to move
16 into a different cell. (Cunningham Dec. ¶ 8; ECF 90, Plaintiff’s Undisputed Material Fact
17 Nos. 11, 14.)
- 18 13. At some point, Plaintiff started kicking his cell door. (ECF No. 90, Plaintiff’s Undisputed
19 Material Fact No. 22; Cunningham Dec. ¶ 12.)
- 20 14. Defendant Cunningham and Hartman approached the cell and observed that it was Plaintiff
21 that was kicking the door. (ECF No. 90, Plaintiff’s Undisputed Material Fact No. 24;
22 Cunningham Dec. ¶ 12.)
- 23 15. Defendant Cunningham ordered him to stop, and Plaintiff complied. (ECF No. 90,
24 Plaintiff’s Undisputed Material Fact No. 23; Cunningham Dec. ¶ 12.)
- 25 16. Plaintiff began talking to his cellmate Foster. (ECF No. 90, Plaintiff’s Undisputed Material
26 Fact No. 26; Cunningham Dec. ¶ 13.)
- 27 17. Defendant Cunningham ordered Plaintiff to submit to being placed into handcuffs. (ECF
28 No. 90, Plaintiff’s Undisputed Material Fact No. 28; Cunningham Dec. ¶ 14.)

- 1 18. Plaintiff complied and Defendant Cunningham placed him into handcuffs through the open
2 tray slot on the cell door. (Cunningham Dec. ¶ 14; ECF No. 90, Plaintiff's Undisputed
3 Material Fact No. 29.)
- 4 19. Defendant Cunningham directed Plaintiff to move to the back of the cell and directed
5 Foster to come to the front of the cell so that he too could be placed in handcuffs.
6 (Cunningham Dec. ¶ 14.)
- 7 20. Plaintiff moved to the back of the cell. (Cunningham Dec. ¶ 15.)
- 8 21. Inmate Foster came to the cell door, bent over at the waist to a 90 degree angle, and placed
9 his hands into the tray slot in the door so that Defendant Cunningham could place him into
10 handcuffs. (ECF No. 90, Plaintiff's Undisputed Material Fact No. 35; Cunningham Dec. ¶
11 15.)
- 12 22. At some point, Plaintiff kicked inmate Foster. (ECF No. 90, Plaintiff's Undisputed
13 Material Fact No. 34; Cunningham Dec. ¶ 15.)
- 14 23. Defendant Cunningham put his hand through the tray slot and attempted to push inmate
15 Foster to the side. (Cunningham Dec. ¶ 16; ECF No. 90, Plaintiff's Undisputed Material
16 Fact No. 38.)
- 17 24. Inmate Foster moved aside slightly and Defendant Cunningham discharged pepper spray
18 through the tray-slot into the cell and directed it at Plaintiff. (Cunningham Dec. ¶ 16; ECF
19 No. 90, Plaintiff's Undisputed Material Fact No. 38.)
- 20 25. Defendant Cunningham finished placing inmate Foster into handcuffs. (Cunningham Dec.
21 ¶ 16.)
- 22 26. Defendant Cunningham then ordered that the cell door be opened. (Cunningham Dec. ¶
23 17.)
- 24 27. He ordered that both inmates exit the cell. (Cunningham Dec. ¶ 17.)
- 25 28. As Foster exited the cell, Defendant Cunningham noticed that blood was dripping from his
26 nose. (Cunningham Dec. ¶ 17.)
- 27 29. Officers Santa Maria and Reed then escorted Foster out of the building. (Cunningham Dec.
28 ¶ 17; Exs. D and E to Ochoa Dec.)

- 1 30. Defendant Cunningham escorted Plaintiff out of the building. (Cunningham Dec. ¶ 17.)
- 2 31. Once outside the building, Officers Yoder and Wood took over the duty of escorting
- 3 Plaintiff. (Cunningham Dec. ¶ 17.)
- 4 32. Both inmates were seen by LVN Keyes. (Ex. H to Ochoa Dec.)
- 5 33. Keyes found that Foster was bleeding from a small cut on the top of his nose and a small
- 6 laceration of the top of his right eye. (Ex. H to Ochoa Dec.)
- 7 34. Plaintiff told Keyes that Foster hit him in the head and that he kicked Foster in the face.
- 8 (Ex. I to Ochoa Dec.)
- 9 35. Foster told Keyes that he was handcuffed in his cell when another inmate hit him in his
- 10 face. (Ex. J to Ochoa Dec.)
- 11 36. Plaintiff was found to have a small bruise on his forehead. (Ex. H to Ochoa Dec.)
- 12 37. Plaintiff states that he is alleging a failure to protect claim against Defendant Mullins but
- 13 that he is not alleging an excessive force claim against Mullins. (Deposition of Plaintiff,
- 14 19:5-18, Ex. A to Wilson Dec.)
- 15 38. On November 16, 2006, Defendant Cunningham performed an inventory of Plaintiff's
- 16 property, and delivered property to Plaintiff. (Cunningham Dec. ¶ 20; ECF No. 90,
- 17 Plaintiff's Undisputed Material Fact No. 42.)
- 18 39. An inmate appeal regarding Plaintiff's interest in being moved to a new cell was received
- 19 by the inmate appeals office on November 17, 2006. (Ex. K to Ochoa Dec.)
- 20 40. Defendant Cunningham did not become aware that Plaintiff had filed an inmate appeal
- 21 regarding his desire to move to a new cell until sometime after that appeal had been
- 22 received the inmate appeal office at the prison.¹ (Cunningham Dec. ¶ 19.)

