

1 claims/subclaims:

2 **6. Claim 9**

3 The defendants named in the Supporting
4 Allegations (Counts) below then deprived Plaintiff and his
5 associates further of secured rights, privileges, and
6 immunities by causing the campaign of retaliatory
7 oppression alleged above at Claims 1-8 to continue being
8 perpetrated against them as follows in direct relation to
9 their documenting, reporting, publicizing though UNION's
10 Internet web site (1union1.com), and otherwise petitioning
11 for redress of the unlawful events, circumstances, and
12 conditions alleged in Claims 1-8 above and in the
13 Supporting Allegations (Counts) below which occurred
14 after and because Plaintiff and his prisoner associates
15 petitioned for redress of their food being repeatedly defiled
16 by other prisoners.

17 9b: On 1/7/03, 1/11/03 & 1/15/03, ETHEREDGE, . . .
18 GUTIERREZ . . . caused Plaintiff and his prisoner
19 associates to be served food which prisoners on
20 MCSP's "C" facility had contaminated with what
21 was reported, identified, &/or said to be,
22 respectively, "pubic hairs" & at least one rock-like
23 object, fragmented razor blades, & at least one
24 hook-shaped length of wire embedded within bite-
25 size meat.

26 9c: On 1/11/03, . . . GUTIERREZ . . . caused several
MAC members (see above, Claims 4 & 6) to be
unlawfully threatened by GUTIERREZ with
retaliatory disciplinary action and confinement in
ad-seg for lawfully alerting their prisoner
constituents entering the dining area to the razor
blade fragments just discovered in that evening's
dinner entree.

Here, Plaintiff's retaliation claims are again unclear. To the
extent Plaintiff is claiming defendant Gutierrez threatened MAC
members with disciplinary action, he has been denied third party
standing to raise issues related to other prisoners. In support of his
claims, Plaintiff again submitted his journal entries. In his journal
entry for January 11, 2003, the day Plaintiff alleges defendant
Gutierrez made threats, he states that he heard of the threats from
MAC members, not that Gutierrez made the threats directly to
Plaintiff. (Pl. Ex B at 558). There is nothing to support an
interpretation of this claim that defendant Gutierrez threatened
Plaintiff. Therefore, Claim 9 does not appear to include any
retaliation claim.

In addition, as discussed below, defendants argue that the
investigation into the alleged food contamination determined that it

1 was Plaintiff and another inmate who were contaminating the food,
2 and trying to incite other prisoners to revolt in order to transfer the
3 food preparation duties to Facility B instead of Facility C where the
4 kitchen facilities were. Therefore, any threat or actual disciplinary
5 action was based on a legitimate penological goal, and Plaintiff
6 was not actually engaged in protected activity. In support of this
7 argument, defendants submit the investigation report, including the
8 confidential statement reports, and Plaintiff's disciplinary
9 proceedings wherein he was found guilty of the conspiracy to
10 contaminate the food. Plaintiff contends that the investigation and
11 report resulting therefrom were falsified. However, he fails to
12 support these contentions with any evidence, such as a decision
13 overturing the guilty disposition.

14 Therefore, the undersigned finds no retaliation claim
15 remains in Claim 9. Even if one could be construed therein,
16 Defendants provide evidence supporting their contention that the
17 response to the contaminated food was a legitimate penological
18 goal, and Plaintiff fails to provide any evidence to the contrary.
19 Accordingly, defendant's summary judgment motion should be
20 granted as to Claim 9.

21 **7. Claim 10**

22 The defendants named in the Supporting
23 Allegations (Counts) below then deprived Plaintiff and his
24 associates further of secured rights, privileges, and
25 immunities by causing the campaign of retaliatory
26 oppression alleged above at Claims 1-9 to not merely
continue being perpetrated against them but rather escalate
and intensify as follows in direct relation to their
documenting, reporting, publicizing through UNION's
Internet web site (1union1.com), and otherwise petitioning
for redress of the unlawful events, circumstances, and
conditions alleged in Claims 1-9 above and in the
Supporting Allegations (Counts) below which occurred
after and because Plaintiff and his associates documented,
reported, publicized through UNION, and otherwise
grieved the recent food contaminations and related
deliberate indifference, endangerment, and retaliatory acts
alleged above at Claim 9.

