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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WADE ANTHONY MORMAN,
Plaintiff,
v.
MICHAEL DYER, et al.,
Defendants.

Case No. [16-cv-01523-SI](#)

**ORDER GRANTING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Re: Dkt. No. 17

In this *pro se* prisoner's civil rights action under 42 U.S.C. § 1983, Wade Anthony Morman claims that several defendants retaliated against him and others denied him due process. Defendants now move for summary judgment on the merits of Morman's claims and on their defense of qualified immunity, as well as on the ground that Morman did not exhaust administrative remedies for his claims against several defendants. Morman opposes the motion. For the reasons discussed below, defendants' motion for summary judgment will be granted in part and denied in part. Specifically, the motion will be granted as to everything except the retaliation claim against defendants Lee and Heller for the September 14, 2011 search, and their defense of qualified immunity to that claim. The case will be referred to the court's *pro se* prisoner mediation program.

BACKGROUND

The court found cognizable three claims in the amended complaint: a claim that four defendants conducted a retaliatory search on September 14, 2011 (Claim 6); a claim that three defendants retaliated against Morman on September 28, 2011 (Claim 7); and a claim that two defendants denied Morman his right to due process in connection with Morman's placement in

1 administrative segregation on or about December 1, 2011 (Claim 9). *See* Docket No. 8. Several
2 other claims were dismissed. *Id.* Although Morman continues to argue the merits of some
3 dismissed claims in his opposition to the motion for summary judgment, the court will refer to the
4 incidents in the dismissed claims only as necessary to provide background for the three claims that
5 it found cognizable.

6
7 A. The Claims

8 The following facts are undisputed unless otherwise noted:

9 Morman was an inmate at the Correctional Training Facility in Soledad in August and
10 September 2011. In or before December 2011, he was transferred to San Quentin State Prison.

11
12 1. The September 14, 2011 Search

13 Correctional staff at the Correctional Training Facility routinely conducted searches of
14 inmates and their property for contraband. Some of the searches were random. *See* Docket No.
15 17-4 at 2. Searches of inmates’ cells, property, and bodies were authorized by California Code of
16 Regulations, title 15, § 3287. The searches included searches of written materials that could
17 contain contraband. Docket No. 17-4 at 2. Correctional officers conducted random searches to
18 identify and confiscate contraband, and to discourage inmates from bringing more contraband into
19 the facility. *Id.*; Docket No. 17-5 at 2. Items that are not approved or accounted for are
20 disallowed under California regulations. *See* Cal. Code Regs. tit. 15, §§ 3190-3192.

21 In late August 2011, Morman verbally objected to correctional staff that he had been
22 subjected to too many searches by correctional officer (“C/O”) Quintero and had been given a
23 “wedgy” during one of those searches. Docket No. 7 at 5. Morman states that C/O Heller then
24 told Morman to “shut the fuck up; pick up your shit and get out of here!” and that Morman
25 responded that it “was not necessary to use such tone and profanity against the plaintiff and that it
26 was in violation of prison policy.” *Id.* at 6.¹ At the time, C/O Michael Dyer said to Morman and

27
28 ¹ The court earlier dismissed claims regarding the August 2011 events because, among other things, they were barred by the statute of limitations. *See* Docket No. 8 at 2-6.

1 correctional staff, including Heller and Lee, “I didn’t hear no profanity,” and C/O Dyer
2 “sarcastically ask[ed] Heller and Lee, “did you hear any profanity?”” *Id.* at 7. Morman accused
3 Dyer of siding with his officers and pretending not to notice their lack of respect for Morman. *Id.*

4 In the several weeks following that late August 2011 search, Lee directed several negative
5 comments toward Morman: While Morman was walking and talking to another inmate on August
6 25, 2011, C/O Lee stared at Morman and ordered him to “shut the fuck up and keep walking!”
7 *Id.* at 8. On or about August 25, 2011, C/O Lee “intruded into Plaintiff’s consideration with
8 another inmate” and said that he would not stop another inmate from beating up Morman; insulted
9 Morman because of his sex offenses; and rushed to within two feet of Morman. *Id.* at 9. On or
10 about September 2, 2011, C/O Lee told Morman that he was staring at him because Morman was
11 ugly. *Id.* at 10. Although claims based on these incidents have been dismissed for the reasons
12 stated in the order of partial dismissal and service (Docket No. 8), the incidents described in this
13 paragraph are recounted to provide a backdrop for what occurred on September 14, 2011.

14 On or about September 14, 2011, C/O Heller selected Morman from among numerous
15 inmates for a search of his person and property, and said to other staff members, “we’re harassing
16 him!” Docket No. 7 at 11. C/O Lee “laugh[ed] gloatingly” and searched Morman’s property. *Id.*
17 Lee “shielded his search” of Morman’s property so that Morman could not see it. *Id.* Morman
18 thinks (but does not explain how he could have seen since the search was shielded from his view)
19 that Lee read Morman’s legal property, which included written grievances. *Id.* at 11. C/O Lee
20 also took some personal property and damaged other personal property. *Id.* at 11-12. C/O Taylor
21 encouraged C/O Lavelle to confiscate art pastels found during the search and verbally insulted
22 Morman. *Id.* at 12. C/O Lavelle confiscated the art pastels because they were not included on the
23 property card that detailed the inmate’s authorized possessions. Docket No. 17-5 at 2. Lavelle
24 provided a property receipt for the confiscated pastels and marked that they had been confiscated
25 because they were “unauthorized.” *Id.* at 5. Morman presents no evidence that the art pastels
26 were not contraband.

