

1 As previously stated, on February 21, 2018, Plaintiff filed a motion for summary judgment,
2 along with a separate statement of undisputed facts. Defendant filed an opposition on March 9, 2018.
3 Plaintiff did not file a reply and the time to do so has expired. Accordingly, Plaintiff's motion is
4 deemed submitted for review without oral argument. Local Rule 230(1).

5 II.

6 DISCUSSION

7 A. Motion for Summary Judgment Standard

8 Any party may move for summary judgment, and the Court shall grant summary judgment if
9 the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
10 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Washington Mut. Inc. v.
11 U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether it be that a fact is disputed
12 or undisputed, must be supported by (1) citing to particular parts of materials in the record, including
13 but not limited to depositions, documents, declarations, or discovery; or (2) showing that the materials
14 cited do not establish the presence or absence of a genuine dispute or that the opposing party cannot
15 produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted).
16 The Court may consider other materials in the record not cited to by the parties, but it is not required
17 to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031
18 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

19 In judging the evidence at the summary judgment stage, the Court does not make credibility
20 determinations or weigh conflicting evidence, Soremekun, 509 F.3d at 984 (quotation marks and
21 citation omitted), and it must draw all inferences in the light most favorable to the nonmoving party
22 and determine whether a genuine issue of material fact precludes entry of judgment, Comite de
23 Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d at 942 (quotation marks and
24 citation omitted).

25 With regard to Plaintiff's motion for summary judgment, as the party with the burden of
26 persuasion at trial, Plaintiff must establish "beyond controversy every essential element of" his
27 affirmative claims. S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003) (quoting
28 W. Shwarzer, California Practice Guide: Federal Civil Procedure Before Trial § 14:124-127 (2001)).

1 The moving party's evidence is judged by the same standard of proof applicable at trial. Anderson v.
2 Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

3 **B. Allegations of Complaint**

4 On or about February 27, 2014, Plaintiff submitted an inmate appeal complaint about the D-
5 Facility food trays returning back to G-Facility with food and trash still on the trays and inmates being
6 held past their designated work hours. The appeal was withdrawn due to fear of retaliation from
7 threats made by Defendant.

8 On or about April 27, 2014, Plaintiff submitted an inmate appeal complaining of the retaliation
9 that took place. Plaintiff complained that on or about March 30, 2014, he was informed by Defendant
10 Gomez that he had a phone call in the office from Defendant lieutenant Rivero in regards to his inmate
11 group appeal log #SATF-G-1401039.

12 Defendant Rivero put Plaintiff on the speaker phone and informed him that he was to go and
13 inform all the other inmates who were part of the group appeal that he (Rivero) was going to have
14 them "all reassigned to other jobs and transferred to A-Facility." Rivero then informed Plaintiff that
15 he had ten minutes to inform everyone who signed the group appeal before he went to the building.
16 Approximately twenty minutes later, Gomez informed Plaintiff that Rivero and Flores and Lopez
17 arrived to interview him regarding the group appeal.

18 Rivero informed Plaintiff that he was going to reassign him to another job and transfer him from
19 G-Facility to A-Facility "[i]f he did not sign off on the group appeal." Plaintiff signed off on the
20 group appeal because of fear and threats of job removal and transfer.

21 On or about April 9, 2014, one of the threats was carried out and Plaintiff was removed from
22 his job assignment as Lead Retherm Cook to Vocational Office Services in direct violation of the
23 Classification Committee Action.

24 On or about April 10, 2014, Plaintiff went to his correctional counselor B. Mendes and
25 explained everything that happened. B. Mendes then talked to correctional counselor II D. Hanson.

26 On or about April 11, 2014, Plaintiff was reassigned "back to his Lead Retherm Cook Job
27 position because his removal went against the Classification Committee Action.[""]
28

1 On or about February 18, 2015, the appeal which was processed as a staff complaint was
2 denied at the third level of review.

3 **C. Undisputed Facts**

4 1. Defendant admits that for training purposes, he accompanied Sergeant J. Flores during
5 an interview of Plaintiff on March 30, 2014. (Pl.'s Mtn. Summ. J., Ex. C, Resp. to Req. for Admis.
6 No. 18; ECF No. 32 at 19:19-24.)¹

7 2. Defendant admits that based on review of Plaintiff's inmate job assignment, he was
8 assigned to G-Facility Vocational Office Services from G-Facility Cook Rethrem April 9, 2014. (Pl.'s
9 Mtn. Summ. J., Ex. C, Resp. to Req. for Admis. No. 18; ECF No. 32 at 21:13-22:2.)

10 3. Defendant states that group appeals are not to be cancelled at the request of the
11 submitting individual unless all of the inmate signatories are released, transferred, or agree to
12 withdraw the appeal. (Pl.'s Mtn. Summ. J., Ex. E, Resp. to Req. for Interrog. No. 4; ECF No. 32 at
13 29:7-13.)

14 **D. Defendant's Evidentiary Objections**

15 Defendant objects to the following exhibits attached to Plaintiff's motion: (1) Exhibit D,
16 Declaration of C. Hooker, first paragraph; (2) Exhibit D, Declaration of C. Hooker, third paragraph;
17 and (3) Exhibit D, Declaration of C. Hooker, last paragraph. (Def.'s Obj. at 1-2, ECF No. 34-3.)

18 1. Plaintiff's Exhibit D, Declaration of C. Hooker, first paragraph (ECF No. 32, at p. 25.)

19 Defendant objects to the portion of the first paragraph of C. Hooker's declaration as hearsay
20 which states, "Mr. Brummett then informed us that he got off of the phone with Lieutenant Rivero,
21 and Lt. Rivero had informed him..." to "sent to another facility."

