

1 retaliated against plaintiff by further poisoning him, verbally assaulting him and
2 otherwise harassing him state a cognizable § 1983 claim for damages for
3 retaliation against De Leon, Altunc and France; and (3) plaintiff's allegations that
4 Chappell and Barnes were told that correctional officers were poisoning and
5 harassing plaintiff, but neither took any steps to protect him, state a cognizable
6 § 1983 claim for damages for deliberate indifference to plaintiff's health and
7 safety against Chappell and Barnes.

8 Defendants now move for summary judgment on the ground that there are
9 no material facts in dispute and that they are entitled to judgment as a matter of
10 law on plaintiff's three cognizable § 1983 claims against them. Defendants also
11 argue that plaintiff did not exhaust available administrative remedies as to his
12 claims against France and Chappell, as required by 42 U.S.C. § 1997e(a), and
13 that Chappel and Barnes are entitled to qualified immunity. Plaintiff has filed an
14 opposition and defendants have filed a reply. Plaintiff also has filed two cross-
15 motions for summary judgment on both exhaustion and the merits of his claims.
16 Defendants have filed oppositions and plaintiff has filed replies (and a surreply).

17 **BACKGROUND**

18 Plaintiff was incarcerated at SQSP "between May 2010 and December
19 2012." Second Am. Compl. (SAC) (ECF No. 78) at 7. He was initially housed
20 in the Alpine section, a protective-custody unit, but in September 2010 had
21 himself placed in administrative segregation (ad seg) "[t]o deal with severe
22 mental illness," including "acute social phobia, panic attacks, and depression."
23 Id. Plaintiff was told that "we don't house people in ad seg for having social
24 phobia or for being antisocial or something to that effect," so he threatened to
25 assault staff if he remained in the Alpine section in order to be moved to ad seg.
26 Van Loh Decl. Ex. A (ECF No. 120-1) (Pl.'s Depo.) at 87.

1 Plaintiff was housed in ad seg between “September 2010 and November
2 2011.” SAC at 7. He was first placed on the second tier of Carson section,
3 where defendant France worked as a tier officer. Plaintiff alleges that “[fr]om
4 September 2010 to December 2010,” France “misappropriated” his mail,
5 “verbally abused” him and “otherwise harassed” him. Id. at 8-9.

6 In December 2010, plaintiff was transferred to Donner section, another
7 section in ad seg. Plaintiff testified that he continued to experience verbal
8 harassment and “a lack of respect” by other correctional officers in Donner
9 section. Pl’s Depo. at 96.

10 In March 2011, plaintiff returned to Carson section, this time to the fourth
11 tier, where defendant Burpo worked as a tier officer. Plaintiff alleges that
12 “[f]rom March 2011 to May 20, 2011,” Burpo “poisoned” his meals, “verbally
13 abused” him and “otherwise harassed” him. SAC at 7.

14 On May 20, 2011, plaintiff alleges he became “violently sick” after eating
15 the breakfast Burpo served him and “had to go to the emergency room because of
16 the poisoning.” Id. Later that same day, plaintiff alleges that he “submitted a
17 grievance” regarding the incident to a correctional officer named Fry, but never
18 received a response. Id. at 8.

19 On May 21, 2011, plaintiff alleges that he told defendant Barnes that
20 Burpo had poisoned his food on May 20, 2011 “requiring him to go to the SQSP
21 emergency room.” Id. at 11. But Barnes “took no steps to protect plaintiff other
22 than transferring plaintiff to a different cell,” id., in “another section” in ad seg –
23 “Donner Section on the second tier,” Pl’s Depo. at 72.

24 In “[I]late May or early June of 2011,” id. at 75, plaintiff allegedly sent a
25 letter to “Rylan Conner,” in the Office of the Ombudsman, reporting that “Burpo
26 had poisoned him,” SAC at 8. As a result, plaintiff claims Burpo “was fired or
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1 reassigned.” Id. But Burpo declares that he “transferred from San Quentin to
2 California State Prison – Sacramento in June 2011 because I requested the
3 transfer and it was approved.” Burpo Decl. (ECF No. 116) at 2.

4 In June 2011, plaintiff was moved to the third tier of Carson section,
5 where defendants De Leon and Altunc worked as tier officers. Plaintiff alleges
6 that “[b]etween June 2011 and October 2011,” De Leon and Altunc “poisoned”
7 his meals and verbally abused him by calling him names. SAC at 10. Plaintiff
8 claims De Leon and Altunc poisoned his meals and verbally abused him “in
9 retaliation” for his submitting a grievance and letter reporting that “Burpo
10 poisoned him.” Id.