27 Morman states that the defendants’ actions were taken because of (a) Morman’s August
28 2011 complaints about the searches and correctional officers, (b) Morman’s convictions for sex

1 offenses, and (c) “information included in plaintiff’s prison record.” Docket No. 7 at 11.²

2
3 2. September 28, 2011 Search and Hearing on CDCR-22s:

4 When inmates are subject to movement within a prison outside of the regular schedule,
5 such as when they are taken to an appointment or interview, they must be escorted by staff.
6 Docket No. 17-4 at 2; Cal. Code Regs. tit. 15, § 3274(b)(2) (“If unscheduled movement of an
7 inmate is necessary, such movement shall not take place unless the inmate is escorted by staff, or a
8 pass has been issued by staff authorizing the movement.”). C/O Lee states that he “regularly
9 searched for contraband in connection with the escort to ensure [his] own safety, the safety of
10 other officers, and the safety of other inmates during the escort. [He] also secured inmates in
11 holding cells to ensure the safety of officers and inmates.” Docket No. 17-4 at 3.

12 Sometime before September 28, Morman filled out several CDCR-22 forms. The CDCR-
13 22 form is an “inmate/parolee request for interview, item or service,” and is described in
14 California Code of Regulations, title 15, § 3086. That regulation provides: “Inmates and parolees
15 may request interviews with staff and/or request items and services via a written request process.
16 The objectives of timely resolution of routine matters through an effective and non-conflictive
17 communication process shall be facilitated by the practices set forth in this article.” *Id.* at §
18 3086(a). The CDCR-22 form process works separately from the inmate appeal process that is
19 commenced with the filing of a CDCR-602 form. *See id.* at § 3086(e)(2).

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22 _____
23 ² Morman states specifically that one of the reasons for defendants’ conduct was because
24 of his “California Penal Code § 290 convictions.” Docket No. 7 at 11. California Penal Code
25 § 290 imposes a sex-offender registration requirement on certain sex offenders. It is not clear
26 whether Morman means that defendants retaliated against him because he had been convicted of a
27 violation of § 290 or because he was someone to whom § 290 applied. In 2011, Morman was
28 serving an indeterminate life sentence following his conviction for rape and other sex crimes
against two victims. *See People v. Morman*, 2008 WL 4696606 (Cal. Ct. App. 2008). According
to the California Court of Appeal, when he committed those rapes, Morman already had a lengthy
criminal record that may have included more sex crimes. *See id.* at *9 (listing Morman’s criminal
convictions between 1989 and 1993; “[d]uring this time period, he violated both his probation and
parole and was also found guilty of rape, oral copulation, forcible anal and genital penetration, and
assault with a firearm”).

1 Morman was subjected to a search on September 28, 2011 by C/O Lavelle. Docket No. 7
2 at 14. C/O Lee ordered Morman to go to a job location in the medical facility. *Id.* At the medical
3 facility, C/O Lee gathered copies of three CDCR-22 forms that Morman had written about the
4 conduct of Lee, Dyer and other officers. Lee ordered Morman to go upstairs with him to have a
5 hearing on the CDCR-22 forms. *Id.* at 15. Morman refused, saying he was afraid to be alone with
6 Lee and wanted the grievances heard by a supervisor or to be responded to in writing. *Id.* C/O
7 Lee threatened to drag Morman up the stairs. *Id.* Pursuant to sergeant Dyer’s orders, C/O Lee
8 handcuffed Morman, took him upstairs, and put him in a holding cell. During the escort, Lee
9 pushed Morman into a wall and left him in tight handcuffs in the holding cell for about 30
10 minutes. *Id.* Sergeant Dyer took “an aggressive stance” and “chased [Morman] around in
11 attempts to provoke [Morman] to physically fight him,” but no physical contact occurred. *Id.* at
12 16. Dyer also attempted to convince Morman to leave him (Dyer) out of the complaints. *Id.* at 17.
13 Morman refused to drop the complaints. The CDCR-22 forms were returned to him, without Dyer
14 having “record[ed] any facts regarding the forced [] hearing.” *Id.*

15 Morman states that the defendants’ actions were taken because of (a) Morman’s earlier
16 complaints about the searches and correctional officers, (b) Morman’s convictions for sex
17 offenses, (c) “information included in plaintiff’s prison record;” and (d) because Morman had filed
18 the grievances. *Id.* at 17.

19

20 3. December 1, 2011 Administrative Segregation Placement

21 Morman was transferred to San Quentin State Prison some time after the above described
22 incidents. On or about December 1, 2011, correctional captain Evans and correctional sergeant
23 Kilmer caused documents to be filed at San Quentin State Prison to “falsely reflect” that Morman
24 was properly housed in administrative segregation. *Id.* at 19. Morman was not provided a proper
25 notice or hearing in connection with his placement in administrative segregation. *Id.*

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B. Inmate Appeals

Morman pursued three inmate appeals starting in late 2011. He filed an inmate appeal dated September 22, 2011 (log # CTF-11-01755), in which he complained about C/O Lee’s behavior on August 25, 2011. See Docket No. 17-3 at 8-11. He filed another inmate appeal dated October 5, 2011 (log # CTF-11-01820), in which he complained about a search on September 28, 2011. See Docket No. 19-1 at 8-11. He filed a third inmate appeal, also dated October 5, 2011 (log # CTF-11-01821), in which he complained about a search and other events occurring on September 14, 2011. See Docket No. 19-1 at 15-17. The third-level appeal for this last appeal was signed by Morman on January 5, 2012. *Id.* (§ F). Morman submitted his January 5, 2012 third-level appeal after his December 1, 2011 placement in administrative segregation. All three inmate appeals were denied at the third level of review.

Morman did not file any inmate appeal pertaining to his placement in administrative segregation or mentioning captain Evans and correctional sergeant Kilmer.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper where the pleadings, discovery and affidavits show 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). The court will grant summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a fact is material if it might affect the outcome of the suit under governing law, and a dispute about a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party”).

