

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OMAR SHARRIEFF GAY, E22575,  
Plaintiff,  
v.  
AMY PARSONS, et al.,  
Defendant(s).

Case No. [16-cv-05998-CRB](#) (PR)

**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT, AND  
REFERRING CASE TO  
MAGISTRATE JUDGE FOR  
SETTLEMENT PROCEEDINGS**

(ECF No. 22)

Plaintiff, a prisoner at the California Men's Colony (CMC) in San Luis Obispo, filed a sworn and verified pro se complaint under 42 U.S.C. § 1983 alleging that in September 2015, while he was incarcerated at the Correctional Training Facility (CTF) in Soledad, Board of Parole Hearings (BPH) psychologists Amy Parsons and Gregory S. Goldstein interviewed him for a psychological diagnostic evaluation in preparation for a subsequent parole suitability hearing and, on account of his being African-American and Muslim, assessed him as high risk for future violence in their report. Plaintiff claims this amounted to unlawful discrimination and retaliation.

Per order filed on June 28, 2017, the court found that plaintiff's allegations, liberally construed, appeared to state arguably cognizable claims under § 1983 for denial of equal protection and for retaliation against defendants Parsons and Goldstein, and ordered the United States Marshal to serve them. The court dismissed all other purported claims and defendants under the authority of 28 U.S.C. § 1915A(b).

Defendants now move for summary judgment on the ground that there are no material facts in dispute and that they are entitled to judgment as a matter of law. They also claim that they are entitled to qualified immunity. Plaintiff has filed an opposition and defendants have filed a reply.

1 **BACKGROUND**

2 The September 2015 risk assessment report prepared by Defendant Goldstein and reviewed  
3 by Defendant Parsons before plaintiff’s subsequent parole suitability hearing included a section  
4 entitled “Assessment of Risk for Violence.” Compl. Ex. B (ECF No. 1-2) at 11. In that portion of  
5 the report, defendants wrote that “Mr. Gay presents with several factors in the historical domain  
6 which have been associated with future risk for violence.” Id. They noted that plaintiff had a  
7 history of violent crime and other antisocial behavior that began at a young age, and increased in  
8 severity until he was convicted in 1989 of the attempted murder of a police officer. According to  
9 defendants, “Mr. Gay’s history of violence and other antisocial behavior are highly relevant risk  
10 factors for future violence.” Id. at 11-12. Plaintiff’s antisocial behavior included the following:

11 Substance Abuse: The report notes that the records indicate that plaintiff’s substance  
12 abuse history involved the use of alcohol, marijuana and PCP. Plaintiff also was engaged in the  
13 selling narcotics and “associated violence related to that lifestyle.” Id. at 12. As a result, “Mr.  
14 Gay’s history of substance use and his involvement in selling narcotics is a relevant factor in his  
15 risk for future violence.” Id.

16 Negative Relationships and Violent Attitude: During his interview with defendants,  
17 plaintiff “noted that his father was involved in organized crime and acknowledged that his father  
18 extorted money from businesses in their area.” Id. He also explained that his father “instilled early  
19 in him that he should not accept the police’s authority, the government, or the rule of law.” Id. At  
20 a young age, plaintiff sought out negative peers, became a gang member, pursued a criminal  
21 lifestyle and engaged in ongoing violence. Plaintiff also made a targeted attack on a police officer  
22 with the intent to commit murder. As a result, defendants concluded that plaintiff’s “history of  
23 negative relationships and violent attitude, each present as highly significant factors in his risk for  
24 future violence.” Id.

25 History of Employment Problems: The report also noted that plaintiff did not have a  
26 consistent work history as an adult in the community. Plaintiff “chose to forgo legitimate  
27 employment and instead engaged in gang warfare and criminal behavior for financial gain.” Id.  
28 And during his incarceration, plaintiff’s work history had not been especially strong. In 2013,  
plaintiff received “Counseling Chronos” for “failure to report to work and not performing his  
assigned task,” and in 2012, he was written up by correctional staff who suspected he was faking  
an injury in order to avoid his work assignment. Id. According to defendants, plaintiff’s “choice

1 to forgo legitimate employment for criminal behavior and his history of employment problems  
2 while in prison present as highly relevant risk factors for future violence.” Id.