...
10m: Beginning 2/20/03, ETHEREDGE, ...
GUTIERREZ, ... HOGAN, ... LATTIMORE,
POE, ... WARREN ... jointly caused Plaintiff and
MAC Vice Chairman Bristow (see above, Counts 9f
&10c) to suffer retaliatory & false disciplinary
action which deprived them of rights and liberty
without adequate Due Process and Equal Protection
in direct retaliation to their having documented,
reported, and otherwise grieved not only the
previously discussed food contamination of 1/7/03,

1 1/11/03, & 1/15/03, but also the related retaliation
2 they and their prisoner associates had suffered as a
3 result.

4 10o: During the “investigation” supposedly conducted on
5 Plaintiff’s behalf by an assigned guard,
6 ETHEREDGE, . . . GUTIERREZ, . . . HOGAN, . . .
7 LATTIMORE, POE, . . . WARREN, . . . jointly
8 caused Plaintiff’s requested prisoner witnesses to be
9 threatened, intimidated, & otherwise prevented from
10 answering discovery questions asked by Plaintiff
11 through the assigned guard.

12 . . .
13 10x: On 4/29/03, ETHEREDGE, . . . GUTIERREZ, . . .
14 LATTIMORE, . . . WARREN . . . caused Plaintiff
15 to suffer retaliatory transfer to a higher-security
16 prison where he was put in ad-seg for 9 days and
17 then deprived of several expensive items of personal
18 property allowed at MCSP, as well as many of the
19 liberties and privileges he had earned his first
20 several years in prison before being transferred to
21 MCSP in 1999 to facilitate his mental condition &
22 prescribed needs as previously stated at ¶ 1 of this
23 Section E.

24 Here Plaintiff argues that he suffered from several
25 retaliatory acts because he reported contaminated food. As
26 mentioned above, the defendants completed an investigation in to
the alleged food contamination and determined it was Plaintiff and
another inmate who conspired together to contaminate the food in
an attempt to have the food preparation responsibilities transferred
from Facility C to Facility B. While Plaintiff contends this
investigation was falsified, he has not provided any support for that
position. Defendants, however, have provided the investigation
and hearing documentation which support the findings. (See Def.
Ex. A at 111-39).

However, to the extent there are retaliatory claims raised in
Claim 10, the undersigned will address the sub-claims separately.
Plaintiff’s claims break down into several categories: cell search;
impeding grievances; placement in administrative segregation;
false disciplinary; treatment while in administrative segregation;
and transfer.

. . .

Claim 10m,o: Here, Plaintiff contends he suffered false
disciplinary action regarding the conspiracy to contaminate the
food, and that the investigation therein was interfered with by
threatening and preventing witnesses from answering his questions.
Defendants contend that following the investigation and hearing,
Plaintiff was found guilty, thus any retaliation claim is defeated by
that finding. In addition, the investigation was thorough and

1 complete, with no interference with the witnesses, and therefore no
2 adverse action to support a retaliation claim.¹ However, to the
3 extent Plaintiff claims the “confidential” witness statements
4 supporting the disciplinary action were coerced, he again fails to
5 provide any evidence to support this position. While he makes
6 reference to other inmates informing him that they gave false
7 statements to the investigator based on fear of the officers, this
8 “evidence” is contained in his journal entries and inmate appeals.
9 (See, i.e., Pl. Ex. B. at 586, 620, 645). He does not provide any
10 direct evidence such as declarations from the inmates themselves.²

11 In relation to claim 10m, as defendants argue, Plaintiff’s
12 claim of retaliation is defeated by the finding that he was guilty of
13 the charges. Defendants have shown their actions were motivated
14 by a legitimate penological interest, that of preserving safety,
15 security, order and discipline in the institution. The burden then
16 shifts to Plaintiff to show a motivation other than a legitimate
17 penological interest, which he fails to do. Plaintiff provides no
18 evidence supporting his argument that the charges were false, such
19 as a court granting a habeas petition overturning the guilty finding.
20 Thus, the undersigned finds summary judgment is appropriate as to
21 claim 10m.

22 Similarly, as to claim 10o, the defendants have provided a
23 copy of the complete investigation, including the questions and
24 answers of Plaintiff’s inmate witnesses, and statements that some
25 potential witnesses were unwilling to testify. Although there is
26 evidence that some of Plaintiff’s questions were not allowed, and
some of the witnesses refused to cooperate, Plaintiff fails to meet
his burden that the unwilling witnesses were motivated out of fear
due to threats from the defendants. As such, there is no showing
that Plaintiff suffered from an adverse action to support his
retaliation claim, and summary judgment is again appropriate.

...
Claim 10x: Here, Plaintiff contends the defendants caused
him to suffer an adverse transfer to a higher security prison.
Plaintiff does not articulate involvement in any specific protected
activity linked to this adverse transfer.