Generally, as is the situation with defendants’ challenge to the retaliation claims, the moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. The burden then shifts to the

1 nonmoving party to “go beyond the pleadings, and by [his] own affidavits, or by the ‘depositions,
2 answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a
3 genuine issue for trial.’” *Celotex*, 477 U.S. at 324.

4 When a defendant moves for summary judgment on an affirmative defense on which he
5 bears the burden of proof at trial, he must come forward with evidence that would entitle him to a
6 directed verdict if the evidence went uncontroverted at trial. *See Houghton v. South*, 965 F.2d
7 1532, 1536 (9th Cir. 1992). The failure to exhaust administrative remedies is an affirmative
8 defense that must be raised in a motion for summary judgment. *See Albino v. Baca*, 747 F.3d
9 1162, 1166 (9th Cir. 2014) (en banc). On a motion for summary judgment for nonexhaustion, the
10 defendant has the initial burden to prove “that there was an available administrative remedy, and
11 that the prisoner did not exhaust that available remedy.” *Id.* at 1172. If the defendant carries that
12 burden, the “burden shifts to the prisoner to come forward with evidence showing that there is
13 something in his particular case that made the existing and generally available administrative
14 remedies effectively unavailable to him.” *Id.* The ultimate burden of proof remains with the
15 defendant, however. *Id.* If material facts are disputed, summary judgment should be denied, and
16 the “district judge rather than a jury should determine the facts” on the exhaustion question, *id.* at
17 1166, “in the same manner a judge rather than a jury decides disputed factual questions relevant to
18 jurisdiction and venue,” *id.* at 1170-71.

19 The court’s function on a summary judgment motion is not to make credibility
20 determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W.*
21 *Elec. Serv. Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). The
22 evidence must be viewed in the light most favorable to the nonmoving party, and the inferences to
23 be drawn from the facts must be viewed in a light most favorable to the nonmoving party. *See id.*
24 at 631.

25 A verified complaint may be used as an opposing affidavit under Rule 56, as long as it is
26 based on personal knowledge and sets forth specific facts admissible in evidence. *See Schroeder*
27 *v. McDonald*, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995) (treating plaintiff’s verified complaint
28 as opposing affidavit where, even though verification not in conformity with 28 U.S.C. § 1746,

1 plaintiff stated under penalty of perjury that contents were true and correct, and allegations were
2 not based purely on his belief but on his personal knowledge). Here, Morman’s amended
3 complaint is verified (*see* Docket No. 7 at 23), and therefore is considered as part of the evidence
4 in opposition to defendants’ motion for summary judgment.

5
6 **DISCUSSION**

7 A. Plaintiff Failed To Exhaust Administrative Remedies For His
8 Claims Against Evans and Kilmer (Claim 9 in Amended Complaint)

9 1. Exhaustion Requirements

10 “No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or
11 any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
12 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion
13 in prisoner cases covered by § 1997e(a) is mandatory. *Porter v. Nussle*, 534 U.S. 516, 524 (2002);
14 *Ross v. Blake*, 136 S. Ct. 1850, 1856-57 (2016) (mandatory language of § 1997e(a) forecloses
15 judicial discretion to craft exceptions to the requirement). All available remedies must be
16 exhausted; those remedies “need not meet federal standards, nor must they be ‘plain, speedy, and
17 effective.’” *Porter*, 534 U.S. at 524. Even when the prisoner seeks relief not available in
18 grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. *Id.*; *Booth v.*
19 *Churner*, 532 U.S. 731, 741 (2001). Section 1997e(a) requires “proper exhaustion” of available
20 administrative remedies. *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). Proper exhaustion requires
21 using all steps of an administrative process and complying with “deadlines and other critical
22 procedural rules.” *Id.* at 90.

23 An inmate “need not exhaust *unavailable* [remedies].” *Ross*, 136 S. Ct. at 1858 (emphasis
24 added). An administrative remedy is unavailable if, for example, “it operates as a simple dead
25 end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates”; or
26 if it is “so opaque that it becomes, practically speaking, incapable of use”; or if “prison
27 administrators thwart inmates from taking advantage of a grievance process through machination,
28 misrepresentation, or intimidation.” *Id.* at 1859–60.

1 The State of California provides its inmates and parolees the right to appeal
2 administratively “any policy, decision, action, condition, or omission by the department or its staff
3 that the inmate or parolee can demonstrate as having a material adverse effect upon his or her
4 health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust available
5 administrative remedies within this system, a prisoner must proceed through three formal levels of
6 appeal and receive a decision from the Secretary of the California Department of Corrections and
7 Rehabilitation or his designee. *Id.* § 3084.1(b), § 3084.7(d)(3).

8 The amount of detail in an administrative grievance necessary to properly exhaust a claim
9 is determined by the prison's applicable grievance procedures. *Jones v. Bock*, 549 U.S. 199, 218
10 (2007); *see also Sapp v. Kimbrell*, 623 F.3d 813, 824 (9th Cir. 2010) (“To provide adequate
11 notice, the prisoner need only provide the level of detail required by the prison's regulations.”).
12 California prisoners are required to lodge their administrative complaint on a CDCR 602 form.
13 The level of specificity required in the appeal is described in a regulation:

14 The inmate or parolee shall list all staff member(s) involved and shall describe their
15 involvement in the issue. To assist in the identification of staff members, the inmate or
16 parolee shall include the staff member’s last name, first initial, title or position, if known,
17 and the dates of the staff member's involvement in the issue under appeal. If the inmate or
18 parolee does not have the requested identifying information about the staff member(s), he
19 or she shall provide any other available information that would assist the appeals
20 coordinator in making a reasonable attempt to identify the staff member(s) in question. [¶]
21 The inmate or parolee shall state all facts known and available to him/her regarding the
22 issue being appealed at the time of submitting the Inmate/Parolee Appeal form, and if
23 needed, the Inmate/Parolee Appeal Form Attachment.