3 Defendants’ report also recounted that plaintiff, who attributed his behavior as a young  
4 adult to his father’s teachings, was now a devout Muslim, “and has accepted Islamic law as his  
5 moral compass, guiding his beliefs and actions.” Id. at 14. But according to defendants, plaintiff  
6 did not “appear to have insight as to why he wholly embraced his father’s value system, Islamic  
7 law, or any other system he chooses to embrace in the future.” Id. They added that plaintiff’s  
8 “total commitment to whatever cause he sees fit in the future, and his lack of insight as to why he  
9 totally commits himself to that cause as he did on the day he committed the life crime, is a highly  
10 significant factor in Mr. Gay’s future risk for violence.” Id.

11 In the final section of the report, defendants concluded that “based upon an analysis of the  
12 presence and relevance of empirically supported risk factors, case formulation of risk, and  
13 consideration of the inmate’s anticipated risk management needs if granted parole supervision  
14 (i.e., intervention, monitoring), Mr. Gay represents a **High** risk for violence.” Id. at 16 (emphasis  
15 in original). They noted that plaintiff had not programmed well during his incarceration and added  
16 the following observation:

17 Overall, Mr. Gay has not spent a great deal of time while  
18 incarcerated attending self-help programming and his level of  
19 understanding of his antisocial personality characteristics which  
20 predispose him to violence is lacking. Furthermore, Mr. Gay’s  
21 continued oppositional attitude toward authority does not appear to  
22 be well contained and continues to be a highly relevant factor in his  
23 risk for future violence at this time. Lastly, Mr. Gay has not  
24 communicated an understanding of his total commitment to a  
25 particular belief system such as that of his father, his Islamic faith,  
26 or any other system he may adopt in the future. And this lack of  
27 understanding makes his susceptibility to possible negative  
28 influences unpredictable.

Id.

/

/

## DISCUSSION

### A. Standard of Review

Summary judgment is proper where the pleadings, discovery and affidavits show that there  
is “no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a  
matter of law.” Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of  
the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material

1 fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the  
2 nonmoving party. Id.

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

10 Once the moving party meets its initial burden, the nonmoving party must go beyond the  
11 pleadings to demonstrate the existence of a genuine dispute of material fact by “citing to specific  
12 parts of materials in the record” or “showing that the materials cited do not establish the absence  
13 or presence of a genuine dispute.” Fed. R. Civ. P. 56(c). A triable dispute of material fact exists  
14 only if there is sufficient evidence favoring the nonmoving party to allow a jury to return a verdict  
15 for that party. Anderson, 477 U.S. at 249. If the nonmoving party fails to make this showing, “the  
16 moving party is entitled to judgment as a matter of law.” Celotex, 477 U.S. at 323.

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

21 B. Analysis

22 Defendants argue that they are entitled to summary judgment and qualified immunity on  
23 plaintiff’s claims that defendants’ assessment of plaintiff as high risk for future violence amounted  
24 to denial of equal protection and to retaliation. Under Saucier v. Katz, 533 U.S. 194 (2001), the  
25 court must undertake a two-step analysis when a defendant asserts qualified immunity in a motion  
26 for summary judgment. The court first faces “this threshold question: Taken in the light most  
27 favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated  
28 a constitutional right?” 533 U.S. at 201. If the court determines that the conduct did not violate a  
constitutional right, the inquiry is over and the officer is entitled to qualified immunity.

If the court determines that the conduct did violate a constitutional right, it then moves to  
the second step and asks “whether the right was clearly established” such that “it would be clear to  
a reasonable officer that his conduct was unlawful in the situation he confronted.” Id. at 201-02.  
Even if the violated right was clearly established, qualified immunity shields an officer from suit

1 when he makes a decision that, even if constitutionally deficient, reasonably misapprehends the  
2 law governing the circumstances he confronted. Brosseau v. Haugen, 543 U.S. 194, 198 (2004);  
3 Saucier, 533 U.S. at 205-06. If “the officer’s mistake as to what the law requires is reasonable . . .  
4 the officer is entitled to the immunity defense.” Id. at 205.<sup>1</sup>