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26 ¹ Plaintiff attempts to dispute this fact by claiming that Officer Sailor, who did not work in the Appeals Office, but worked with Defendant Cunningham, was able to view the appeal before it was received and filed with the Appeals Office. Although Plaintiff provides evidence that Officer Sailor was aware that Plaintiff filed an inmate appeal regarding an ongoing problem with inmate Foster, this evidence does not raise a triable issue of fact that Defendant Cunningham was aware of the appeal. (ECF No. 87, Ex. S to Plaintiff's Opposition.) Plaintiff's assertion is unsupported by the evidence and is based on mere conjecture.

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1 **III. Discussion**

2 **A. Plaintiff's Eighth Amendment Claims**

3 **1. Deliberate Indifference to Safety**

4 Under the Eighth Amendment, "prison officials have a duty . . . to protect prisoners from
5 violence at the hands of other prisoners." [Farmer v. Brennan, 511 U.S. 825, 833, 114 S.Ct. 1970, 128](#)
6 [L.Ed.2d 811 \(1994\)](#) (internal quotation marks and citation omitted). However, "not . . . every injury
7 suffered by one prisoner at the hands of another . . . translates into constitutional liability for prison
8 officials responsible for the victim's safety." [Id. at 834](#). A prison official may be held liable for an
9 assault suffered by one inmate at the hands of another only where the assaulted inmate can show that
10 the injury is sufficiently serious, [id. at 834](#) (citing [Wilson v. Seiter, 501 U.S. 294, 298, 111 S.Ct. 2321,](#)
11 [115 L.Ed.2d 271 \(1991\)](#)), and that the prison official was deliberately indifferent to the risk of harm,
12 [id. at 837](#). To be deliberately indifferent, the "official must both be aware of facts from which the
13 inference could be drawn that a substantial risk of serious harm exists, and he must also draw the
14 inference." [Id.](#)

15 **Defendant Mullins**

16 Defendant Mullins argues that there is no evidence that he failed to protect Plaintiff because
17 (1) the evidence indicates that Plaintiff initiated the altercation with inmate Foster; and (2) Defendant
18 Mullins was unaware of any underlying facts indicating that Plaintiff was facing a sufficiently
19 substantial danger. (ECF No. 72-2, pp. 13-14.) Defendant Mullins therefore concludes that he is
20 entitled to summary judgment.

21 The Court recommends that Defendant Mullins be denied summary judgment on this claim.
22 Genuine issues of material fact exist as to whether Plaintiff was assaulted by inmate Foster and
23 whether Defendant Mullins knew of the risk of assault by inmate Foster and failed to move Plaintiff
24 from the cell. With regard to the alleged assault, Defendants admit that an altercation took place
25 between Plaintiff and inmate Foster on November 12, 2009. However, Defendants contend that
26 Plaintiff initiated the altercation. (ECF No. 72-2, p. 13.) In contrast, Plaintiff has presented evidence,
27 in the form of his verified complaint and declaration, that inmate Foster assaulted him on November
28 12, 2006, after Plaintiff was placed in handcuffs by Defendant Cunningham. (ECF No. 1, p. 12; ECF

1 No. 87, p. 64, Declaration of Plaintiff ¶¶ 30-32.) Plaintiff's evidence creates a genuine dispute
2 regarding who initiated the altercation and whether Plaintiff was assaulted by inmate Foster.