11 In October 2011, plaintiff returned to the second tier of Carson section,
12 where defendant France worked. Plaintiff alleges that “[f]rom October 2011 to
13 November 2011,” France “poisoned” his meals, “verbally abused” him and
14 “otherwise harassed” him. Id. at 9. Plaintiff claims France poisoned his meals
15 and verbally abused and harassed him “in retaliation” for his submitting a
16 grievance and letter reporting that “Burpo poisoned him.” Id. at 8, 9.

17 On November 4, 2011, plaintiff told defendant Barnes that “he was being
18 subjected to various abuses and mistreatment,” including “poisoning” and “verbal
19 abuse,” by defendants De Leon, Altunc and France. Id. at 11-12. But Barnes
20 “took no steps to protect” him, id. at 12, other than to allow plaintiff to transfer to
21 “any tier, any section” in ad seg plaintiff wanted, Pl.’s Depo. at 121. Plaintiff
22 chose “the fifth tier in Donner section,” where none of the correctional officer
23 defendants worked. Id.

24 On November 16, 2011, plaintiff was released from ad seg back to the
25 “Alpine section” protective-custody unit. Pl.’s Depo. at 128-29. He remained
26 there until April 2012, when correctional staff moved him back to “Donner
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1 Section” in ad seg while investigating him for possible involvement in a
2 protective-custody prison gang. Id. at 148-49. Plaintiff testified that an officer
3 he did not know in Donner section tampered with his food and he reported that he
4 was suicidal. He was hospitalized for two or three days and moved to the
5 “adjustment center” (AC), where he remained until June 2012. Id. at 150-52.
6 Plaintiff further testified that an unidentified officer at the AC tampered with his
7 meals. He was transferred back to Alpine section in June 2012, and was released
8 from SQSP on December 2012.

9 Plaintiff alleges that defendant Chappell was “informed” multiple times by
10 plaintiff, his mother and others that plaintiff was being “subjected to continuous
11 and ongoing poisoning,” “verbal abuse” and other “harassment and
12 mistreatment,” but Chappell “took no steps to protect plaintiff.” SAC at 12-13.

13 **DISCUSSION**

14 A. Standard of Review

15 Summary judgment is proper where the pleadings, discovery and
16 affidavits show that there is “no genuine dispute as to any material fact and the
17 [moving party] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
18 Material facts are those which may affect the outcome of the case. Anderson v.
19 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is
20 genuine if there is sufficient evidence for a reasonable jury to return a verdict for
21 the nonmoving party. Id.

22 The moving party for summary judgment bears the initial burden of
23 identifying those portions of the pleadings, discovery and affidavits which
24 demonstrate the absence of a genuine issue of material fact. Celotex Corp. v.
25 Cattrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden
26 of proof on an issue at trial, it must affirmatively demonstrate that no reasonable
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1 trier of fact could find other than for the moving party. But on an issue for which
2 the opposing party will have the burden of proof at trial, the moving party need
3 only point out “that there is an absence of evidence to support the nonmoving
4 party’s case.” Id.

5 Once the moving party meets its initial burden, the nonmoving party must
6 go beyond the pleadings to demonstrate the existence of a genuine dispute of
7 material fact by “citing to specific parts of materials in the record” or “showing
8 that the materials cited do not establish the absence or presence of a genuine
9 dispute.” Fed. R. Civ. P. 56(c). If the nonmoving party fails to make this
10 showing, “the moving party is entitled to judgment as a matter of law.” Celotex,
11 477 U.S. at 323.

12 There is no genuine issue for trial unless there is sufficient evidence
13 favoring the nonmoving party for a jury to return a verdict for that party.
14 Anderson, 477 U.S. at 249. If the evidence is merely colorable, or is not
15 significantly probative, summary judgment may be granted. Id. at 249-50.

16 When the parties file cross-motions for summary judgment, the district
17 court must consider all of the evidence submitted in support of both motions to
18 evaluate whether a genuine issue of material fact exists precluding summary
19 judgment for either party. The Fair Housing Council of Riverside County, Inc. v.
20 Riverside Two, 249 F.3d 1132, 1135 (9th Cir. 2001).

21 B. Analysis

22 Defendants argue that they are entitled to summary judgment on plaintiff’s
23 three cognizable § 1983 claims for damages against them: (1) Burpo, De Leon,
24 Altunc and France were deliberately indifferent to plaintiff’s health and safety by
25 intentionally poisoning plaintiff’s food; (2) De Leon, Altunc and France
26 retaliated against plaintiff for reporting that Burpo was poisoning his food, by
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1 further poisoning, verbally assaulting and otherwise harassing plaintiff; and (3)
2 Chappell and Barnes were deliberately indifferent to plaintiff's health and safety
3 by failing to protect him.