5 1. Equal Protection

6 “The Equal Protection Clause of the Fourteenth Amendment commands that no  
7 State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is  
8 essentially a direction that all persons similarly situated should be treated alike.” City of Cleburne  
9 v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216  
10 (1982)). “Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment  
11 from invidious discrimination based on race.” Wolff v. McDonnell, 418 U.S. 539, 556 (1974)  
12 (citation omitted). They also are protected under the Equal Protection Clause from invidious  
13 discrimination based on being an adherent of a minority religion. See Cruz v. Beto, 405 U.S. 319,  
14 322 (1972).

15 To state a claim under § 1983 for violation of the Equal Protection Clause, a prisoner  
16 plaintiff must show that the defendants acted with an intent or purpose to discriminate against him  
17 based upon his membership in a protected class. Furnace v. Sullivan, 705 F.3d 1021, 1030 (9th  
18 Cir. 2013); Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir. 2003). “Intentional discrimination  
19 means that a defendant acted at least in part because of a plaintiff’s protected status.” Maynard v.  
20 City of San Jose, 37 F.3d 1396, 1404 (9th Cir. 1994) (emphasis in original) (citation omitted). To  
21 avoid summary judgment, a prisoner plaintiff must produce evidence sufficient to permit a  
22 reasonable trier of fact to find by a preponderance of the evidence that the decision at issue was  
23 motivated at least in part by his membership in a protected class. Serrano, 345 F.3d at 1082.

24 Defendants argue that the September 2015 risk assessment report shows that plaintiff’s  
25 status as an African-American Muslim did not impact their decision that plaintiff posed a high risk  
26 for violence. They note that the report makes clear that they found plaintiff to be a high risk for  
27 violence because plaintiff has a history of violence and antisocial behavior, and continues to  
28 exhibit antisocial personality characteristics that predispose him to violence. Defendants did note  
in the report that plaintiff’s father was a “‘Black Nationalist’ who considered himself a Muslim,”  
Comp. Ex. B at 2, and that plaintiff reported that “he acted so violently because he devoted

---

<sup>1</sup>Although the Saucier sequence is often appropriate and beneficial, it is not mandatory. A court may exercise its discretion in deciding which prong to address first, in light of the particular circumstances of each case. See Pearson v. Callahan, 555 U.S. 223, 236 (2009).

1 himself completely to the internalized belief system instilled in him by his father,” *id.* at 14. But  
2 defendants’ expressed concern was not with plaintiff’s status as an African-American Muslim, but  
3 rather with the fact that plaintiff “has not communicated an understanding of his total commitment  
4 to a particular belief system such as that of his father, his Islamic faith, or any other system he may  
5 adopt in the future. And this lack of understanding makes his susceptibility to possible negative  
6 influences unpredictable.” *Id.* at 16.

7 Under the facts presented in the September 2015 risk assessment report, no reasonable jury  
8 could find that defendants’ decision that plaintiff posed a high risk for violence was motivated by  
9 plaintiff’s status as an African-American Muslim. *See Anderson*, 477 U.S. at 249. But plaintiff’s  
10 detailed description of the psychological diagnostic evaluation and process that led to defendants’  
11 decision is very different from that provided in the report.

12 In his sworn and verified complaint,<sup>2</sup> plaintiff alleges that during the psychological  
13 diagnostic evaluation with defendants he “explained in detail his earliest childhood benefits,  
14 introduction, and positive experiences and beliefs from his father’s Black Nationalistic and Pseudo  
15 Islamic belief system.” Compl. ¶ 16.

16 Plaintiff actually elaborated to Defendants, when asked, how  
17 Plaintiff’s father was a member of a pro-Black Nationalist  
18 organization having Pseudo-Islamic beliefs and practiced the social  
19 and economic upliftment [sic] of African Americans through ‘Black  
20 free enterprise, the establishment of Black-owned, Black-operated  
21 businesses in the African American communities to the full  
22 exclusion of the Jewish business monopoly in the African American  
23 communities at that time in the nineteen fifties and nineteen sixties.