3 Defendant Mullins further contends that he was unaware of any underlying facts indicating that
4 Plaintiff was facing a sufficiently substantial danger from his cellmate. However, Plaintiff has
5 presented evidence, in the form of his verified complaint and declaration, that he informed Defendant
6 Mullins that he had received threats to his safety from his cellmate, inmate Foster, that he required a
7 cell move, and that Defendant Mullins did not effectuate a cell move. (ECF No. 1, p. 9; ECF No. 87,
8 p. 59, Declaration of Plaintiff ¶¶ 3, 5-6.) Plaintiff's evidence creates a genuine dispute regarding
9 whether or not Defendant Mullins was aware that Plaintiff faced a substantial risk and failed to
10 respond.

11 The Court therefore concludes that Plaintiff has raised triable issues of fact regarding whether
12 Defendant Mullins was deliberately indifferent to a substantial risk of serious harm to Plaintiff.

13 Defendant Cunningham

14 Defendant Cunningham contends that there is no evidence that he failed to protect Plaintiff
15 because (1) it does not appear the Plaintiff was facing any particularly substantial danger; (2) Plaintiff
16 initiated the fight with inmate Foster; and (3) Defendant Cunningham was in the process of moving
17 Plaintiff from the cell when Plaintiff challenged inmate Foster and kicked him in the head. (ECF No.
18 72-2, pp. 14-15.)

19 The Court recommends that Defendant Cunningham be denied summary judgment on this
20 claim. Plaintiff has presented evidence that he informed Defendant Cunningham on more than one
21 occasion that he faced a risk of assault from his cellmate and required a cell move, that Defendant
22 Cunningham did not move Plaintiff from the cell with inmate Foster, and, as discussed above, that
23 inmate Foster assaulted Plaintiff on November 12, 2006, after Plaintiff was handcuffed by Defendant
24 Cunningham. (ECF No. 1, pp. 9, 12; ECF No. 87, pp. 59-60, Declaration of Price ¶¶ 3, 5, 12-13, 18,
25 24, 30-32.) Accordingly, the Court finds that Plaintiff has raised triable issues of fact regarding
26 whether Defendant Cunningham was deliberately indifferent to a substantial risk of serious harm to
27 Plaintiff.

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1 **2. Excessive Force**

2 “What is necessary to show sufficient harm for purposes of the Cruel and Unusual
3 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue” [Hudson v.](#)
4 [McMillian, 503 U.S. 1, 8 \(1992\)](#). “The objective component of an Eighth Amendment claim is . . .
5 contextual and responsive to contemporary standards of decency.” [Id.](#) (internal quotation marks and
6 citations omitted). The malicious and sadistic use of force to cause harm always violates
7 contemporary standards of decency, regardless of whether or not significant injury is evident. [Id. at 9](#);
8 [see also Oliver v. Keller, 289 F.3d 623, 628 \(9th Cir. 2002\)](#) (Eighth Amendment excessive force
9 standard examines de minimis uses of force, not de minimis injuries). However, not “every
10 malevolent touch by a prison guard gives rise to a federal cause of action.” [Hudson, 503 U.S. at 9](#).
11 “The Eighth Amendment’s prohibition of cruel and unusual punishments necessarily excludes from
12 constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a
13 sort repugnant to the conscience of mankind.” [Id. at 9-10](#) (internal quotations marks and citations
14 omitted).

15 “[W]henever prison officials stand accused of using excessive physical force in violation of the
16 Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force . . . was applied in a
17 good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” [Id.](#)
18 [at 6-7](#). “In determining whether the use of force was wanton and unnecessary, it may also be proper to
19 evaluate the need for application of force, the relationship between that need and the amount of force
20 used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the
21 severity of a forceful response.” [Id. at 7](#) (internal quotation marks and citations omitted). “The
22 absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it.” [Id.](#)

23 Defendant Mullins

24 The Court recommends that summary judgment be entered in favor of Defendant Mullins on
25 Plaintiff’s claim of excessive force in violation of the Eighth Amendment. Plaintiff has admitted that
26 he is not alleging an excessive force claim against Defendant Mullins, and he does not argue that
27 Defendant Mullins should be denied summary judgment on this claim. (UMF 37; ECF No. 87, pp. 35-
28 40.)

1 Defendant Cunningham

2 The Court recommends that summary judgment be entered in favor of Defendant Cunningham
3 on Plaintiff’s claim of excessive force in violation of the Eighth Amendment. The undisputed
4 evidence indicates that Plaintiff and inmate Foster were involved in an altercation in their cell, both
5 were handcuffed (to some degree), Plaintiff kicked inmate Foster, and Defendant Cunningham then
6 used pepper spray on Plaintiff. (UMF Nos. 17, 18, 22-25.)