4 1. Poisoning Plaintiff's Food

5 A prison official violates the Eighth Amendment only if two
6 requirements are met: (1) the deprivation alleged must be, objectively,
7 sufficiently serious, and (2) the prison official possesses a sufficiently culpable
8 state of mind. Farmer v. Brennan, 511 U.S. 825, 834 (1994). In prison-
9 conditions cases, the requisite state of mind to establish an Eighth Amendment
10 violation is one of deliberate indifference to inmate health or safety. Id.

11 A prison official is deliberately indifferent if he knows that a prisoner
12 faces a substantial risk of serious harm and disregards that risk by failing to take
13 reasonable steps to abate it. Id. at 837, 844. The official must both be aware of
14 facts from which the inference could be drawn that a substantial risk of serious
15 harm exists, and he must also draw the inference. Id. at 837.

16 In order to establish a claim for damages against an individual prison
17 official under § 1983, a plaintiff also must set forth evidence showing that the
18 specific prison official's deliberate indifference was the "actual and proximate
19 cause" of the deprivation of plaintiff's Eighth Amendment rights. Leer v.
20 Murphy, 844 F.2d 628, 634 (9th Cir. 1988).

21 Defendants argue that they are entitled to summary judgment on plaintiff's
22 claim that Burpo, De Leon, Altunc and France were deliberately indifferent to
23 plaintiff's health and safety by poisoning his food because plaintiff has set forth
24 no objective evidence that he was poisoned (and consequently suffered a serious
25 harm brought on by being poisoned), or that Burpo, De Leon, Altunc or France
26 caused the alleged poisoning. Defendants also argue that plaintiff's medical
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1 records contradict his claim that he was poisoned because the records instead
2 show that plaintiff suffered only from indigestion and a possible ulcer, both of
3 which were treated with medication. In support, defendants submit documentary
4 evidence showing the following:

5 On June 14, 2011, plaintiff was seen by medical staff for multiple
6 complaints, including “white growth on his tonsils, nasal congestion, ringworm
7 on the abdomen[, and] increased flatulence the past two months. He denies any
8 blood in the stools He has no nausea or vomiting.” Van Loh Decl. Ex. B
9 (ECF No. 120-2) at 3. He was diagnosed with dyspepsia (indigestion) with
10 increased flatulence and prescribed “simethicone” to address it. His weight was
11 187 pounds, down four pounds since his last visit.

12 On July 15, 2011, plaintiff was seen by medical staff for allergies. He
13 reported that the simethicone was helping improve his dyspepsia and that he had
14 not experienced any nausea or vomited. Plaintiff “has been attempting to lose
15 weight to help lower his blood pressure. He actually lost 11 pounds since his last
16 visit.” Id. at 4. His weight was 176 pounds. The notes state, “Resolved
17 dyspepsia.” Id. at 5.

18 On September 7 and 13, 2011, plaintiff reported to his dentist that his
19 general health was good, and that he had not experienced any diarrhea, vomiting,
20 nausea or stomach problems.

21 On September 19, 2011, plaintiff was seen by medical staff for follow-up
22 on face lacerations and a small bone fracture on his jaw after an altercation with
23 another inmate. He reported that dyspepsia was “not an issue” and that he “has
24 no difficulty eating.” Id. at 8. His weight was recorded at 181 pounds, up five
25 pounds since the last visit. Plaintiff expressed concern about a growth on his left
26 tonsil, which he worried might be malignant. Blood and urine tests from October
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1 11, 2011, revealed slightly low glucose levels, but were otherwise normal.

2 On October 21, 2011, plaintiff was seen by medical staff for a follow-up
3 visit. He again expressed concern about a cyst on his tonsil, which the doctor did
4 not believe required removal, and worried that he might have a kidney infection
5 and/or an ulcer. He reported that he was “able to eat and has gained weight.” Id.
6 at 11. His weight was 185 pounds, up four pounds since the last visit. Medical
7 staff ordered tests for plaintiff’s complete blood count (CBC), vitamin D level
8 and a serum antigen for H. pylori¹ because “the patient persists that he has an
9 ulcer.” Id. at 12.

10 On November 7, 2011, plaintiff was informed that he needed to “start
11 antibiotics” for his upset stomach because the H. pylori test had come back
12 “nearly positive.” Id. at 13 (emphasis in original). A urine test on that same day
13 showed trace amounts of ketones, protein and bacteria, but a subsequent urine
14 test on November 23, 2011 came back normal.