24 *Id.* ¶ 80. But defendants responded angrily to his description of his community members by  
25 referring to them as a “bunch of gorillas and thugs in suits and bow ties.” *Id.* ¶ 81. And in their  
26 risk assessment report, they stated that plaintiff had “noted that his father was involved in  
27 organized crime, and acknowledged that his father extorted money from businesses in their area.  
28 Mr. Gay also explained that his father instilled early in him that he should not accept the police’s

---

<sup>2</sup>A verified complaint may be treated as an opposing affidavit or declaration where, as here, plaintiff states under penalty of perjury that the allegations are true and correct, and the allegations are based on his personal knowledge. *See Schroeder v. McDonald*, 55 F.3d 454, 460 & nn. 10-11 (9th Cir. 1995).

1 authority, the government, or the rule of law.” Id. Ex. B at 2. Plaintiff refutes this by alleging that  
2 “at no time did Plaintiff report or acknowledge to said Defendants that Plaintiff’s father ‘was  
3 involved in organized crime and extortion.’” Id. ¶ 82. Defendants “prejudicially changed lawful  
4 economic ‘free enterprise’ by Black people into ‘organized crime’ and ‘extortion’ and ‘Black  
5 Muslims’ into being ‘organized criminals.’” Id. ¶ 83.

6 Plaintiff further alleges that defendants asked him “racially charged anti-Islamic” questions  
7 and called him “racially charged anti-Islamic” names. Id. ¶ 17. At one point during the  
8 evaluation, Defendant Parsons looked directly at plaintiff and said, “‘talk about radical Black  
9 Islamic terrorist.’” Id. ¶¶ 20, 21. At another point during the evaluation, Defendant Goldstein said,  
10 “‘with everything going on in the world, at home with Moslems, we don’t know if you are just  
11 another radical Islamic terrorist.’” Id. ¶ 14. Goldstein added, “‘Parsons and I are just trying to  
12 understand in your own words a little about your history as a Moslem, who are you today? What  
13 particular ideology do you follow? Malcolm X? Luis Farrakhan? Osama Bin Laden? Who are you  
14 today?’” Id. ¶ 15. And when plaintiff noted that he had “self-esteem not conceit” in response to a  
15 question about whether he thought highly of himself, id. ¶ 23, Goldstein asked, “‘is that the sort of  
16 teachings you learned from those criminals and Black Nationals growing up as a child?’” id. ¶ 24.  
17 Plaintiff objected to the characterization of Black Nationalists as criminals, but Goldstein  
18 continued, “‘I bet they taught you a lot of that militant garbage and nonsense like Black Power,  
19 Black Pride, smashing up Jewish liquor stores, huh?’” Id. ¶ 27.

20 Viewing the evidence in the light most favorable to plaintiff as the nonmoving party,  
21 plaintiff has alleged sufficient facts to permit a reasonable trier of fact to find by a preponderance  
22 of the evidence that defendants’ decision that he posed a high risk for violence was motivated at  
23 least in part by his status as an African-American Muslim. Although defendants point to various  
24 permissible findings and observations in support of their decision, the fact remains that plaintiff  
25 has alleged under penalty of perjury that defendants made specific, racially and anti-Islamic tinged  
26 remarks during the evaluation, and this is sufficient evidence of discriminatory intent to create a  
27 genuine issue of material fact as to whether defendants’ actions violated the Equal Protection  
28 Clause. See Serrano, 345 F.3d at 1082-83 (prisoner’s declaration that hearing officer made  
specific racial comments at disciplinary hearing in response to prisoner’s own infusion of race into  
the hearing – specifically, hearing officer remarked that he “[didn’t] know how black people  
think” and that “he was treating [prisoner] like all the rest . . . and that [prisoner] was ‘not O.J.

1 Simpson or Johnnie Chocran” – was enough to create a triable issue of fact on prisoner’s § 1983  
2 claim that decision not to allow live witness testimony at hearing was racially motivated).

