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

**ANTHONY DAVIS, CDCR #-T-48683,**  
  
**Plaintiff,**  
  
**vs.**  
  
**A. LYNN, Correctional Officer;  
D. GONSALEZ, Correctional Officer;  
F. FREGOSA, Correctional Officer,**  
  
**Defendants.**

Civil No. 1:08cv01245-BTM (BLM)  
  
**ORDER DENYING PLAINTIFF'S  
MOTION TO VACATE JUDGMENT**  
  
(Dkt No. 41)

Plaintiff Anthony Davis ("Davis"), a state prisoner serving a life sentence for murder and robbery, proceeding *pro se* and *in forma pauperis* with this 42 U.S.C. § 1983 civil rights action, alleged Eighth Amendment violations arising from a September 15, 2007 incident at Pleasant Valley State Prison involving claims of excessive force by the named correctional officers. By Order entered March 30, 2011, the Court granted Defendants' Motion For Summary Judgment and judgment was entered in their favor. (Dkt No. 39.) Davis now moves for an Order to vacate the judgment pursuant to Fed. R. Civ. P. 59(e), a rule addressing motions for new trial or to "alter or amend a judgment" and providing such a motion "must be filed no later than 28 days after the entry of the judgment." Davis states the ground for his motion:

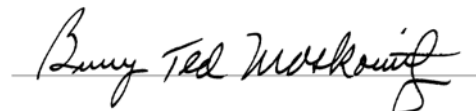
This March 29th, 2011 court order was erroneous and contrary to law; in the court order, it states that plaintiff failed to file a[n] opposition to defendant's motion for summary judgment. In fact, plaintiff filed his opposition on 8-16-2010.

Dkt No. 41 1:14-19.

1           However, contrary to Davis' representation, the docket shows no entry for any activity in this  
2 case during the month of August 2010. In addition, although Davis states he attached a "memorandum  
3 of law" to his motion to vacate the judgment, the filing is comprised of a single-page document.  
4 Contrary to Davis' inference, summary judgment was not entered based on the absence of an Opposition  
5 to the motion, even though Davis was informed that could happen in the Klinge / Rand notice the  
6 Court provided him in the briefing schedule Order. The Court reached the merits of Davis' complaint  
7 allegations in ruling on defendants' Motion For Summary Judgment, despite the absence of an  
8 Opposition, because his Complaint was verified and his sworn deposition testimony was before the  
9 Court. *See* Dkt No. 39, 6:9-18. The facts averred in those materials constituted admissible evidence  
10 in support of his allegations for purposes of deciding the motion. *See* Keenan v. Hall, 83 F.3d 1083,  
11 1090 n.1 (9th Cir. 1996). In deciding the motion, the Court applied FED. R. CIV. P. 56 standards to all  
12 the evidence presented, construing it in the light most favorable to Davis as the non-moving party. Id.  
13 8:27-28; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Moreover, in addition to the  
14 merits result finding no constitutional violation had occurred in the defendants' use of force, the Court  
15 also found the doctrine of qualified immunity would shield these defendants from liability for civil  
16 damages even were the record construed to find a constitutional violation. Dkt No. 39, 11:8-20; *see*  
17 Pearson v. Callahan, 555 U.S. 223, 129 S.Ct.808, 815 (2009). For all these reasons, Davis' Motion To  
18 Vacate Judgment is **DENIED**.

19           **IT IS SO ORDERED.**

20           DATED: May 2, 2011

21           

22           Honorable Barry Ted Moskowitz  
23           United States District Judge