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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

STEVEN DALE PERCELLE,  
Plaintiff,  
v.  
STEVEN PEARSON, et al.,  
Defendants.

Case No. 12-cv-05343-TEH

**ORDER DENYING DEFENDANTS'  
MOTION FOR JUDGMENT AS A  
MATTER OF LAW**

This matter comes before the Court on a motion for judgment as a matter of law brought by Defendants Steven Pearson, Derek Arredondo, Dylan Fletcher, and Mike Williams (collectively, "Defendants"). For the reasons set forth below, the motion is DENIED.

**BACKGROUND**

Plaintiff Steven Dale Percelle is a former state prisoner who contends that he was retaliated against for engaging in litigation activity protected by the First Amendment. While incarcerated at the Correctional Training Facility ("CTF") in Soledad, California, Plaintiff sued the California Department of Corrections and Rehabilitation ("CDCR") for negligent medical care. In retaliation for having filed and obtained an entry of default in that lawsuit, Plaintiff claims that Defendants, who were correctional officers and members of the Institutional Gang Investigation task force at CTF, retaliated against him by taking actions that led to his validation as a gang member and placement in administrative segregation. An eight-day jury trial was held, and, at the close of evidence, Defendants timely moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). While the motion was under the submission, the jury returned a verdict for Plaintiff.

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**LEGAL STANDARD**

Federal Rule of Civil Procedure 50 governs motions for judgment as a matter of law. Under Rule 50(a)(1),

If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient basis to find for the party on that issue, the court may:

- (A) resolve the issue against the party; and
- (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Once a party has been fully heard on an issue during a jury trial, the court may grant a motion for judgment as a matter of law against the non-moving party only if “there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” Fed.R.Civ.P. 50(a); *Ritchie v. United States*, 451 F.3d 1019, 1022-23 (9th Cir. 2006).

In deciding a motion under Rule 50(a), the Court reviews all of the evidence and draws all reasonable inferences in favor of the nonmoving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). The Court is not permitted to make credibility determinations or weigh the evidence. *Id.* The salient inquiry is whether the evidence “permits only one reasonable conclusion [.]” *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002).

**DISCUSSION**

Defendants claim that there is no legally sufficient evidence for a reasonable jury to find for Plaintiff on his First Amendment retaliation claim. They dispute that there is sufficient evidence for Plaintiff to establish that: (1) Defendants took an adverse action; (2) Defendants acted because of Plaintiff’s protected conduct; (3) Defendants’ actions chilled Plaintiff’s First Amendment rights; and (4) Defendants’ actions did not reasonably advance a legitimate correctional goal. The Court disagrees. In light of the evidence presented at trial, the Court finds that a reasonable jury could conclude that Plaintiff proved all the elements of his claim and was entitled to a favorable verdict.

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**I. Adverse Action**

Defendants argue that there is no evidence that Defendants took any adverse actions against the Plaintiff. They claim that the evidence shows that Defendants did not have the authority to validate Plaintiff as a gang member. Secondly, they argue that the actions that Defendants took in searching Plaintiff’s cell and preparing a validation package were “insufficient” to constitute adverse actions because inmates do not have a right to be free from cell searches and investigations into gang activity. Mot. at 2-3.

The Ninth Circuit has held that an action constitutes an adverse action when it “would chill or silence a person of ordinary firmness from future First Amendment activities.” *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). Even the mere threat of harm can be an adverse action, because the threat itself can have a chilling effect regardless of whether it is carried out. *See Brodheim v. Cry*, 684 F.3d 1262, 1270 (9th Cir. 2009). The adverse action need not be an independent constitutional violation. *See Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). An otherwise permitted action can be the basis for a retaliation claim if performed with a retaliatory motive and lacking a legitimate correctional goal. *See Watison*, 668 F.3d at 1115 (9th Cir. 2012) (holding that an inmate had sufficiently alleged that an officer took an adverse action against him when the officer filed a disciplinary charge against that inmate which led to the inmate being placed in administrative segregation).