15 On December 1, 2011, plaintiff was seen by medical staff following
16 observation for “suicidal ideation.” Id. at 19. He was started on the anti-
17 depressant “sertraline” and “currently states he is feeling much more stable.
18 Apparently, he felt that Custody had been putting foreign objects in his food, as
19 well as spraying pepper spray in his food.” Id. “Quite happy he is out of
20 segregation.” Id. He states he currently “has no suicidal ideations or the need to
21 hurt others.” Plaintiff’s weight was recorded as 175 pounds, down ten pounds
22 since his last visit, and H. pylori test was equivocal. But a subsequent H. pylori
23 test on December 23, 2011 showed that the issue was resolved.

24 On February 22, 2012, plaintiff reported “spasms in stomach.” Id. at 22.

26 ¹Helicobacter pylori (H. pylori) is a type of bacteria that lives in the digestive
27 tract and can cause ulcers.

1 He also told medical staff that he “has continued concerns that Custody is
2 poisoning his food.” Id. at 23. Medical staff noted that “[w]e have done a
3 number of tests in the past, but the patient insists that he be checked for ‘organ
4 damage.’ He states it is not normal that he feels Custody is watching him. He
5 currently is taking sertraline . . . [and] I am not seeing that he has a diagnosis of
6 paranoid schizophrenia.” Id. Plaintiff’s weight was recorded as 175 pounds and
7 he denied diarrhea, vomiting or nausea. Medical staff ordered “a [comprehensive
8 metabolic panel (CMP)], hepatitis A and B serologies, vitamin D level, and a UA
9 so I can show patient that his laboratory studies are within normal limits.” Id.
10 Medical staff also noted plaintiff’s diagnosis of major depression and that
11 “[t]here is a component of paranoia here.” Id. Plaintiff’s lab results came back
12 normal, except his glucose levels were slightly low.

13 On March 1, 2012, medical staff took biopsies of bumps on plaintiff’s
14 nose and abdomen for skin cancer screening, and both returned normal results.

15 On March 15, 2012, medical staff saw plaintiff for a follow-up visit on the
16 biopsies. Medical staff noted that plaintiff “has been requesting screening
17 laboratory studies after he had daily GI discomfort after the food delivered to him
18 in Administrative Segregation []. Concerned that he may have been poisoned.
19 He has had no further sequelae since leaving that unit” Id. at 32. Plaintiff’s
20 weight was recorded as 170 pounds.

21 On June 8, 2012, plaintiff was seen by medical staff for “bloating and
22 flatulence after meals.” Id. at 33. Medical staff noted that plaintiff “feels it is
23 due to a ‘caustic substance in his food’ and looking at his last note he felt that he
24 may be being poisoned. The patient has no nausea, vomiting or abnormal
25 stools.” Id. Medical staff ordered a trial of simethicone to address plaintiff’s
26 abdominal discomfort.

1 On June 22, 2012, plaintiff was seen by medical staff for a buttock lesion
2 and weight loss. Medical staff noted that plaintiff “states he is eating a normal
3 diet. He had laboratory studies done in February that showed normal CMP,
4 vitamin D normal, hepatitis B immune.” Id. at 34. Plaintiff’s weight was
5 recorded as 161 pounds. Medical staff ordered a TSH (thyroid stimulating
6 hormone) test, which came back normal.

7 On July 26, 2012, plaintiff reported that he was poisoned at the AC. He
8 expressed concern that “he was given ‘caustic material’ in his food” and
9 requested a renal function panel. Id. at 36. He also expressed concern with
10 weight loss and having a tape worm. Plaintiff’s weight was recorded as 168
11 pounds. Medical staff noted that plaintiff “is somewhat paranoid, stating he is
12 going to sue the entire State.” Id. Medical staff “will check a vitamin D level,
13 blood sugar, stool for ova and parasites and culture as well as a CMP to reassure
14 this patient that he has none of the above issues. He is seeing Psychiatry. He
15 denied the need to hurt himself or others, but he is exhibiting some paranoid
16 behavior.” Id.

17 On July 30, 2012, plaintiff was given a CMP, vitamin D, hemoglobin A1C
18 and TSH tests, all of which were normal. On July 31, 2012, plaintiff submitted a
19 stool sample for multiple tests, which revealed no abnormalities.

20 On August 17, 2012, plaintiff was seen by medical staff for laboratory
21 review. Plaintiff had been concerned about having been poisoned at the AC.
22 “He underwent a [CMP] which included renal functioning testing. He also had
23 issues with perceived weight loss.” Id. at 44. Plaintiff’s weight was recorded as
24 172 pounds. Medical staff noted that plaintiff “is much less paranoid today.” Id.
25 Plaintiff had normal test results and his body mass index was “completely
26 normal.” Id. Medical staff and plaintiff “discussed the patient’s good health, that
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1 his kidneys and liver were functioning perfectly normal, and he does not have a
2 tapeworm.” Id.