24 Cal. Code Regs. tit. 15, § 3084.2(a)(3-4).³

25 ³ Several Ninth Circuit cases have referred to California prisoners’ grievance procedures as
26 not specifying the level of detail necessary and instead requiring only that the grievance “describe
27 the problem and the action requested.” *See Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.
28 2014) (quoting Cal. Code Regs. tit. 15, § 3084.2); *Sapp*, 623 F.3d at 824 (“California regulations
require only that an inmate ‘describe the problem and the action requested.’ Cal. Code Regs. tit.
15, § 3084.2(a)”); *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (when prison or jail’s
procedures do not specify the requisite level of detail, “a grievance suffices if it alerts the prison
to the nature of the wrong for which redress is sought”). Those cases are distinguishable,
however, because they did not address the regulation as it existed at the time of the events
complained of in this action. Since January 28, 2011, the operative regulation has required
California prisoners using the CDCR’s inmate appeal system to list the name(s) of the
wrongdoer(s) in their administrative appeals.

1 2. Analysis

2 Defendants have moved for summary judgment on the ground that Morman did not
3 properly exhaust administrative remedies for his claims against defendants Evans and Kilmer
4 because he did not file any inmate appeal concerning their alleged failure to provide required
5 procedural protections for Morman when he was placed in administrative segregation on
6 December 1, 2011.

7 Defendants have carried their burden to demonstrate that Morman did not properly exhaust
8 those available remedies as to claims against Evans and Kilmer. The undisputed evidence shows
9 that California provides an administrative remedies system for California prisoners to complain
10 about their conditions of confinement, and that Morman used that California inmate appeal system
11 to complain about some events that gave rise to his amended complaint. The undisputed evidence
12 also shows that the only inmate appeals filed pertaining to events alleged in the amended
13 complaint that received a decision at the third level did not assert any wrongdoing by defendants
14 Evans or Kilmer. It is undisputed that: (1) Morman filed only three inmate appeals in and after
15 late 2011 relating to the events giving rise to his amended complaint that received a decision at the
16 third, or highest, level; and (2) none of those three appeals mentioned Evans or Kilmer or
17 pertained to the alleged wrongdoing of Evans or Kilmer. Defendants met their initial burden to
18 prove “that there was an available remedy, and that [Morman] did not exhaust that available
19 remedy.” *Albino*, 747 F.3d at 1172.

20 Once defendants met their initial burden, the burden shifted to Morman to come forward
21 with evidence showing that something in his particular case made the existing administrative
22 remedies “effectively unavailable to him.” *Id.* Morman failed to make the requisite showing. He
23 declares: “I felt that there was not [sic] use in trying the appeals process and feared that further
24 retaliation would come to me if I continued to file appeals in regards to my placement in the ASU.
25 At times, I felt that I have to try anyways but my belief was that process would just continue to be
26 unfair and not provide me any process of fairness.” Docket No. 18 at 22.⁴ Morman’s statement

27 _____
28 ⁴ Morman contends that he was harassed by an unidentified member of the correctional
staff at San Quentin in the period from April 2012 through November 2012 after that staff member

1 does not show that administrative remedies were effectively unavailable. His statement shows that
2 he chose not to use a process that he knew was available. His presumption that the administrative
3 appeal process would be futile does not show that process was unavailable. His contention that he
4 did not file an appeal because he feared further retaliation is not credible because he *did* pursue an
5 inmate appeal after his placement in administrative segregation, albeit about a different problem: a
6 month after his December 1, 2011 placement in administrative segregation, he signed and
7 submitted his third-level appeal of the inmate appeal he had started on October 5, 2011 at the
8 Correctional Training Facility. *See* Docket No. 19-1 at 15, 17 (§ F). Moreover, by that time,
9 Morman had been moved to San Quentin, away from the Correctional Training Facility where the
10 alleged retaliation of August and September 2011 had occurred. Morman has not met his burden
11 to show that administrative remedies were effectively unavailable to him.

12 Morman failed to properly exhaust his administrative remedies as to defendants Evans and
13 Kilmer. *See Ngo*, 548 U.S. at 90-91 (“Proper exhaustion demands compliance with an agency’s
14 deadlines and other critical procedural rules because no adjudicative system can function
15 effectively without imposing some orderly structure on the course of its proceedings.”) Bearing in
16 mind that defendants have the ultimate burden of proof on the defense and viewing the evidence in
17 the light most favorable to Morman, the court concludes that defendants Evans and Kilmer are
18 entitled to judgment as a matter of law on the affirmative defense that Morman failed to exhaust
19 administrative remedies for his § 1983 claims against them.

20 Due to the differences between the unexhausted claim against Evans and Kilmer and the
21 exhausted claims against other defendants, the unexhausted claim can be dismissed while the
22 exhausted claims against are separately adjudicated. That is, the entire action need not be
23 dismissed based on the non-exhaustion of the claims against two of the seven defendants. *See*

24
25 looked at his prison records which Morman believes included information about Morman’s
26 grievance-filing activity and Morman’s sex offense history. By the time the unidentified member
27 of the correctional staff allegedly harassed him, more than four months had passed since the
28 alleged misconduct of defendants Evan and Kilmer; Morman does not explain why he was unable
to pursue an administrative remedy during those months. (If Morman wants to pursue a legal
claim against that unidentified staff member regarding that harassment, he can file another civil
rights action under 42 U.S.C. § 1983 but would need to learn that person’s identity and exhaust
administrative remedies before filing such a claim.)

1 *Jones v. Bock*, 549 U.S. 199, 222-24 (2007) (rejecting “total exhaustion-dismissal” rule); *Lira v.*
2 *Herrera*, 427 F.3d 1164, 1175 (9th Cir. 2005). The claim against defendants Evans and Kilmer
3 (i.e., Claim 9) is therefore dismissed without prejudice to Morman filing a new action alleging that
4 claim if he ever properly exhausts his administrative remedies for it.

