UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ALVARO QUEZADA,

Plaintiff,

v.

R. LINDSEY, et al.,

Defendants.

No. 1:10-cv-01402-DAD-SAB

ORDER ADOPTING RECOMMENDATION, DENYING MOTION FOR SUMMARY JUDGMENT IN PART AND GRANTING MOTION FOR SUMMARY JUDGMENT IN PART, AND REFERRING THE MATTER BACK TO THE ASSIGNED MAGISTRATE JUDGE FOR FURTHER PROCEEDINGS

(Doc. Nos. 78, 95)

Plaintiff is a state prisoner proceeding pro se in this civil rights action brought pursuant to 42 U.S.C. § 1983. (Doc. No. 18.) The matter was referred to the assigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 of the United States District Court for the Eastern District of California.

On April 1, 2015, defendants filed a motion for summary judgment with respect to plaintiff's Eighth Amendment deliberate indifference claims against defendants Lindsey and Gonzalez, and plaintiff's First Amendment retaliation claim against defendants Lindsey and Doran. (Doc. No. 78.) On February 5, 2016, the assigned magistrate judge issued findings and recommendations recommending the motion for summary judgment be denied as to plaintiff's Eighth Amendment claims against defendants Lindsey and Gonzalez, the denied as to First

Amendment claim against defendant Lindsey, and granted only as to plaintiff's First Amendment claim against defendant Doran. (Doc. No. 95.) Defendants filed objections to the findings and recommendations on March 2, 2016. (Doc. No. 96.) Plaintiff submitted no objections, and the deadline to do so has passed.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis, save and except as discussed below.

Concerning plaintiff's Eighth Amendment claims against defendants Lindsey and Gonzalez, the defendants moved for summary judgment in their favor arguing that they did not act with deliberate indifference because they notified the appropriate department at the prison and submitted work orders to repair the dangerous situation. (Doc. No. 78-1 at 6.) In the meantime, according to defendants, they instructed the inmates to be careful and to take certain precautions. (*Id.*) The findings and recommendations state, "without evidence of an actual work order, the determination of whether Defendant Lindsey actually submitted a work order regarding the leaking pipes and formation of ice in the meat freezer area is a question of fact that cannot be resolved by the Court." (Doc. No. 95 at 10.) The undersigned disagrees. As defendants note in their objections, there is no requirement that documentary evidence be presented in support of a motion for summary judgment. Indeed, Rule 56 specifically contemplates the parties proceeding by way of affidavit or declaration. Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."). Accordingly, oral testimony from one with personal knowledge would generally be admissible.[1]

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[1] The absence of a written document that a factfinder would expect to find might go the credibility of a declaration. However, credibility determinations are not to be made on summary judgment.

Here, in moving for summary judgment defendants came forward with evidence in the form of a declaration by defendant Lindsey stating, "I received reports that leaks had developed in the main freezers at KVSP, and that ice had formed inside the freezer boxes, and responded by submitting a Work Order to the Plant Operations Department at KVSP, requesting that their personnel address the leaks." (Doc. No. 78-2 at 41–42.) Defendant Lindsey's declaration was signed under penalty of perjury and is dated, and therefore is admissible as evidence on summary judgment. *Chao v. Westside Drywall, Inc.*, 709 F. Supp. 2d 1037, 1052 (D. Ore. 2010); *United States v. Malinowski, et al.*, No 2:11-cv-1187-JAM-JFM, 2012 WL 4866321, at *2 (E.D. Cal. Oct. 12, 2012) ("Under Federal Rule of Civil Procedure 56, a motion for summary judgment can be supported with affidavits, admissible evidence, and declarations. An attorney declaration is a proper vehicle for submitting admissible evidence.").[2] Of course, a court may not simply disregard admissible evidence on summary judgment. *See Nigro v. Sears, Roebuck and Co., 784 F.3d 495, 497 (9th Cir. 2015)* ("Although the source of the evidence may have some bearing on its credibility and on the weight it may be given by a trier of fact, the district court may not disregard a piece of evidence at the summary judgment stage solely based on its self-serving nature."); *Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999) (district court could not disregard evidence simply because no reasonable jury would believe it); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) ("Nor does the judge [on summary judgment] make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions").

The findings and recommendations also state that plaintiff "submits that he cannot dispute this fact because there is no record of any work order having ever been submitted by Defendant Lindsey." (Doc. No. 95, at 9–10.) Indeed, plaintiff does assert the defendants "never took such measures." (Doc. No. 88 at 29.) However, plaintiff presents no evidence to support this

[2] On the other hand, a self-serving declaration that states only conclusions and not facts that would be admissible evidence may be disregarded by the court on summary judgment. Nigro v. Sears, Roebuck and Co., 784 F.3d 495, 497 (9th Cir. 2015) (citing *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1059 n. 5, 1061 (9th Cir.2002) (holding that the district court properly disregarded the declaration that included facts beyond the declarant's personal knowledge and did not indicate how she knew the facts to be true). But, such is not the case here.

contention. If plaintiff presents no admissible evidence with which to dispute a fact, the court should generally treat it as having been established. *See Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987).