3 Defendants correctly argue that they are entitled to summary judgment on
4 plaintiff’s claim that Burpo, De Leon, Altunc and France were deliberately
5 indifferent to plaintiff’s health and safety by poisoning his food. Although
6 plaintiff declares that he became ill after eating most meals starting in June 2011,
7 he sets forth no significantly probative evidence that he suffered a substantial risk
8 of serious harm brought on by poisoning. See Anderson, 477 U.S. at 249-50.
9 Plaintiff’s medical records show that when he complained of abdominal
10 discomfort, medical staff diagnosed him with dyspepsia/indigestion and then
11 possible H. pylori, and successfully treated him. And when he began to complain
12 that he had been poisoned, medical staff ordered a series of comprehensive tests
13 to assuage his fears and all came back normal. On this record, plaintiff’s mere
14 speculation that his meals must have been poisoned is not enough to survive
15 summary judgment. See Rivera v. Nat’l R.R. Passenger Corp., 331 F.3d 1074,
16 1078 (9th Cir.) (conclusory allegations unsupported by factual data cannot defeat
17 summary judgment), amended, 340 F.3d 767 (9th Cir. 2003); Leer, 844 F.2d at
18 634 (same). Plaintiff’s claim that he did not become ill when he received sealed
19 Ramadan meals in August 2011 does not compel a different conclusion. No
20 reasonable jury could conclude that because plaintiff felt ill after he ate most of
21 the unsealed meals he received while at ad seg, the meals were poisoned. See
22 Anderson, 477 U.S. at 248.

23 Even if plaintiff had suffered a significant risk of serious harm brought on
24 by poisoning, he has set forth no significantly probative evidence that Burpo, De
25 Leon, Altunc or France actually and proximately caused the poisoning of which
26 he complains. See Leer, 844 F.2d at 634. Again, plaintiff’s claim rests on his
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1 speculation that Burpo, De Leon, Altunc and France must have poisoned him
2 because he became ill after eating meals served by them. But plaintiff did not see
3 any of these defendants put anything in his food.² Nor did any of the inmates
4 who provided declarations in support of plaintiff's claim. The declarations at
5 most support plaintiff's allegations that Burpo, De Leon, Altunc and France
6 verbally abused and harassed plaintiff, which the court already found do not state
7 a cognizable claim for damages under § 1983. Accord Freeman v. Arpaio, 125
8 F.3d 732, 738 (9th Cir. 1997) (allegations of verbal abuse and harassment fail to
9 state a claim cognizable under § 1983), overruled in part on other grounds by
10 Shakur v. Schriro, 514 F.3d 878, 884-85 (9th Cir. 2008).³ Plaintiff's additional
11 speculation that Burpo, De Leon, Altunc and/or France must have caused his H.
12 pylori by poisoning him does not compel a different conclusion. See Rivera, 331

14 ²Nor did plaintiff see any of the other unnamed SQSP officials he also claims
15 poisoned him (both while he was in ad seg and after he was released from ad seg) put
16 anything in his meals.

17 ³Plaintiff argues that his allegations that De Leon, Altunc and France called him
18 a snitch in front of other inmates are corroborated by his declarants, and establish a
19 violation of his Eighth Amendments rights. Not so. While in some instances
20 deliberately spreading a rumor that a prisoner is a snitch may amount to a violation of
21 the right to be protected from violence, see Valandingham v. Bojorquez, 866 F.2d 1135,
22 1138 (9th Cir. 1989), this is not one of those instances. In Valandingham, the actions of
23 the correctional officer defendants were of such gravity and persistence that the prisoner
24 plaintiff was assaulted by other inmates on two separate occasions over a period two
25 years. See Valandingham v. Moen, No. 91-15714, 1992 WL 102662, at *1 (9th Cir.
26 May 14, 1992) (unpublished memorandum disposition). But plaintiff here was never
27 assaulted as a result of allegedly being called a snitch in front of other inmates in ad
28 seg. Nor is there any indication that he was ever in danger of being assaulted as a result
of being called a snitch, or even in fear of being assaulted as a result of being called a
snitch. Plaintiff does not establish a § 1983 claim for damages for a violation the right
to be protected from violence because "speculative and generalized fears of harm at the
hands of other prisoners do not rise to a sufficiently substantial risk of serious harm."
Williams v. Wood, 223 Fed. Appx. 670, 671 (9th Cir. 2007). See also 42 U.S.C. §
1997e(e) (no action may be brought by prisoner for mental or emotional injury while in
custody without prior showing of physical injury).

1 F.3d at 1078. Put simply, the evidence in the record does not support a finding or
2 reasonable inference that Burpo, De Leon, Altunc or France poisoned plaintiff's
3 food. On this record, no reasonable jury could conclude that Burpo, De Leon,
4 Altunc or France actually and proximately caused the poisoning of which plaintiff
5 complains. See Anderson, 477 U.S. at 248.