5

6 B. Retaliation Claims

7 A prisoner has a First Amendment right to file grievances against prison officials without
8 being subjected to retaliation in response thereto. *Watison v. Carter*, 668 F.3d 1108, 1114 (9th
9 Cir. 2012). “Within the prison context, a viable claim of First Amendment retaliation entails five
10 basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2)
11 because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
12 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate
13 correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted).

14

15 1. The Search on September 14, 2011 (Claim 6 in Amended Complaint)

16 Morman claims that defendants Heller, Lee, Taylor and Lavelle searched his cell on
17 September 14, 2011 to retaliate for his complaints. Defendants urge that the retaliation claim fails
18 because Morman cannot show a causal connection, a chilling effect, or the absence of a legitimate
19 penological purpose for the search.

20 Causal connection: A prisoner must show a “causal connection between the adverse action
21 and the protected conduct.” *Watison*, 668 F.3d at 1114. “[M]ere speculation that defendants acted
22 out of retaliation motive is not sufficient.” *Wood v. Yordy*, 753 F.3d 899, 904-05 (9th Cir. 2014)
23 (affirming grant of summary judgment where no evidence that defendants knew about plaintiff's
24 prior lawsuit, or that defendants' disparaging remarks were made in reference to prior lawsuit).
25 “[T]iming can properly be considered as circumstantial evidence of retaliatory intent,” although
26 timing alone is not enough to support a finding of retaliation. *Pratt v. Rowland*, 65 F.3d 802, 808
27 (9th Cir. 1995); *Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir. 2000) (retaliation claim
28 cannot rest on the logical fallacy of *post hoc, ergo propter hoc*, i.e., "after this, therefore because

1 of this"); *see, e.g., Bruce v. Ylst*, 351 F.3d 1283, 1288-89 (9th Cir. 2003) (retaliatory motive may
2 be shown by the timing of the allegedly retaliatory act and inconsistency with previous actions, as
3 well as direct evidence); *Pratt*, 65 F.3d at 808 (error to find that the allegedly retaliatory action
4 that preceded a television interview was caused by the interview).

5 Viewing the evidence in the light most favorable to Morman, a reasonable jury could find
6 that Morman's complaining in late August 2011 about the repeated searches and the manner of
7 searches was protected conduct under the First Amendment.⁵ *See Entler v. Gregoire*, 872 F.3d
8 1031, 1038 (9th Cir. 2017); *Jones v. Williams*, 791 F.3d 1023, 1035-36 (9th Cir. 2015).

9 Viewing the evidence in the light most favorable to Morman, a reasonable jury could find
10 that Morman's complaining caused C/Os Heller and Lee to choose Morman to be searched.
11 Morman presents evidence that, on September 14, (1) C/O Heller chose Morman to be searched a
12 few weeks after Morman had complained that the searches were being used to harass him; (2) C/O
13 Heller told his coworkers, "we're harassing him"; (3) C/O Lee laughed at Heller's statement and at
14 his opportunity to search Morman's cell; and (4) on several occasions in the few weeks between
15 Morman's August complaining and the September 14 search, C/O Lee had made unduly negative
16 comments to Morman (e.g., that Morman had to shut up, that Morman was ugly, and that Lee
17 would not intervene if another inmate was attacking Morman). Morman's evidence could allow a
18 jury to believe that C/Os Lee and Heller had lingering irritation about Morman's complaints about
19 the late August 2011 search, and thus distinguish this case from the situation where an adverse act
20 simply follows First Amendment activity by a few weeks. The negative comments by Lee after
21 Morman's complaints in August provide some circumstantial evidence that the search on
22 September 14 had a retaliatory motivation -- especially given the evidence that C/O Heller said
23 "we're harassing him!" and that C/O Lee laughed in response as the search began on September
24 14, 2011. If believed, Morman's evidence would allow a reasonable trier of fact to find that C/Os
25 Heller and Lee searched Morman and his cell on September 14 because of Morman's earlier First
26 Amendment activity. *See Bruce*, 351 F.3d at 1289 (triable issue existed as to whether the motive

27 _____
28 ⁵ The parties agree that Morman's status as a sex offender -- which allegedly was an
additional cause of defendants' behavior -- is not constitutionally protected conduct and could not
support a retaliation claim.

1 for a gang validation was retaliatory based on statements indicating that the validation was
2 payback for earlier complaints, combined with suspect timing and the use of evidence previously
3 rejected).

4 However, the result is different for C/Os Taylor and Lavelle. Morman fails to present
5 evidence that would allow a reasonable trier of fact to determine that C/Os Taylor and Lavelle
6 acted with a retaliatory motive when they acted on September 14, 2011. The evidence shows that,
7 at C/O Taylor’s urging, C/O Lavelle confiscated contraband art pastels and that Lavelle provided a
8 property receipt explaining that the pastels had been confiscated because they were contraband.
9 Morman presents no evidence that Taylor or Lavelle made any comment suggesting that they
10 intended to retaliate with their activities related to the search. Nor does Morman present any
11 evidence that Lavelle and Taylor were aware of Morman’s complaining about the search in
12 August 2011.

13 Chilling effect: To prevail on a retaliation claim, a plaintiff must show a chilling effect on
14 his First Amendment rights. The proper inquiry is “whether an official's acts would chill *or*
15 silence a person of ordinary firmness from future First Amendment activities.” *Rhodes*, 408 F.3d
16 at 568-69 (quoting *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300
17 (9th Cir. 1999)).

