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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BERLAN LYNELL DICEY,  
Plaintiff,  
v.  
T. COBB, et al.,  
Defendants.

No. 2:14-cv-2661 TLN CKD P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. On March 13, 2015, the court screened plaintiff’s complaint pursuant to 28 U.S.C. § 1915A and found that plaintiff could proceed on claims against defendants Betti and Hood arising under the First Amendment. Plaintiff alleges Betti and Hood caused plaintiff to lose a job assignment in retaliation for plaintiff’s use of the inmate grievance process at High Desert State Prison (High Desert). Defendants Betti and Hood answered plaintiff’s complaint on July 21, 2015 and their motion for summary judgment is now before the court.

Summary judgment is appropriate when it is demonstrated that there “is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A party asserting that a fact cannot be disputed must support the assertion by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for

1 purposes of the motion only), admissions, interrogatory answers, or other materials. . .” Fed. R.  
2 Civ. P. 56(c)(1)(A).

3 Summary judgment should be entered, after adequate time for discovery and upon motion,  
4 against a party who fails to make a showing sufficient to establish the existence of an element  
5 essential to that party’s case, and on which that party will bear the burden of proof at trial. See  
6 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). “[A] complete failure of proof concerning an  
7 essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”

8 Id.

9 If the moving party meets its initial responsibility, the burden then shifts to the opposing  
10 party to establish that a genuine issue as to any material fact actually does exist. See Matsushita  
11 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the  
12 existence of this factual dispute, the opposing party may not rely upon the allegations or denials  
13 of their pleadings but is required to tender evidence of specific facts in the form of affidavits,  
14 and/or admissible discovery material, in support of its contention that the dispute exists or show  
15 that the materials cited by the movant do not establish the absence of a genuine dispute. See Fed.  
16 R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the  
17 fact in contention is material, i.e., a fact that might affect the outcome of the suit under the  
18 governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv.,  
19 Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is  
20 genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving  
21 party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

22 In the endeavor to establish the existence of a factual dispute, the opposing party need not  
23 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual  
24 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at  
25 trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce  
26 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”  
27 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee’s note on 1963  
28 amendments).

1 In resolving the summary judgment motion, the evidence of the opposing party is to be  
2 believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the  
3 facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475  
4 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's  
5 obligation to produce a factual predicate from which the inference may be drawn. See Richards  
6 v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902  
7 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than  
8 simply show that there is some metaphysical doubt as to the material facts . . . . Where the record  
9 taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no  
10 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

11 In his complaint, which is signed under the penalty of perjury, plaintiff alleges that on  
12 November 4, 2010, plaintiff was transferred from the Delta Five housing unit, C section, to the  
13 Delta One unit. As a result of this transfer, plaintiff was removed from his job assignment in the  
14 Delta Three dining hall.

15 Plaintiff alleges that defendants Betti and Hood caused plaintiff to be transferred in  
16 retaliation for prisoner grievances submitted by plaintiff. In support of this, plaintiff asserts that  
17 defendant Betti told plaintiff the following, two days before plaintiff was transferred to Delta  
18 One:

19 Dickey I see that second watch now has you on their shit list. You  
20 just can't stop your little appeals, huh. You[re] going to lose.

21 Compl. at 6.

22 Plaintiff also claims defendant Betti said the following, the day before he was transferred:

23 Dickey I know people such as "Griffith," remember him Dickey from  
24 "C" Yard? Well he is the assignment Lieutenant so here is your  
25 heads up, trash that / those appeals right now, this is your last  
26 chance to keep everything you now have, once you are moved you  
27 will lose your job.

26 Id. at 7.

27 In their affidavits attached to defendants' motion for summary judgment, Betti and Hood  
28 both state that while they could recommend that an inmate be transferred to another housing

1 facility, a transfer could only be effectuated upon approval of the “facility sergeant.” Neither  
2 recalls recommending plaintiff for a transfer out of Delta Five in November, 2010.

3 At his deposition, plaintiff testified that after he was moved to Delta One, he was given a  
4 new job in December, 2010. ECF No. 29-4 at 11. He also testified that after he was transferred  
5 to Delta One, but before he was given a new job assignment, he was away from High Desert for a  
6 jury trial for approximately 16 days. *Id.* Accordingly, as a result of being transferred to Delta  
7 One, plaintiff did not have a job assignment for, at most, approximately one month.

8 Additionally, at his deposition, plaintiff testified that on at least four or five occasions  
9 plaintiff asked defendants Betti and Hood for a transfer out of the C section of Delta Five because  
10 of a lack of privileges. *Id.* at 14. However, nothing suggests plaintiff requested a transfer from  
11 the Delta Five unit.

12 Prison officials generally cannot retaliate against inmates for exercising First Amendment  
13 rights. *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985). A First Amendment retaliation  
14 claim has five elements: 1) the retaliated-against conduct is protected; 2) a defendant took  
15 adverse action against the plaintiff; 3) there is a causal connection between the protected conduct  
16 and the adverse action; 4) the defendant’s acts would chill future First Amendment activities of a  
17 reasonable person; and 5) the retaliatory action did not advance legitimate correctional goals.  
18 *Watison v. Carter*, 668 F.3d 1108, 1114-15 (9th Cir. 2012).

19 Defendants argue that there is no evidence that either defendant caused plaintiff to be  
20 transferred from Delta Five to Delta One, thereby causing plaintiff to lose his job in the Delta  
21 Three dining hall. With respect to defendant Hood, the court agrees. There is no evidence before  
22 the court indicating Hood took any action which resulted in plaintiff being transferred to Delta  
23 One. As for defendant Betti, however, the statement plaintiff alleges Betti made the day before  
24 transfer could be viewed as a threat that plaintiff would be transferred if he did not withdraw his  
25 prisoner grievances. This is enough evidence to create at least a genuine issue of material fact as  
26 to whether Betti recommended plaintiff for transfer the next day, and thereby caused his transfer,  
27 because plaintiff refused to withdraw his grievances.

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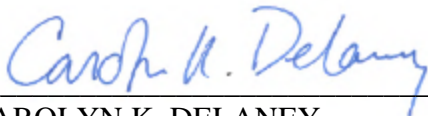
1 Defendants also argue that plaintiff's transfer to Delta One served a legitimate  
2 correctional goal, i.e. granting plaintiff's request to be transferred from C section in Delta Five.  
3 This court rejects this argument as there is no evidence suggesting plaintiff ever requested a  
4 transfer out of Delta Five or into Delta One. Furthermore, there is no evidence that defendants  
5 transferred plaintiff to Delta One based upon plaintiff's request that he be transferred from C  
6 section in Delta Five. In fact, defendants fail to adduce any evidence as to why plaintiff was  
7 transferred.

8 In accordance with the above, IT IS HEREBY RECOMMENDED that defendant Betti  
9 and Hood's motion for summary judgment (ECF No. 29) be granted in part and denied in part as  
10 follows:

- 11 1. Granted with respect to plaintiff's remaining claim against defendant Hood, resulting  
12 in defendant Hood's dismissal from this action; and
- 13 2. Denied with respect to plaintiff's remaining claim against defendant Betti.

14 These findings and recommendations are submitted to the United States District Judge  
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
16 after being served with these findings and recommendations, any party may file written  
17 objections with the court and serve a copy on all parties. Such a document should be captioned  
18 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
19 objections shall be served and filed within fourteen days after service of the objections. The  
20 parties are advised that failure to file objections within the specified time may waive the right to  
21 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

22 Dated: January 13, 2017

23   
24 \_\_\_\_\_  
25 CAROLYN K. DELANEY  
26 UNITED STATES MAGISTRATE JUDGE