Here, the record contains evidence that Defendants Pearson, Williams and Arredondo searched Plaintiff’s cell on November 18, 2010. Tr. 293:22. Three weeks later, Officer Arredondo sent an email to a gang investigator in another institution asking for information to “seal the deal” on Percelle’s validation. Ex. 113. Close to a year later and after the receipt of a third source item needed for validation, Officer Pearson prepared a validation packet. Ex. D. Sergeant Williams “worked closely” with Officer Pearson and reviewed the validation packet. Tr. 424:15-424:2. Lieutenant Fletcher signed off on the validation packet before it was sent to the Office of Correctional Safety. Tr. 558-559.

1 A reasonable jury could have found that any and all of these actions constitute  
2 adverse actions because they would chill a person of ordinary firmness from continuing to  
3 engage in litigation activities. Put bluntly, a person of ordinary firmness may hesitate to  
4 pursue his case against CDCR when, shortly after obtaining an entry of default in that case,  
5 CDCR officers search his cell and open an investigation into whether he is a gang member.  
6 In the very least, these actions constitute threat of harm and are enough for a reasonable  
7 jury to find that Plaintiff has proved the first element of his retaliation claim.<sup>1</sup>  
8

9 **II. Retaliatory Motive**

10 Defendants next claim that there is no evidence to show that Defendants knew of  
11 Plaintiff's lawsuit against medical staff at CTF and thus could not have acted "because of"  
12 Plaintiff's protected activity. They also claim that there is insufficient evidence for a jury  
13 to find that Defendants acted with a retaliatory motive.

14 Defendants are incorrect. There is sufficient circumstantial evidence on the record  
15 from which the jury could infer that Defendants knew about Plaintiff's jailhouse lawyer  
16 activities and his lawsuit against CDCR. First, Defendants admitted that when they  
17 searched Plaintiff's cell, they saw legal papers among his belongings. Tr. 439:1. Second,  
18 Officer Pearson said that he reviewed Plaintiff's Central File, which included many  
19 references to Plaintiff's pending lawsuit against CDCR. Tr. 438:10-13; Ex. 138. Third,  
20 Defendants could have learned about Plaintiff's lawsuit through the letters he received in  
21 the mail from the court; Sergeant Williams explained that agents monitor the mail of  
22 inmates they are investigating for gang activity. Tr. 341:9. Fourth, as Defendants  
23 conceded, Plaintiff presented evidence that Deputy Attorney General Jennifer Nygaard and  
24 CTF Litigation Coordinator Dan Pherigo knew of Plaintiff's lawsuit. Tr. 539:11-541:21,  
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26 <sup>1</sup> The jury could also have found that Defendants took individual actions knowing that the  
27 end of result of their actions would be the validation of Plaintiff as a gang member and  
28 consequent placement in more restrictive housing. Tr. 431: 18-25. *See Watison*, 668 F.3d  
at 115 ("being placed in administrative segregation constitutes an adverse action"); *see*  
*also Shepard v. Quillen*, 840 F.3d 686, 691 (9th Cir. 2016).

1 631-634. The jury could have inferred that either Ms. Nygaard or Mr. Pherigo had  
2 communicated with medical professionals at CTF, who could have informed other staff,  
3 including Defendants, of the substantial sum of money Plaintiff was about to recover from  
4 CDCR.

5 Plaintiff also produced sufficient circumstantial evidence of retaliatory motive in  
6 the form of (a) evidence of proximity in time between Plaintiff's litigation activities and  
7 his validation by Defendants; and (b) evidence that Defendants' stated reasons for  
8 investigating Plaintiff were pretextual. Jennifer Nyaagard admitted that she found out  
9 about the entry of default and discussed it with her supervisor on November 10, 2010, a  
10 week before Defendants searched Plaintiff's cell. Tr. 631: 14-25. Dan Pherigo recalled  
11 receiving a letter from Bob Rehm, a damages expert appointed in Plaintiff's medical care  
12 case, on May 18, 2011, three months before Defendants prepared and approved Plaintiff's  
13 validation packet. Tr. 54:8-543:16.