Further, the documentary evidence submitted by plaintiff suggest that work orders had, in fact, been submitted concerning the ice in the freezer. Plaintiff submitted his verified first amended complaint in support of his opposition for summary judgment, in which he alleges that prior to being assigned to work loading and unloading shipments in the kitchen, he was a clerk for the kitchen. (Doc. No. 88 at 51–52.) In this capacity, plaintiff observed several previously filed work orders which noted the "long standing deficiencies" in the kitchen, including the ice on the floor of the freezers. (Doc. No. 88 at 52.) While plaintiff's verified complaint is unclear about who submitted these work orders, the allegations of the complaint do suggest plaintiff knew defendant Lindsey was aware of these work order requests being submitted. (Doc. No. 88 at 51–52.) The documents submitted with plaintiff's opposition to the pending motion also include an affidavit in which plaintiff declares that he was a clerk for about seven months prior to being transferred approximately one month before the accident, and saw that "[m]any work orders were submitted regarding the 'Main Kitchen Freezers' regarding loose metal inside the freezers, and also the ice all on the floors of the freezers." (Doc. No. 88 at 76.)

The real question concerning Eighth Amendment liability here, therefore, is not whether defendants submitted work orders. While whether Lindsey personally submitted the work orders is unclear, there appears to be no dispute that work orders about this problem were submitted and that Lindsey was aware of their submission. The material issue is whether the submission of work orders and the cautionary instructions given to plaintiff and other inmates were a reasonable, albeit unsuccessful, response to the risk. *Farmer v. Brennan*, 511 U.S. 825, 844–45 (1994). Defendants believe they were; plaintiff asserts they were not.

Where the facts are undisputed, generally the question of reasonableness is a question for the court to resolve as a matter of law only if a rational jury could reach only one answer. *See Gorman v. Wolpoff & Abramson, 584 F.3d 1147, 1157 (9th Cir. 2009); In re Software Toolworks Inc., 50 F.3d 615, 621 (9th Cir. 1994)* ("[S]ummary judgment is generally an inappropriate way

to decide questions of reasonableness because 'the jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment.' " *(quoting TSC Indus. v. Northway, Inc., 426 U.S. 438, 450 n. 12 (1976); Act Up!/Portland v. Bagley*, 988 F.2d 868, 872–73 (9th Cir. 1993); *see also Act Up!*, 988 F.2d at 877–78 (dissent). Here, given the evidence presented on summary judgment, a jury could reasonably reach either answer. Therefore, finding the defendants' response to the problem reasonable or unreasonable is a decision for the trier of fact under these circumstances. The undersigned therefore adopts the ultimate recommendation, albeit not the analysis of the findings and recommendations with respect to this claim. The undersigned also adopts both the findings and recommendations concerning the Eighth Amendment claim against defendant Gonzalez. The motion for summary judgment on the Eighth Amendment claims against defendants Lindsey and Gonzalez is denied.

Concerning the First Amendment retaliation claim against defendant Lindsey, defendants again assert defendant Lindsey's declaration may not be discredited merely because it is unsupported by documentary evidence. While that is certainly true for the reasons discussed above, on this issue the findings and recommendations do note the existence of conflicting testimony: while defendant Lindsey states the policy change was not done for retaliatory purposes, plaintiff insists that it was. Evidence has been presented on summary judgment that supports both positions. Defendant Lindsey states in his declaration that the decision not to allow inmates to use pallet jacks in the freezers was the result of the jacks damaging the interior walls of the freezer, and that the policy was instituted by Associate Warden R. Grissom and Plant Manager G. Jaime. (Doc. No. 78-2 at 42.) Plaintiff contends it was done to punish him, as evidenced by declarations from other witnesses who noted the policy was instituted following plaintiff's filing of an inmate grievance, and never enforced after plaintiff was removed from his position in the kitchen. (*See* Doc. No. 88 at 126.) Plaintiff's declaration also provides evidence that the timing of the allegedly retaliatory policy's implementation suggests it was punitive in nature. (Doc. No. 88 at 7.) This evidence on summary judgment is sufficient to require the trier of fact to weigh the credibility of the witnesses and determine whom to believe. Accordingly, the

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undersigned adopts the findings and recommendations of the assigned magistrate judge on this issue.

Neither party has objected to the recommendation that summary judgment be granted in favor of defendant Doran. The undersigned therefore adopts the remainder of the findings and recommendations filed by the magistrate judge. (Doc. No. 95.)

Given the foregoing:

1. The findings and recommendations (Doc. No. 95) are adopted, save and except as discussed above;

2. The motion for summary judgment (Doc. No. 78) is denied as to the Eighth Amendment deliberate indifference claims against defendants Lindsey and Gonzalez, denied as to the First Amendment retaliation claim against defendant Lindsey, and granted as to the First Amendment retaliation claim against Doran; and

3. This matter is referred back to the magistrate judge for further proceedings.

IT IS SO ORDERED.

Dated: **March 30, 2016**

Dale A. Drozd
UNITED STATES DISTRICT JUDGE