22 Defendant's objection is sustained as the above statements are hearsay under Federal Rules of
23 Evidence 801 and 802, as they are out of court statements offered for the truth of the matter asserted.

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27 ¹ References herein to page numbers are to the Court's ECF pagination headers.
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1 2. Plaintiff's Exhibit D, Declaration of C. Hooker, third paragraph (ECF No. 32, at p. 25)
2 Defendant objects to the portion of the third paragraph of C. Hooker's declaration as hearsay
3 which states, "informed us that he was forced..." to "off the Facility G."

4 Defendant's objection is sustained as the above statements are hearsay under Federal Rules of
5 Evidence 801 and 802 as being offered for truth of matter asserted.

6 3. Plaintiff's Exhibit D, Declaration of C. Hooker, last paragraph (ECF No. 32, at p. 25)
7 Defendant objects to the portion of the last paragraph of C. Hooker's declaration as hearsay
8 which states, "[o]n or about 4/9/2014, I was informed by Mr. Brummett that he had been removed
9 from his job assignment in retaliation..." to "Appeal."

10 Defendant's objection is sustained as the above statements are hearsay under Federal Rules of
11 Evidence 801 and 802 as being offered for the truth of the matter asserted.

12 **E. Analysis of Plaintiff's Motion for Summary Judgment**

13 Plaintiff moves for summary judgment and claims that the following determinations dispose of
14 his retaliation claim against Defendant Rivero:

15 That defendant J. Rivero conspired to chill the effect of Plaintiff's exercise of his First
16 Amendment rights to file prison grievances by arbitrarily removing him from his job
17 assignment and forcing him to withdraw his prison grievance through threats. Defendant's
18 action chilled his exercise of his First Amendment rights and did not reasonably advance a
legitimate correctional goal such as preserving institutional order and discipline, in violation of
the First Amendment of the United States [C]onstitution.

19 (Pl.'s Mtn. for Summ J. at 10, ¶ B.)

20 Defendant argues that Plaintiff has not demonstrated that he took an adverse action against
21 Plaintiff because of Plaintiff's conduct. Further, even considering Plaintiff's argument, and not merely
22 his statement of undisputed facts, Plaintiff has not demonstrated that there is no genuine issue of
23 material fact, and his motion for summary judgment should be denied.

24 "Prisoners have a First Amendment right to file grievances against prison officials and to be
25 free from retaliation for doing so." Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (citing
26 Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009)). Also protected by the First Amendment is the
27 right to pursue civil rights litigation in federal court without retaliation. Silva v. Di Vittorio, 658 F.3d
28

1 1090, 1104 (9th Cir. 2011). “Within the prison context, a viable claim of First Amendment retaliation
2 entails five basic elements: (1) An assertion that a state actor took some adverse action against an
3 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the
4 inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a
5 legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

6 Plaintiff has failed to meet his burden of proof as the moving party on summary judgment.
7 Plaintiff simply restates the allegations set forth in the operative complaint, namely, that defendant J.
8 Rivero conspired to chill the exercise of his First Amendment rights to file prison grievances by
9 arbitrarily removing him from his job assignment and forcing him to withdraw his prison grievance
10 through threats. (Pl.’s Mot. for Summ. J. at 10.) Plaintiff argues that Defendant Rivero accompanied
11 another correctional employee during an interview and that Plaintiff was assigned to another job.
12 However, Plaintiff has failed to reference undisputed facts demonstrating that Defendant Rivero took
13 adverse action by threatening Plaintiff because of filing a grievance.

14 Plaintiff, as the moving party, is required to establish every element of his claim, showing that
15 there are no disputed issues of facts. Plaintiff’s undisputed facts assert only that Defendant
16 accompanied a sergeant during an interview of Plaintiff regarding a group appeal and that Plaintiff
17 was assigned from G-Facility dining to G-Facility vocational services on April 9, 2014. In support of
18 his motion, Plaintiff attaches responses by Defendant Rivero to Plaintiff’s discovery requests. (Pl.’s
19 Mot. for Summ J., Ex. C at pp. 20-22.) However, in response to Plaintiff’s discovery requests,
20 Defendant Rivero denied that he told Plaintiff to tell inmates that signed the group appeal that they
21 were going to be reassigned. (Id. at p. 20.) Defendant further denied that he threatened Plaintiff with
22 removal from his job, either by phone or during an interview. (Id. at pp. 20-21.) Further, in
23 opposition, Defendant Rivero has submitted a declaration in which he declares that he “did not
24 threaten Plaintiff or retaliate against him for filing an inmate appeal, group appeal or for any other
25 reason on March 30, 2014, or any other date.” (Declaration of J. Rivero, ¶ 3, ECF No. 35.) Rivero
26 further declares that he “did not have Plaintiff removed or reassigned from his job on April 9, 2014, or
27 any other date, I also did not threaten Plaintiff with reassignment or removal from his job.” (Id. ¶ 4.)
28 Plaintiff has failed to present undisputed facts to establish his retaliation claim against Defendant

1 Rivero. Accordingly, Plaintiff has failed to meet his burden on summary judgment and his motion
2 must be denied.

3 **III.**

4 **RECOMMENDATION**

5 Based on the foregoing, it is HEREBY RECOMMENDED that Plaintiff's motion for summary
6 judgment on his retaliation claim against Defendant Rivero be denied.

7 This Findings and Recommendation will be submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after
9 being served with this Findings and Recommendation, the parties may file written objections with the
10 Court. The document should be captioned "Objections to Magistrate Judge's Findings and
11 Recommendation." The parties are advised that failure to file objections within the specified time may
12 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014)
13 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

14
15 IT IS SO ORDERED.

16 Dated: April 2, 2018



17 UNITED STATES MAGISTRATE JUDGE