14 Defendants argue that suspect timing is not, in itself, sufficient evidence of  
15 retaliatory motive. Here, there is ample other evidence from which the jury could conclude  
16 that Defendants used the gang validation process as a pretext for retaliation, thus acting  
17 with a retaliatory motive. Defendants admitted that they received multiple trainings on the  
18 requirements for validation listed in Title 15, the Department Operations Manual ("DOM")  
19 and other gang validation manuals. Tr. 318-320; 517-520. Plaintiff's expert witness  
20 Richard Subia testified that for a debriefing report to be used as a source item for  
21 validation, it needs to identify an activity that the suspect performed in furtherance of the  
22 gang. Tr. 765-765. Defendants testified that there was nothing in the debriefing report that  
23 indicated that Plaintiff had committed an action in furtherance of the Black Guerrilla  
24 Family gang. Tr. 866-867. The jury could have inferred that Defendants knew Plaintiff was  
25 not a member of the gang and decided to attempt to validate him anyway.<sup>2</sup> The email from

26 \_\_\_\_\_  
27 <sup>2</sup> Evidence that the book "Blood in My Eye" came from the library and that Defendants  
28 knew Plaintiff did not communicate with any of the people whose names appeared in the  
address book serves the same purpose—to show that Defendants acted with a retaliatory  
motive, not of out a legitimate concern that Plaintiff was a member of a gang. Tr. 308-310.

1 Officer Arredondo, requesting a direct link to “seal the deal,” further serves as evidence of  
2 an express intent to see Plaintiff validated as a gang member. Ex. 113.

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4 **III. Chilling Effect**

5 Defendants argue that Plaintiff failed to present any evidence that Defendants’  
6 actions would chill a person of ordinary firmness from future First Amendment activities.  
7 They also claim there was no evidence that Plaintiff himself was deterred from pursuing  
8 his medical claims as a result of Defendants’ actions.

9 Defendants are wrong on both counts. First, Mr. Percelle testified that his litigation  
10 activities were actually chilled: he had to ask the Monterey County Court to stay his  
11 medical care case because he could not access the library as often from his placement in  
12 administrative segregation. Tr. 877. Second, even if Defendants were not the ones who  
13 actually validated Plaintiff and placed him in administrative segregation, the jury could  
14 infer that their search of Plaintiff’s cell and the ensuing investigation were enough to chill  
15 a person of ordinary firmness from continuing to pursue legal action against CDCR.

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17 **IV. Legitimate Correctional Goal**

18 Defendants claim that all of the evidence presented at trial shows that they were  
19 performing their job duties when they investigated Plaintiff and submitted a validation  
20 packet. All of their actions, Defendants contend, were in furtherance of the correctional  
21 goal of gang management.

22 In light of all the evidence presented at trial, the jury could have found that  
23 Defendants used the gang validation process as a cover for retaliation. As the Ninth Circuit  
24 has made clear, “a prison official who uses a validation procedure to obscure retaliation  
25 ‘cannot assert that [his action] served a valid penological purpose, even though [the  
26 prisoner] may have arguably ended up where he belonged.’” *Shepard*, 840 F.3d at 692  
27 (citing *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003)). The inquiry is not whether  
28 Defendants had enough evidence to validate Plaintiff once they started investigating him;

1 the inquiry is whether they had a retaliatory reason to investigate him in the first place. The  
2 jury could have concluded that Defendants took actions that did not serve a legitimate  
3 correctional goal because those actions were taken to punish or silence Mr. Percelle for his  
4 protected conduct.

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6 **CONCLUSION**

7 For the reasons state above, the Court finds that there is sufficient evidentiary basis  
8 for a jury to return a verdict in favor Plaintiff. Defendants' motion for judgment as a matter  
9 of law is hereby DENIED.

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11 **IT IS SO ORDERED.**

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13 Dated: 12/21/16



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THELTON E. HENDERSON  
United States District Judge

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