6 Defendants are entitled to summary judgment on plaintiff's claim that
7 Burpo, De Leon, Altunc and France were deliberately indifferent to plaintiff's
8 health and safety by poisoning his food. See Celotex, 477 U.S. at 323.

9 2. Retaliation

10 To prevail on a First Amendment retaliation claim, a prisoner must
11 show: (1) that a state actor took some adverse action against a prisoner (2)
12 because of (3) that prisoner's protected conduct, and that such action (4) chilled
13 the prisoner's exercise of his First Amendment rights, and (5) the action did not
14 reasonably advance a legitimate correctional goal. Rhodes v. Robinson, 408 F.3d
15 559, 567-68 (9th Cir. 2005).

16 The prisoner must prove all the elements of a retaliation claim, including
17 the absence of legitimate correctional goals for the conduct of which he
18 complains. Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995). But the prisoner
19 need not prove a total chilling of his First Amendment rights; that his First
20 Amendment rights were chilled, though not necessarily silenced, is enough.
21 Rhodes, 408 F.3d at 569.

22 Retaliation claims brought by prisoners must be evaluated in light of
23 concerns over "excessive judicial involvement in day-to-day prison management,
24 which 'often squander[s] judicial resources with little offsetting benefit to
25 anyone.'" Pratt, 65 F.3d at 807 (quoting Sandin v. Conner, 515 U.S. 472, 482
26 (1995)). In particular, courts should "afford appropriate deference and
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1 flexibility’ to prison officials in the evaluation of proffered legitimate penological
2 reasons for conduct alleged to be retaliatory.” Id.

3 Defendants argue that they are entitled to summary judgment on plaintiff’s
4 claim that De Leon, Altunc and France retaliated against plaintiff for reporting
5 that Burpo was poisoning plaintiff’s food, by further poisoning, verbally
6 assaulting and otherwise harassing plaintiff, because plaintiff has set forth no
7 evidence that De Leon, Altunc or France knew that plaintiff had reported Burpo
8 or that they decided to punish him for it. The court agrees.

9 Plaintiff admitted at his deposition that he has no direct evidence that De
10 Leon, Altunc or France acted against plaintiff because of plaintiff’s reporting of
11 Burpo: “I guess I would just have to say I drew an inference based on the
12 proximity and time, the fact that [Burpo] got disciplined, fired, transferred, or
13 whatever, and then the fact that the harassment and these comments like snitch
14 and rat and other terms started – I don’t know, there was never a direct statement
15 like I’m calling you a rat right now because you filed a grievance against
16 Correctional Officer [Burpo]” Pl’s Depo. at 174-75. But plaintiff’s
17 “inference” is no more than speculation and not enough to defeat summary
18 judgment. See Wood v. Yordy, 753 F.3d 899, 905 (9th Cir. 2014) (speculation
19 that defendants acted out of retaliation is not sufficient).

20 “In the First Amendment context, a plaintiff creates a genuine issue of
21 material fact on the question of retaliatory motive when he or she produces, in
22 addition to evidence that the defendant knew of the protected speech, at least (1)
23 evidence of proximity in time between the protected speech and the allegedly
24 retaliatory decision, (2) evidence that the defendant expressed opposition to the
25 speech or (3) evidence that the defendant’s proffered reason for the adverse
26 action was false or pretextual.” Corales v. Bennett, 567 F.3d 554, 568 (9th Cir.

1 2009) (internal quotation marks and citation omitted) (emphasis in original). But
2 plaintiff here produces no evidence that De Leon, Altunch or France knew that
3 plaintiff reported Burpo, expressed opposition to plaintiff reporting Burpo, or
4 proffered a false or pretextual reason for their adverse actions. At most, plaintiff
5 produces evidence of proximity in time between his protected speech and the
6 allegedly retaliatory actions, which can be considered circumstantial evidence of
7 retaliatory intent but alone is insufficient to establish retaliatory motive. See
8 Pratt, 65 F.3d at 808 (finding timing between protected speech and allegedly
9 retaliatory action insufficient to support inference of retaliatory intent where there
10 was no evidence that defendants were aware of plaintiff's protected speech).