¹ Plaintiff again fails to address claim 10m in his opposition
to the motion. As to claim 10o, the citations to disputed facts are
incorrect. The citations he provides have to do with claim 10d
only and are irrelevant to this claim.

² At least not that the court has been successful in
discovering. If there are some declarations within the 1500 or so
pages of documents Plaintiff submitted as “evidence” in support of
his claims, the court was unable to locate them, nor does Plaintiff
specifically reference any.

1 The undisputed facts show that Plaintiff was transferred
2 from MCSP to California State Prison - Sacramento (CSP-Sac) on
3 April 29, 2003. Prior to the transfer, Plaintiff wrote to Warden
4 Knowles indicating he did not want to be transferred, and that he
5 could peacefully co-exist with all inmates on Facility B. The
6 decision of Plaintiff's future placement would be determined by
7 the interdisciplinary treatment team and the institutional
8 classification committee (ICC) following the adjudication of the
9 RVRs.

6 Defendants argue that the decision whether or not to
7 transfer Plaintiff to another institution was made by a committee
8 based on his custody and security level, recent disciplinary history,
9 and enemy concerns. In support of this position, the defendants
10 have provided declarations asserting as much, as well as citations
11 to the decision to retain Plaintiff in ad-seg (Def. Ex. A 141),
12 documenting Plaintiff's disciplinary proceedings and enemy
13 concerns, and to a memorandum written to Plaintiff by Warden
14 Knowles indicating the same (Def. Ex. A 185).

11 Plaintiff acknowledges his placement is determined by the
12 ICC, but argues that none of the defendants have personal
13 knowledge of what criteria the ICC uses to determine proper
14 placement. (See Doc. 210 at 48-49). He does not, however,
15 respond to the claims in his opposition to the summary judgment
16 motion. Plaintiff therefore fails to support his claims that
17 defendants Etheredge, Gutierrez, Lattimore, and/or Warren were
18 responsible for the decision to transfer Plaintiff to another
19 institution. To the extent he argues the transfer was due to the
20 false disciplinary proceedings which these defendants were
21 responsible for, as discussed above, Plaintiff fails to support those
22 allegations as well. Plaintiff was found guilty in the prison
23 disciplinary proceedings, and has provided no proof that the
24 findings have been reversed. Therefore, his claim that the transfer
25 to another facility was done in retaliation is unsupported.

19 Accordingly, the undersigned finds it is appropriate to grant
20 Defendants' summary judgment motion.

21 **B. DISTRICT JUDGE ORDER**

22 In the order adopting in part the undersigned prior findings and recommendations,
23 the District Judge stated as follows:

24 Having reviewed the findings and recommendations and
25 the parties' filings, and good cause occurring, the court declines to
26 adopt the findings and recommendations as to claims 9 and 10 m, o
and x. The findings and recommendations appear to rely on the
rationale of *Heck v. Humphrey*, 512 U.S. 477 (1994) in deciding

1 those claims, but do not discuss the other cases that discuss
2 application of the *Heck* doctrine to retaliation claims.

3 The District Judge therefore declined to adopt the findings and recommendations
4 as to claims 9 and 10 m, o and x and referred that portion of the summary judgment back to the
5 undersigned for further consideration.

6 **C. SUPPLEMENTAL BRIEFS**

7 Plaintiff argues in his supplemental brief that the favorable termination rule does
8 not apply to claims of First Amendment retaliation. Plaintiff relies on the Ninth Circuit decision
9 in Ramirez v. Galaza, 334 F.3d 850 (9th Cir. 2003) for the holding that the favorable termination
10 rules does not apply where the length of a prisoner's confinement is not at issue.

11 Defendants argue the opposite, that because a finding in plaintiff's favor would
12 necessarily imply the invalidity of the prison disciplinary proceeding, the favorable termination
13 rule does apply to this case. In support of their position, defendants cite to a decision out of this
14 court, Cohea v. Salter, 2009 WL 3128949 *4 (E.D. Cal 2009) (involving a retaliation claim for
15 alleged false disciplinary proceedings wherein the plaintiff was assessed loss of good time
16 credits).

17 **D. DISCUSSION**

18 The undersigned finds that the favorable termination rule, as set forth in Heck v.
19 Humphrey, 512 U.S. 477 (1994), and Edwards v. Balisok, 520 U.S. 641 (1997) is not applicable
20 to this action. Plaintiff was not assessed with the loss of good time credits for the prison
21 disciplinary action at issue in these remaining claims. Rather, he was assessed with a suspended
22 secured housing unit term. Thus, while these proceedings do challenge the validity of the
23 underlying disciplinary action, as plaintiff claims they were false charges, such a challenge
24 relates only to the conditions of confinement, and does not affect the overall length of plaintiff's
25 confinement. See Ramirez v. Galaza, 334 F.3d 850, 857 (9th Cir. 2003). It therefore is not
26 appropriate to dismiss these claims as barred.