18 Defendants contend that the required chilling effect did not exist because Morman filed
19 written grievances after the cell search. Docket No. 17 at 12. This logic has been squarely
20 rejected by the Ninth Circuit. *See Rhodes*, 408 F.3d at 568-69 (rejecting argument that inmate did
21 not state a claim for relief because he had been able to file inmate grievances and a lawsuit). The
22 fact that Morman continued to complain and filed inmate appeals does not negate the existence of
23 this element because the chilling effect need not be so great as to totally silence the inmate. A
24 reasonable jury could conclude that knowing that one’s cell would be searched and property
25 confiscated or damaged during that search as a payback for First Amendment activity would chill
26 a person of ordinary firmness from future First Amendment activities, even in a prison unit where
27 cell searches could be done on a random basis as well as for cause. “A retaliatory search makes a
28 certainty of that which is only a possibility under a policy of truly random cell searches. That is,

1 an inmate living with a random search policy knows each day that maybe his cell will be searched
2 and maybe it won't, whereas an inmate being subjected to retaliation is led to believe that the price
3 of First Amendment activity is a cell search.” *Haddix v. Burris*, 2015 WL 1055768, *6 (N.D. Cal.
4 2015).

5 Legitimate correctional goals: The prisoner bears the burden of pleading and proving
6 absence of legitimate correctional goals for the conduct of which he complains. *Pratt*, 65 F.3d at
7 806. At that point, the burden shifts to the prison official to show, by a preponderance of the
8 evidence, that the retaliatory action was narrowly tailored to serve a legitimate penological
9 purpose. *See Schroeder v. McDonald*, 55 F.3d 454, 461-62 (9th Cir. 1995) (defendants had
10 qualified immunity against retaliation claim based on their decision to transfer prisoner to preserve
11 internal order and discipline and maintain institutional security).

12 Defendants urge that the retaliation claim fails because the cell search was supported by
13 legitimate correctional goals. Defendants state that random searches of inmates and their property
14 serve a legitimate penological purpose of promoting institutional security by enabling prison
15 officials to confiscate contraband. But defendants fail to acknowledge that Morman's verified
16 complaint described more than a simple search: Morman stated that the cell search included
17 damaging and confiscating his property (other than the art pastels, discussed in the next paragraph
18 below): Morman presents evidence that, during the search, Lee read Morman's legal paperwork,
19 "secretly took plaintiff's photograph of his deceased mother, a straight edged ruler and legal
20 papers, and other items; damaged/broke his typewriter daisy wheel; called plaintiff a flasher."
21 Docket No. 7 at 11-12. Unlike the art pastels, there was no property receipt prepared for the
22 confiscated photo, ruler, or legal papers. Nor was there any suggestion that Lee accidentally broke
23 the typewriter part. A reasonable jury could conclude that a search that included taking some
24 property and breaking other property without any acknowledgment of having taken or broken the
25 property does not serve a legitimate correctional goal. Moreover, defendants do not offer any
26 evidence showing that the search of Morman's cell was a truly random search. *See Bruce*, 351
27 F.3d at 1289 ("prison officials may not defeat a retaliation claim on summary judgment simply by
28 articulating a general justification for a neutral process, when there is a genuine issue of material

1 fact as to whether the action was taken in retaliation for the exercise of a constitutional right”).
2 There are triable issues with regard to the existence of a legitimate penological purpose for the cell
3 search as it was conducted.

4 The result is different for defendants Lavelle and Taylor. Morman has presented evidence
5 that C/O Lavelle confiscated art pastels at C/O Taylor’s direction at the conclusion of the search
6 on September 14. The evidence is undisputed that Morman’s art pastels were not included on a
7 property card that detailed his allowed possessions; the pastels were confiscated because they were
8 contraband; and a property receipt was issued that explained that the art pastels had been
9 confiscated as unauthorized property. Docket No. 17-5 at 5. Morman does not provide any
10 evidence to dispute that this confiscation of contraband served a legitimate penological interest in
11 deterring contraband in the prison. Defendants Lavelle and Taylor are entitled to judgment in their
12 favor because Morman has not raised a triable issue that the confiscation of the contraband art
13 pastels did not serve a legitimate correctional goal.

14 Morman has established “genuine dispute[s] as to [] material facts” on his retaliatory cell
15 search claim against only C/Os Heller and Lee. Fed. R. Civ. P. 56(a). Summary judgment
16 therefore is not appropriate on the retaliatory search claim against those two defendants.
17 Summary judgment is, however, appropriate for the retaliation claim against defendants Taylor
18 and Lavelle for the September 14 search.

19
20 2. The Events on September 28, 2011 (Claim 7 in Amended Complaint)

21 Morman claims that defendants Lavelle, Lee and Dyer searched and intimidated him into a
22 hearing about his written grievances on September 28, 2011. Defendants urge that this retaliation
23 claim fails because Morman cannot show a causal connection between protected speech and their
24 adverse action, a chilling effect, or the absence of a legitimate penological purpose for the
25 defendants’ actions.

26 Causal connection: Morman has failed to raise a triable issue of fact that defendants took
27 adverse actions because of his constitutionally protected conduct. Unlike the September 14 search
28 -- where Heller commented that they were harassing Morman, and Lee laughed in apparent

1 agreement -- there is no evidence on which a reasonable trier of fact could conclude that there was
2 a causal connection between their search, handcuffed escort and interview of Morman on
3 September 28 and his earlier First Amendment activity. The September 28 events followed the
4 First Amendment activity, but that timing is insufficient to support a reasonable inference that the
5 September 28 events were caused by the First Amendment activity, especially in light of the
6 evidence that Morman had submitted CDCR-22s requesting an interview or other action and
7 defendants were responding to the CDCR-22s. *See Huskey*, 204 F.3d at 899 (retaliation claim
8 cannot rest on the logical fallacy of *post hoc, ergo propter hoc*, i.e., “after this, therefore because
9 of this”); *Pratt*, 65 F.3d at 808 (timing alone is not enough to support a finding of retaliation).