3 Defendants are not entitled to summary judgment on plaintiff’s equal protection claim.  
4 See id. at 1083. Nor are they entitled to qualified immunity at this stage in the proceedings.  
5 Whether defendants may be said to have made a “reasonable mistake” of fact or law entitling them  
6 to qualified immunity, Saucier v. Katz, 533 U.S. 194, 205 (2001), will depend on the resolution of  
7 disputed facts and the inferences that may be drawn therefrom. See Santos v. Gates, 287 F.3d  
8 846, 855 n.12 (9th Cir. 2002).

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
2. Retaliation

To prevail on a First Amendment retaliation claim, a prisoner must show: (1) that a  
state actor took some adverse action against a prisoner (2) because of (3) that prisoner’s protected  
conduct, and that such action (4) chilled the prisoner’s exercise of his First Amendment rights, and  
(5) the action did not reasonably advance a legitimate correctional goal. Rhodes v. Robinson, 408  
F.3d 559, 567-68 (9th Cir. 2005). The prisoner must prove all the elements of a retaliation claim,  
including the absence of legitimate correctional goals for the conduct of which he complains.  
Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995). Plaintiff does not.

Plaintiff claims that defendants decided that he posed a high risk for violence in retaliation  
for his status as an African-American Muslim. But this is a reiteration of plaintiff’s equal  
protection claim rather than a stand-alone First Amendment retaliation claim. To be sure, it is well  
established in this circuit that the right to equal protection includes the right not to be retaliated  
against because of the protected status of the person to whom one offers assistance with the filing  
of a grievance or complaint. See Maynard v. City of San Jose, 37 F.3d 1396, 1404 (9th Cir. 1994)  
(noting that jury instructions correctly explained that right to equal protection of the laws includes  
right not to be subjected to retaliation because one offers assistance to a Black person). In order to  
prove such an equal protection violation, a plaintiff must show that the individual defendants  
retaliated against him at least in part because of the protected status of the person to whom  
plaintiff offered assistance with the filing of a grievance or complaint. See id. at 1404-05 (jury  
verdict for white plaintiff on equal protection claim under § 1983 reversed where there was no  
evidence that defendants retaliated against plaintiff because he assisted Black job applicant who  
was passed over for job). But plaintiff makes no such claim, let alone such showing. Nor does  
plaintiff set forth any evidence showing all the elements of a First Amendment retaliation claim.  
See Rhodes, 408 F.3d at 567-68; Pratt, 65 F.3d at 806.

1 Defendants are entitled to summary judgment and qualified immunity on plaintiff's  
2 retaliation claim. See Celotex Corp., 477 U.S. at 323; Saucier, 533 U.S. at 201.

3 /  
4 /

5 **CONCLUSION**

6 For the foregoing reasons, defendants' motion for summary judgment (ECF No. 22) is  
7 GRANTED IN PART and DENIED IN PART. Defendants are entitled to summary judgment and  
8 qualified immunity on plaintiff's retaliation claim, but are not entitled to summary judgment or  
9 qualified immunity on plaintiff's equal protection claim at this stage in the proceedings.

10 The court finds that referral of this case to a magistrate judge for settlement proceedings is  
11 in order and hereby REFERS this matter to Magistrate Judge Illman for settlement proceedings.  
12 All other proceedings are stayed.

13 A settlement conference shall take place within 90 days of the date of this order, or as soon  
14 thereafter as is convenient to Magistrate Judge Illman's calendar. Magistrate Judge Illman shall  
15 coordinate a time and date for the conference with all interested parties and/or their representatives  
16 and, within ten (10) days after the conclusion of the conference, file a report regarding the  
17 conference.

18 The clerk shall provide a copy of this order to Magistrate Judge Illman.

19 **IT IS SO ORDERED.**

20 Dated: May 4, 2018

21   
22 \_\_\_\_\_  
23 CHARLES R. BREYER  
24 United States District Judge  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OMAR SHARRIEFF GAY,  
Plaintiff,  
v.  
AMY PARSONS, et al.,  
Defendants.

Case No. 3:16-cv-05998-CRB

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 4, 2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Omar Sharrieff Gay ID: E-22575  
California Mens' Colony - West II  
San Luis Obispo, CA 93409

Dated: May 4, 2018

Susan Y. Soong  
Clerk, United States District Court

By:   
Lashanda Scott, Deputy Clerk to the  
Honorable CHARLES R. BREYER