7 Plaintiff attempts to raise a triable issue of fact by arguing that he could not reach inmate
8 Foster to kick him, and that Defendant Cunningham’s use of force was not done in good faith.
9 Plaintiff’s argument is unsupported. Plaintiff has admitted to kicking inmate Foster. (UMF No. 22.)
10 A legitimate penological reason exists to use pepper spray to break up an admittedly ongoing in-cell
11 fight between inmates.

12 Plaintiff also suggests that inmate Foster initiated the attack on Plaintiff following the “go
13 ahead” by Defendant Cunningham to assault Plaintiff, and that Defendant Cunningham used pepper
14 spray to cover up the attack. (ECF No. 87, p. 36; ECF No. 87, p. 64, Declaration of Price ¶ 32.)
15 However, the undisputed evidence demonstrates that Defendant Cunningham utilized the pepper spray
16 after the altercation started and Plaintiff kicked inmate Foster. (UMF Nos. 22-24.) The undisputed
17 evidence also demonstrates that following the use of pepper spray, Defendant Cunningham was able to
18 complete the handcuffing of inmate Foster and remove both inmates from the cell. (UMF Nos. 23-
19 27.) It is evident that Defendant Cunningham utilized the pepper spray in a “good faith effort to
20 maintain or restore discipline.” Hudson, 503 U.S. at 6-7. Defendant Cunningham could not allow the
21 inmates to continue their altercation. The Court therefore concludes that Plaintiff has failed to raise
22 triable issues of material fact regarding Defendant Cunningham’s need for the application of force.

23 **B. Plaintiff’s First Amendment Retaliation Claim**

24 Plaintiff claims that Defendant Cunningham retaliated against him for filing a staff complaint
25 by giving away Plaintiff’s property to another inmate.

26 An allegation of retaliation against a prisoner’s First Amendment right to file a prison
27 grievance is sufficient to support claim under [section 1983](#). [Bruce v. Ylst, 351 F.3d 1283, 1288 \(9th](#)
28 [Cir. 2003\)](#). Retaliation against a prisoner for the exercise of his right to file a grievance is itself a

1 constitutional violation, prohibited as a matter of clearly established law. [Pratt v. Rowland, 65 F.3d](#)
2 [802, 806 \(9th Cir. 1995\).](#) Within the prison context, “[a] viable claim of First Amendment retaliation
3 entails five basic elements: (1) An assertion that a state actor took some adverse action against an
4 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the
5 inmate’s exercise of his First Amendment rights, and (5) the action did not reasonable advance a
6 legitimate correctional goal.” [Rhodes v. Robinson, 408 F.3d 559, 567 \(9th Cir. 2005\)](#); accord
7 [Brodheim v. Cry, 584 F.3d 1262, 1269 \(9th Cir. 2009\)](#). The court must “‘afford appropriate deference
8 and flexibility’ to prison officials in the evaluation of proffered legitimate penological reasons for
9 conduct alleged to be retaliatory.” [Pratt, 65 F.3d at 807](#) (quoting [Sandin v. Conner, 515 U.S. 472, 482,](#)
10 [115 S. Ct. 2293 \(1995\)](#)). The burden is on plaintiff to demonstrate “that there were no legitimate
11 correctional purposes motivating the actions he complains of.” [Pratt, 65 F.3d at 808](#).

12 The Court recommends that summary judgment be entered in favor of Defendant Cunningham
13 on Plaintiff’s claim of retaliation. It is undisputed that Defendant Cunningham performed an
14 inventory of Plaintiff’s property on November 16, 2006, and returned property to Plaintiff on that date.
15 (UMF No. 38.) Whether Defendant Cunningham returned all or only a portion of Plaintiff’s property
16 to him on that date is immaterial, because it is undisputed that Plaintiff’s appeal regarding his request
17 for a cell move was received by the inmate appeals office on November 17, 2006, and Defendant
18 Cunningham was unaware of that appeal until some later time. (UMF Nos. 38-40.) In other words,
19 Plaintiff has not offered any admissible evidence, aside from conjecture, to suggest that Defendant
20 Cunningham was aware of the inmate appeal on November 16, 2006, when he inventoried and
21 returned Plaintiff’s property. (ECF No. 87, Ex. S to Plaintiff’s Opposition.) The Court therefore finds
22 Plaintiff has not come forward with facts showing a genuine dispute that Defendant Cunningham took
23 some adverse action against Plaintiff *because of* Plaintiff’s inmate appeal. [Rhodes, 408 F.3d at 567](#).

24 **C. Qualified Immunity**

25 Defendants argue that they are entitled to qualified immunity because they could not have
26 reasonably believed that their actions had violated Plaintiff’s constitutional rights.