10 Legitimate correctional goals: On the evidence in the record, a rational trier of fact could
11 not conclude that defendants’ actions on September 28 did not further legitimate correctional
12 goals. The evidence shows that defendants were attempting to conduct an interview with Morman
13 based on his CDCR-22s, which are inmate requests for an interview or other action. Morman has
14 not submitted to the court a copy of any CDCR-22 and has not shown that attempting to interview
15 him for the CDCR-22 was not in furtherance of the legitimate correctional goal. *See Cal. Code*
16 *Regs. tit. 15, § 3086(a)* (CDCR-22 process is intended to encourage “timely resolution of routine
17 matters through an effective and non-conflictive communication process”). Morman’s evidence
18 shows that he did not want to be interviewed and was attempting to avoid being taken to an
19 interview because he worried that something bad might happen to him. But Morman does not
20 present any evidence to contradict defendants’ evidence that searching him prior to an
21 unscheduled movement and handcuffing him during that escort did not further legitimate
22 correctional goals of ensuring the safety of staff and other inmates. *See Cal. Code Regs. tit. 15 §*
23 *3274(b)(2)*; Docket No. 17-4 at 3.

24 Defendants are entitled to judgment as a matter of law on the claim that defendants Lee,
25 Lavelle and Dyer retaliated against Morman on September 28, 2011 for his First Amendment
26 activities.⁶

27 ⁶ Defendants also contend that the required chilling effect did not exist because Morman
28 complained “more volubly and formally” after the September 28 incident. Docket No. 17 at 14.
This logic has been squarely rejected by the Ninth Circuit. *See Rhodes*, 408 F.3d at 568-69

1 C. Qualified Immunity For The Retaliation Claims

2 The defense of qualified immunity protects “government officials . . . from liability for
3 civil damages insofar as their conduct does not violate clearly established statutory or
4 constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457
5 U.S. 800, 818 (1982). To determine whether a government official is entitled to qualified
6 immunity, courts must consider (1) whether the official’s conduct violated a constitutional right,
7 and (2) whether that right was “clearly established” at the time of the alleged misconduct.
8 *Pearson*, 555 U.S. at 232. Courts may “exercise their sound discretion in deciding which of the
9 two prongs of the qualified immunity analysis should be addressed first in light of the
10 circumstances in the particular case at hand.” *Id.* at 236.

11 “An officer cannot be said to have violated a clearly established right unless the right’s
12 contours were sufficiently definite that any reasonable official in [his] shoes would have
13 understood that he was violating it, meaning that existing precedent . . . placed the statutory or
14 constitutional question beyond debate.” *City and County of San Francisco v. Sheehan*, 135 S. Ct.
15 1765, 1774 (2015) (alteration and omission in original) (citation omitted). This is an “exacting
16 standard” that “gives government officials breathing room to make reasonable but mistaken
17 judgments by protect[ing] all but the plainly incompetent or those who knowingly violate the
18 law.” *Id.* (alteration in original) (internal quotation marks omitted).

19 [E]xisting precedent must have “placed beyond debate the unconstitutionality of”
20 the officials’ actions, as those actions unfolded in the specific context of the case at
21 hand. *Taylor*, 135 S. Ct. at 2044. Hence, a plaintiff must prove that “precedent on
22 the books” at the time the officials acted “would have made clear to [them] that
23 [their actions] violated the Constitution.” *Id.* at 2045.

24 As the Supreme Court again stressed recently, “[t]he dispositive question is
25 ‘whether the violative nature of [the defendants’] *particular* conduct is clearly
26 established.’” Moreover, “[t]his inquiry ‘must be undertaken in light of the *specific*
27 *context* of the case, not as a broad general proposition.’” *Id.* (emphasis added)
28 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L.Ed.2d 583
(2004) (per curiam)).

(rejecting argument that inmate did not state a claim for relief because he had been able to file inmate grievances and a lawsuit). The fact that Morman continued to complain and filed inmate appeals does not negate the existence of this element because the chilling effect need not be so great as to totally silence the inmate. Thus, the court does not rely on the chilling effect element in determining that Morman’s September 28 retaliation claim fails.

1 *Hamby v. Hammond*, 821 F.3d 1085, 1090–91 (9th Cir. 2016) (alterations in original) (citations
2 omitted) (quoting *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam)).

3 The “fact-specific, highly contextualized nature of the ‘clearly established’ analysis”
4 applies, regardless of the constitutional right at issue. *Hamby*, 821 F.3d at 1092. For example, in
5 a case in which the plaintiff alleged prison doctors were deliberately indifferent in pursuing a
6 nonsurgical course of care for a prisoner’s hernia, the qualified immunity inquiry required the
7 court to determine whether, at the time of the alleged wrongdoing, it was “‘beyond debate’ that the
8 prison officials pursued a medically unreasonable course of treatment by declining to refer
9 [plaintiff] for a surgical evaluation.” *Id.* Defining the relevant right as a right to be free from
10 deliberate indifference to medical needs was far too general, and would “repeat the same error the
11 Supreme Court has time and again felt compelled to correct.” *See id.* at 1095. As another
12 example, in an excessive-force case where officers shot a woman who was holding a knife and
13 ignoring officers’ orders to drop the weapon, “it [did] not suffice for a court simply to state that an
14 officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the
15 case for a trial on the question of reasonableness.” *Kisela v. Hughes*, No. 17-467, slip op. at 5
16 (U.S. Apr. 2, 2018).

17 In the present case, the question is not simply whether, on September 14, 2011, the law
18 prohibited retaliation against prisoners for their First Amendment activities, as that would be
19 defining the relevant right too generally and would “repeat the same error the Supreme Court has
20 time and again felt compelled to correct.” *See Hamby*, 821 F.3d at 1094. Instead, the question is a
21 narrower one, tied to the specific facts of this case: viewing the evidence in the light most
22 favorable to Morman, and given existing case law at that time, was it beyond debate that it
23 amounted to unconstitutional retaliation to search a prisoner’s cell and confiscate/destroy personal
24 property after he had protested earlier cell searches and perceived harassment by prison officials?