11 Defendants are entitled to summary judgment on plaintiff's claim that De
12 Leon, Altunc and France retaliated against plaintiff for reporting Burpo by
13 poisoning, verbally assaulting and otherwise harassing plaintiff, because plaintiff
14 has set forth no evidence that De Leon, Altunc or France knew that plaintiff had
15 reported Burpo or that their alleged actions were in retaliation for plaintiff's
16 grievance/letter reporting Burpo. Accord Wood, 753 F.3d at 904-05 (summary
17 judgment properly granted in favor of one defendant because nothing in the
18 record showed that defendant knew about protected speech, and properly granted
19 in favor of second defendant because no evidence showed that defendant knew
20 about protected speech or that claimed harassment by defendant was in retaliation
21 for the protected speech). Plaintiff's mere speculation that De Leon, Altunc and
22 France must have acted out of retaliation does not compel a different conclusion.
23 See Wood, 753 F.3d at 905; see also Corales, 567 F.3d at 568 (conclusory
24 allegations of retaliation insufficient to prevent summary judgment).

25 3. Failure to Protect

26 Defendants argue that they are entitled to summary judgment and
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1 qualified immunity on plaintiff’s claim that Barnes and Chappell were
2 deliberately indifferent to plaintiff’s health and safety by failing to protect
3 plaintiff after they were told that correctional officers were poisoning and
4 harassing him. Under Saucier v. Katz, 533 U.S. 194 (2001), the court must
5 undertake a two-step analysis when a defendant asserts qualified immunity in a
6 motion for summary judgment. The court first faces “this threshold question:
7 Taken in the light most favorable to the party asserting the injury, do the facts
8 alleged show the officer’s conduct violated a constitutional right?” 533 U.S. at
9 201. If the court determines that the conduct did not violate a constitutional right,
10 the inquiry is over and the officer is entitled to qualified immunity.

11 If the court determines that the conduct did violate a constitutional right, it
12 then moves to the second step and asks “whether the right was clearly
13 established” such that “it would be clear to a reasonable officer that his conduct
14 was unlawful in the situation he confronted.” Id. at 201-02. Even if the violated
15 right was clearly established, qualified immunity shields an officer from suit
16 when he makes a decision that, even if constitutionally deficient, reasonably
17 misapprehends the law governing the circumstances he confronted. Brosseau v.
18 Haugen, 543 U.S. 194, 198 (2004); Saucier, 533 U.S. at 205-06. If “the officer’s
19 mistake as to what the law requires is reasonable . . . the officer is entitled to the
20 immunity defense.” Id. at 205.⁴

21 The Eighth Amendment requires that prison officials take reasonable
22 measures to guarantee the safety of prisoners. Farmer v. Brennan, 511 U.S. 825,
23 832 (1994). In particular, prison officials have a duty to protect prisoners from

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25 ⁴Although the Saucier sequence is often appropriate and beneficial, it is not
26 mandatory. A court may exercise its discretion in deciding which prong to address first,
27 in light of the particular circumstances of each case. See Pearson v. Callahan, 555 U.S.
28 223, 236 (2009).

1 violence at the hands of other prisoners and from dangerous conditions at the
2 prison. See id. at 833; Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005);
3 Frost v. Agnos, 152 F.3d 1124, 1128-29 (9th Cir. 1998). But the failure of prison
4 officials to protect inmates from attacks by other inmates or from dangerous
5 conditions at the prison violates the Eighth Amendment only if two requirements
6 are met: (1) the deprivation alleged is, objectively, sufficiently serious; and (2)
7 the prison official is deliberately indifferent to inmate health or safety. Farmer,
8 511 U.S. at 834.

9 A prison official is deliberately indifferent if he knows of and disregards
10 an excessive risk to inmate health or safety by failing to take reasonable steps to
11 abate it. Id. at 837, 844. The official must both be aware of facts from which the
12 inference could be drawn that a substantial risk of serious harm exists, and he
13 must also draw the inference. Id. at 837. If the official should have been aware
14 of the risk, but was not, then the official has not violated the Eighth Amendment.
15 Id. at 838; Jeffers v. Gomez, 267 F.3d 895, 914 (9th Cir. 2001).

16 Defendants argue that they are entitled to summary judgment on plaintiff's
17 claim that Barnes and Chappell were deliberately indifferent to plaintiff's health
18 and safety by failing to protect him from correctional officers poisoning and
19 harassing him because plaintiff has set forth no evidence that either Barnes or
20 Chappell was aware of and disregarded a substantial risk of serious harm to
21 plaintiff. Defendants specifically argue that plaintiff has not shown either that he
22 suffered a substantial risk of serious harm, or that Barnes or Chappell believed
23 plaintiff suffered a substantial risk of serious harm and consciously disregarded
24 the risk.

25 The court concluded earlier in this order that plaintiff has set forth no
26 significantly probative evidence that he suffered a substantial risk of serious harm
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1 brought on by poisoning. And it also concluded that plaintiff's allegations that
2 correctional officers verbally abused and harassed him, although troubling, do not
3 state a cognizable claim for damages under § 1983. Nor do they amount to a
4 showing of substantial risk of serious harm. But even if plaintiff had suffered a
5 substantial risk of serious harm, Barnes and Chappell are entitled to summary
6 judgment because plaintiff has set forth no significantly probative evidence that
7 either Barnes or Chappell knew that plaintiff suffered a substantial risk of serious
8 harm and disregarded that risk by failing to take reasonable steps to abate it. See
9 Farmer, 511 U.S. at 837-38, 844; Jeffers, 267 F.3d at 914.