27 The doctrine of qualified immunity protects government officials from civil liability where
28 “their conduct does not violate clearly established statutory or constitutional rights of which a

1 reasonable person would have known.” [Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 815,](#)
2 [172 L.Ed.2d 565](#) (2009) (quoting [Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73](#)
3 [L.Ed.2d 396](#) (1982)). Qualified immunity protects “all but the plainly incompetent or those who
4 knowingly violate the law.” [Ashcroft v. al-Kidd, — U.S. —, —, 131 S.Ct. 2074, 2085, 179](#)
5 [L.Ed.2d 1149](#) (2011) (citations omitted). To determine if an official is entitled to qualified immunity
6 the court uses a two part inquiry. [Saucier v. Katz, 533 U.S. 194, 200, 121 S.Ct. 2151, 2155, 150](#)
7 [L.Ed.2d 272](#) (2001) [overruled in part by Pearson v. Callahan, 555 U.S. at 236, 129 S.Ct. at 818.](#) The
8 court determines if the facts as alleged state a violation of a constitutional right and if the right is
9 clearly established so that a reasonable official would have known that his conduct was unlawful.
10 [Ashcroft, 131 S.Ct. at 2080.](#) This does not require that the same factual situation must have been
11 decided, but that existing precedent would establish the statutory or constitutional question beyond
12 debate. [Id. at 2083; Mattos v. Agarano, 661 F.3d 433, 442 \(9th Cir.2011\).](#) The inquiry as to whether
13 the right was clearly established is “solely a question of law for the judge.” [Dunn v. Castro, 621 F.3d](#)
14 [1196, 1199 \(9th Cir.2010\)](#) (quoting [Tortu v. Las Vegas Metro. Police Dep’t., 556 F.3d 1075, 1085 \(9th](#)
15 [Cir.2009\)](#)). District courts are “permitted to exercise their sound discretion in deciding which of the
16 two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in
17 the particular case at hand.” [Pearson, 555 U.S. at 236, 129 S.Ct. at 818.](#)

18 For the reasons stated above, the Court has found that Defendants Cunningham and Mullins
19 are entitled to summary judgment on Plaintiff’s Eighth Amendment excessive force claim and that
20 Defendant Cunningham is entitled to summary judgment on Plaintiff’s First Amendment retaliation
21 claim. As the Court found no constitutional violations, Defendants are therefore entitled to qualified
22 immunity on these claims.

23 However, the Court does not find that Defendants are entitled to qualified immunity on the
24 remainder of Plaintiff’s claims; that is, Defendants Mullins and Cunningham are not entitled to
25 qualified immunity on Plaintiff’s Eighth Amendment deliberate indifference claim. As discussed, the
26 Court has found that there are genuine issues of material fact regarding this claim and whether
27 Defendants violated Plaintiff’s constitutional rights. Accordingly, at this time, the Court cannot make
28 a determination as to whether Defendants violated Plaintiff’s clearly established constitutional rights.

1 **IV. Conclusion and Recommendation**

2 For the reasons discussed above, the Court HEREBY RECOMMENDS that Defendants’
3 motion for summary judgment, filed on October 8, 2012, be GRANTED IN PART and DENIED IN
4 PART as follows:

- 5 a. Summary judgment be GRANTED in favor of Defendant Cunningham and Mullins on
6 Plaintiff’s claim of excessive force in violation of the Eighth Amendment;
7 b. Summary judgment be DENIED on Plaintiff’s claim of deliberate indifference to safety
8 in violation of the Eighth Amendment against Defendants Cunningham and Mullins.
9 c. Summary judgment be GRANTED in favor of Defendant Cunningham on Plaintiff’s
10 claim of retaliation in violation of the First Amendment; and
11 d. Defendants Cunningham and Mullins be DENIED qualified immunity on Plaintiff’s
12 claim of deliberate indifference to safety in violation of the Eighth Amendment.

13 These Findings and Recommendations will be submitted to the United States District Judge
14 assigned to the case, pursuant to the provisions of [Title 28 U.S.C. § 636\(b\)\(1\)](#). Within **twenty-one (21)**
15 **days** after being served with these Findings and Recommendations, the parties may file written
16 objections with the court. The document should be captioned “Objections to Magistrate Judge’s
17 Findings and Recommendations.” The parties are advised that failure to file objections within the
18 specified time may waive the right to appeal the District Court’s order. [Martinez v. Ylst, 951 F.2d](#)
19 [1153 \(9th Cir. 1991\)](#).

20
21 IT IS SO ORDERED.

22 Dated: August 29, 2013

/s/ Barbara A. McAuliffe
23 UNITED STATES MAGISTRATE JUDGE