25 If the evidence showed *only* a cell search with no property damage/destruction, defendants’
26 qualified immunity argument might have a good chance of success because Morman has not
27 identified and the court has not located controlling law in place in September 2011 that prohibited
28 retaliatory cell searches, where no property is confiscated or damaged. Indeed, some out-of-circuit

1 cases do not even view a search as a sufficiently adverse action for purposes of a retaliation claim.
2 *See Dolan v. Connolly*, 2017 WL 193286, *6 (S.D. N.Y. 2017) (dismissing claim for an allegedly
3 retaliatory search and confiscation of a computer used by prisoner after his First Amendment
4 activity, reasoning that the search did not constitute adverse action in light of the realities of prison
5 life); *Mateo v. Alexander*, 2012 WL 864805, *4 (S.D. N.Y. 2012) (“many district courts in this
6 circuit have concluded that a cell search is insufficient to support [a retaliation] claim”); *id.*
7 (relying on *Hudson v. Palmer*, 468 U.S. 517 (1984), courts have concluded that, even if done for
8 retaliatory reasons, a cell search does not implicate a constitutional right because the prisoner has
9 no reasonable expectation of privacy). Two cases within this circuit have allowed retaliatory cell
10 search claims to survive summary judgment, but both those cases post-date the September 2011
11 search at issue in Morman’s case. *See Saenz v. Chavez*, 2016 WL 8731159 (E.D. Cal. 2016)
12 (triable issue of fact existed as to whether allegedly random search was retaliation); *Haddix v.*
13 *Burris*, 2015 WL 1055768, *6 (N.D. Cal. 2015) (triable issue of fact precluded summary judgment
14 on retaliatory cell search claim).

15 But the evidence here, taken in the light most favorable to Morman, shows that the cell
16 search on September 14, 2011 included the unauthorized taking and breaking of Morman’s
17 personal property. During the search, a photo, ruler and legal papers were taken without any
18 record being made that they were contraband. Morman’s typewriter was broken. (This
19 confiscation/destruction is different from the confiscation of the art pastels; the taking of the art
20 pastels was documented and shown by defendants to have been done for a legitimate penological
21 purpose of eliminating contraband.) As of 2011, the law was clearly established that the
22 confiscation and destruction of an inmate’s personal property in retaliation for his First
23 Amendment activities was actionable. The case of *Rhodes v. Robinson*, 408 F.3d 559, decided in
24 2005, had found an actionable retaliation claim stated by a prisoner who alleged, among other
25 things, that prison officials had “arbitrarily confiscated, withheld, and eventually destroyed his
26 property” and did other wrongs in response to his First Amendment activities. *Id.* at 568. A
27 reasonable officer would not have thought, in 2011, that it was lawful for him to take and break an
28 inmate’s property during a cell search. Defendants Lee and Heller therefore are not entitled to
qualified immunity on the retaliation claim regarding the September 14 search.

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With regard to the events on September 28, 2011, defendants prevail on the first step of the qualified immunity analysis. On the evidence in the record, no rational trier of fact could conclude that defendants' conduct violated Morman's right to be free from retaliation for his First Amendment activity. Defendants therefore are entitled to summary judgment in their favor on their qualified immunity defense, as well as on the merits of Morman's retaliation claim regarding the events on September 28, 2011.

D. Referral To *Pro Se* Prisoner Mediation Program

The court has granted summary judgment on some claims, but there remains for adjudication Morman's retaliation claim for the search on September 14, 2011. This case appears a good candidate for the court's *pro se* prisoner mediation program.

Good cause appearing therefor, this case is now referred to Magistrate Judge Robert Illman for mediation or settlement proceedings pursuant to the *Pro Se* Prisoner Mediation Program. The proceedings will take place within **one hundred twenty days** of the date this order is filed. Magistrate Judge Illman will coordinate a time and date for mediation or settlement proceedings with all interested parties and/or their representatives and, within five days after the conclusion of the proceedings, file with the court a report for the prisoner mediation or settlement proceedings.

From time to time, prisoner-plaintiffs have refused to partake in mediation and settlement proceedings. Although the court assumes that will not occur in this case, the court wants to make clear the consequences if it does. Judicial resources are consumed preparing for mediation and settlement conferences, and those resources are wasted when a scheduled conference does not proceed. To avoid that happening, plaintiff is now specifically ordered to attend and participate in the mediation or settlement conference proceedings. He does not have to reach a settlement or other resolution of his claims, but he absolutely must attend and participate in all the mediation or settlement conference proceedings. The conference may be set up so that he will appear in person, by videoconference or by telephone -- and he must attend whatever format Magistrate Judge Illman chooses. Plaintiff is cautioned that he may be sanctioned for failure to comply with an order to participate in a settlement conference, and such sanctions may include dismissal of part or

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all of the action. *See* Fed. R. Civ. P. 16(a), (f), and 41(b).


CONCLUSION

For the foregoing reasons, defendants’ motion for summary judgment is **GRANTED IN PART AND DENIED IN PART**. Docket No. 17. The motion is granted in favor of defendants in all respects, except that defendants Lee and Heller are not entitled to summary judgment on Claim 6 or on their defense of qualified immunity to Claim 6. Claim 9 is dismissed without prejudice to Morman filing a new action alleging his claim against defendants Kilmer and Evans if he ever properly exhausts his administrative remedies for the claim.

This action is now referred to Magistrate Judge Illman for mediation or settlement proceedings pursuant to the *Pro Se* Prisoner Mediation Program. The Clerk will send a copy of this order to Magistrate Judge Illman.

IT IS SO ORDERED.

Dated: May 29, 2018



SUSAN ILLSTON
United States District Judge