10 The undisputed facts in the record show that after plaintiff told Barnes on
11 May 21, 2011 that Burpo had poisoned plaintiff's food on May 20, 2011, Barnes
12 transferred plaintiff to another section in ad seg. And after plaintiff told Barnes
13 on November 4, 2011 that De Leon, Altunc and France had subjected him to food
14 poisoning and harassment, Barnes allowed plaintiff to transfer to any tier and
15 section in ad seg that he wanted. Plaintiff nonetheless argues that Barnes should
16 have done more. But all Barnes was required to do was take reasonable steps to
17 abate a substantial risk of serious harm. See Farmer, 511 U.S. at 844. In view of
18 plaintiff's unsupported claims to Barnes that first Burpo, and then De Leon,
19 Altunc and France, had poisoned his food, Barnes' response to transfer plaintiff
20 twice to another section and tier in ad seg was more than a reasonable step to
21 abate a no-more-than-merely-possible risk of serious harm. Barnes is entitled to
22 summary judgment because no reasonable jury could find that Barnes
23 disregarded a substantial risk of serious harm to plaintiff by failing to take
24 reasonable steps to abate it. See Anderson, 477 U.S. at 248.

25 At minimum, Barnes is entitled to qualified immunity from damages on
26 plaintiff's claim that Barnes failed to protect plaintiff from correctional officers
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1 poisoning his food in violation of the Eighth Amendment because a reasonable
2 correctional officer could have believed that his conduct was lawful under the
3 circumstances. See Saucier, 533 U.S. at 201-02. A reasonable correctional
4 officer could have believed that transferring plaintiff to another section and tier in
5 ad seg was more than a reasonable step to abate a no-more-than-merely-possible
6 risk of serious harm, and therefore was lawful.

7 Plaintiff has submitted declarations and documentary evidence in support
8 of his claim that Chappell was “informed” by his mother and others that plaintiff
9 was being “subjected to continuous and ongoing poisoning,” “verbal abuse” and
10 other “harassment and mistreatment,” and yet “took no steps to protect plaintiff.”
11 SAC at 12-13. But plaintiff’s own evidence shows that Chappell did not
12 disregard the complaint of staff misconduct towards plaintiff; instead, Chappell
13 “referred” it to “E. Melton, San Quentin Investigative Services Unit Lieutenant
14 for appropriate action/review.” Pl.’s Req. for Judicial Notice (ECF No. 150) Ex.
15 D at 1. Plaintiff argues that Chappell should have done more, but there is no
16 indication that any of the investigations into the matter revealed any wrongdoing
17 and, like Barnes, all Chappell was required to do was take reasonable steps to
18 abate a substantial risk of serious harm. See Farmer, 511 U.S. at 844. Chappell
19 is entitled to summary judgment because no reasonable jury could find that, on
20 the evidence in the record, Chappell knew of and disregarded a substantial risk of
21 serious harm to plaintiff by failing to take reasonable steps to abate it. See
22 Anderson, 477 U.S. at 248.

23 At minimum, Chappell is entitled to qualified immunity from damages on
24 plaintiff’s claim that Chappell failed to protect plaintiff in violation of the Eighth
25 Amendment because a reasonable prison official could have believed that his
26 conduct was lawful under the circumstances. See Saucier, 533 U.S. at 201-02. A
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1 reasonable prison official could have believed that referring the complaint of staff
2 misconduct towards plaintiff to the prison's investigative services unit for
3 action/review was a reasonable step to abate a no-more-than-merely-possible risk
4 of serious harm, and therefore was lawful.


5 **CONCLUSION**

6 For the foregoing reasons, defendants' motion for summary judgment
7 (ECF No. 114) is GRANTED, and plaintiff's cross-motions for summary
8 judgment (ECF Nos. 94 & 125) are DENIED.^{5 6}

9 The clerk shall enter judgment in favor of defendants and close the file.

10 SO ORDERED.

11 DATED: January 5, 2017

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13 CHARLES R. BREYER
14 United States District Judge

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24 ⁵In view of the court's conclusion that defendants are entitled to summary
25 judgment on the merits of plaintiff's claims, it need not also address whether plaintiff
26 exhausted available administrative remedies.

27 ⁶Plaintiff's last-minute miscellaneous motions and requests (see, e.g., ECF Nos.
28 168 & 169) are denied as moot and for lack of merit.