1 However, the undersigned did not rely on the favorable termination rule in the
2 prior findings and recommendations. This case is not a direct challenge to the disciplinary
3 proceedings, but is based on retaliation claims. Plaintiff claims the prison disciplinary
4 proceeding was based on false charges, and was done in retaliation. As set forth in the prior
5 findings and recommendations, if a retaliation claim could be construed from Claims 9 and 10 m,
6 o or x, plaintiff fails to support his claim with any evidence.

7 In order to state a claim for retaliation, a prisoner must establish the following: (1)
8 prison officials took adverse action against the inmate; (2) the adverse action was taken because
9 the inmate engaged in protected conduct; (3) the adverse action chilled the inmate's First
10 Amendment rights; and (4) the adverse action did not serve a legitimate penological purpose.
11 See Rhodes v. Robinson, 408 F.3d 559, 568-69 (9th Cir. 2005).

12 Reading plaintiff's complaint broadly, and in the light most favorable to him,
13 plaintiff alleges the disciplinary proceedings were an adverse action. The undersigned agrees that
14 disciplinary proceedings generally raise to the level of an adverse action. Plaintiff's claim of
15 engagement in protected conduct is more questionable, but he argues and provides some
16 evidence relating to his complaints and "petitions for redress" relating to food contamination.
17 This may satisfy the second requirement for a retaliation claim. However, plaintiff's claim fails
18 as to the fourth requirement, that the adverse action did not serve a legitimate penological
19 purpose. As discussed in the prior findings and recommendations, defendants provided evidence
20 that their actions in bringing disciplinary charges and proceedings relating to plaintiff's role in
21 the contaminated food conspiracy, were based on a legitimate penological interest. Having made
22 such a showing, the burden shifts to plaintiff to show a motivation other than a legitimate
23 penological interest. Plaintiff provides no evidence to support his claim that the witnesses were
24 tampered with, or that the charges were false. As an example of evidence which could support
25 such a showing, the undersigned stated plaintiff has not provided evidence that the disciplinary
26 proceedings have been overturned through any available means, or provided the court with any

1 declaration from the inmates he claims provided false and coerced statements. Such a finding
2 was not intended to be a finding that plaintiff's claims are barred by the favorable termination
3 rule, but rather as a finding that there is no evidence provided to support plaintiff's claim. If
4 plaintiff had the disciplinary charges reversed, or determined to be false, that could certainly
5 support his claim that the charges were retaliatory in nature and served no legitimate penological
6 interest.

7 Given that the burden shifted to plaintiff to show some motivation other than a
8 legitimate penological interest in bring the disciplinary charges against him, the undersigned
9 finds plaintiff fails to meet that burden. Plaintiff provides no evidence to support his claim that
10 the charges were false. He therefore fails to establish the existence of an element essential to that
11 claim. "[A] complete failure of proof concerning an essential element of the nonmoving party's
12 case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322
13 (1986). As stated in the prior findings and recommendations, if the moving party meets its initial
14 responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to
15 any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475
16 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the
17 opposing party may not rely upon the allegations or denials of its pleadings but is required to
18 tender evidence of specific facts in the form of affidavits, and/or admissible discovery material,
19 in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475
20 U.S. at 586 n.11. In this case, plaintiff fails to establish the existence of a factual dispute. He
21 fails to submit any evidence to support his contention that the disciplinary charges were false, or
22 that the testimony relied on was fraudulent or coerced, and therefore fails to meet his burden of
23 showing a motivation for the disciplinary proceedings other than a legitimate penological
24 interest.

25 ///

26 ///

1 **E. CONCLUSION**

2 Based on the foregoing, the undersigned recommends that:

3 1. Defendants' motion for summary judgment (Doc. 201) be granted as to the
4 remaining claims: Claim 9, 10m, o, and x; and

5 2. The Clerk of the Court be directed to enter judgment and close this case.

6 These findings and recommendations are submitted to the United States District
7 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
8 after being served with these findings and recommendations, any party may file written
9 objections with the court. Responses to objections shall be filed within 14 days after service of
10 objections. Failure to file objections within the specified time may waive the right to appeal.

11 See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

12
13 DATED: July 6, 2011

14 
15 **CRAIG M. KELLISON**
16 UNITED STATES MAGISTRATE JUDGE