

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

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KEN ROBERTS,
Plaintiff,

v.

RYAN KLEIN, HOWARD SKOLNIK,
BRIAN WILLIAMS, CLARENCE KING,
KEN NICHOLAS, LAVERT TAYLOR,
CHERYL BURSON, and JAMES
GREGORY COX,
Defendants.

2:09-CV-02382-PMP-LRL

ORDER

Presently before the Court is Defendants’ Motion to Dismiss Plaintiff’s Complaint (Doc. #24), filed on December 15, 2010 by Defendants Ryan Klein, Brian Williams, Clarence King, Ken Nicholas, Lavert Taylor, Cheryl Burson, and James Gregory Cox. Plaintiff filed an Opposition (Doc. #29) on January 7, 2011. Defendants filed a Reply (Doc. #31) on March 2, 2011.

I. BACKGROUND

Plaintiff Ken Roberts currently is an inmate at the Southern Desert Correctional Center (“SDCC”). (Compl. (Doc. #8).) Defendants are administrators and employees with the Nevada Department of Corrections (“NDOC”) and SDCC. (Id.) Plaintiff is a “Black Inmate of Jewish Tenet and Faith.” (Id.) In February 2009, Plaintiff sought to be provided kosher meals to observe his religion’s dietary requirements. (Id.) In June 2009, Plaintiff received notice from an associate warden at the Northern Nevada Correctional Center (“NNCC”) that to receive kosher meals, Plaintiff must be recognized by an outside Jewish

1 group or organization. (Id.)

2 On June 30, 2009, Plaintiff was transferred from NNCC to SDCC. (Id.) Upon
3 arrival at the new prison, Plaintiff sought kosher meals. (Id.) In August 2009, Defendant
4 Chaplain Lavert Taylor (“Taylor”) granted Plaintiff and several other inmates approval to
5 receive kosher meals. (Id.) However, SDCC kitchen manager Defendant Clarence King
6 (“King”) failed to provide Plaintiff with kosher meals. (Id.) On September 26, 2009,
7 Plaintiff was provided with notice from Taylor that Plaintiff’s approval to receive kosher
8 meals was rescinded and per the order of Defendant Gregory Cox (“Cox”), Deputy Director
9 of NDOC, kosher meals would be provided only to inmates who were recognized as Jews
10 requiring kosher meals by an outside Jewish group or organization. (Id.) On September 28,
11 2009, Plaintiff filed an informal grievance challenging his denial of kosher meals and this
12 informal grievance was denied. (Id.) Plaintiff appealed the denial of his grievance and
13 received denials at Level Two of the prison grievance process on November 9, 2009 and
14 November 23, 2009. (Id.)

15 From August 20, 2009 to September 23, 2009, Defendants Brian Williams
16 (“Williams”), Cheryl Burson (“Burson”), and Taylor cancelled all Jewish services to
17 accommodate Muslim inmates during the month of Ramadan. (Id.) There is no record of
18 Plaintiff filing, nor does Plaintiff allege he filed, any grievances related to these actions.

19 On October 10, 2009, Plaintiff was attending Jewish services and Defendant Ken
20 Nicholas (“Nicholas”) terminated Plaintiff from his prison work assignment. (Id.) Plaintiff
21 attempted to explain to Nicholas that Plaintiff was allotted time off from work assignments
22 for weekly worship. (Id.) Nicholas responded by telling Plaintiff “You’re no damn Jew,”
23 “You’re right I’m firing you,” and “Around here I’m your god.” (Id.) On October 12,
24 2009, Plaintiff received disciplinary charges and a hearing. (Id.) During this hearing,
25 Defendant Ryan Klein (“Klein”) told Plaintiff “Attending service is no excuse to miss
26 work.” (Id.) Plaintiff was found guilty of failing to attend work and received disciplinary

1 sanctions. (Id.) Plaintiff filed an informal grievance regarding this matter on October 13,
2 2009. (Defs.’ Mot. to Dismiss (Doc. #24), Ex. 1.) Plaintiff received responses denying his
3 informal grievance on October 13, 14, and 28. (Id.) Plaintiff appealed the denial of his
4 informal grievances to Level One of the prison grievance process, receiving denials on
5 November 6 and 25. (Id.) Plaintiff again appealed and received denials at Level Two of
6 the prison grievance process on January 11 and 26, 2010. (Id.) Plaintiff also received a
7 denial on December 3, 2009, which did not indicate the grievance level. (Id.)

8 On December 11, 2009, Plaintiff filed a five count Complaint against
9 Defendants. Count I alleges Defendants Howard Skolnik (“Skolnik”), Cox, Williams,
10 Burson, King, and Taylor violated Plaintiff’s First Amendment right to free exercise of
11 religion, his statutory rights under the Religious Land Use and Institutionalized Persons Act
12 of 2000 (“RLUIPA”), and the Equal Protection Clause of the Fourteenth Amendment for
13 requiring an outside organization to verify that Plaintiff is Jewish to be entitled to a kosher
14 meal plan. Count II alleges Defendants Williams, Burson, and Taylor violated Plaintiff’s
15 First Amendment free exercise rights, the RLUIPA, and the Equal Protection Clause of the
16 Fourteenth Amendment when they cancelled Jewish services to accommodate Muslims
17 during the month of Ramadan. Count III alleges Defendants Cox and Taylor retaliated
18 against Plaintiff for participating in “protected conduct” by rescinding Plaintiff’s right to
19 receive kosher meals. Count IV alleges Defendant Nicholas retaliated against Plaintiff for
20 attending Jewish services by terminating Plaintiff from his prison work assignment and
21 placing Plaintiff under disciplinary charges. Count V alleges Defendants Nicholas and
22 Klein violated Plaintiff’s First Amendment free exercise rights and the Equal Protection
23 Clause of the Fourteenth Amendment when they placed Plaintiff on disciplinary sanctions
24 for missing work while Plaintiff was attending Jewish services.

25 Defendants filed a Motion to Dismiss alleging that Plaintiff failed to exhaust his
26 administrative remedies regarding Counts II, IV, and V; all five counts fail to state a claim

1 for which relief may be granted under Federal Rule of Civil Procedure 12(b)(6); Plaintiff's
2 claim under RLUIPA is moot; and Defendants are entitled to qualified immunity. Plaintiff
3 replies that he has exhausted his administrative remedies with respect to Counts IV and V,
4 pro se litigants' pleadings are to be construed liberally, and that he has stated claims upon
5 which relief may be granted.

6 **II. DISCUSSION**

7 **A. Failure to Exhaust Administrative Remedies**

8 The Prison Litigation Reform Act of 1996 ("PLRA") provides that "[n]o action
9 shall be brought with respect to prison conditions under section 1983 of this title, or any
10 other Federal law, by a prisoner confined in any jail, prison, or other correctional facility
11 until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a)
12 (2002). Failure to exhaust administrative remedies is an affirmative defense and the
13 defendants bear the burden of raising and proving failure to exhaust. Jones v. Bock, 549
14 U.S. 199, 212-14 (2007). Proper exhaustion requires that the plaintiff utilize all steps made
15 available by the agency and comply with the agency's deadlines and other procedural rules.
16 Woodford v. Ngo, 548 U.S. 81, 89-90 (2006). Proper exhaustion must be completed before
17 a complaint may be filed. Id. at 83-84.

18 If a defendant on a motion under Federal Rule of Civil Procedure 12(b)(6)
19 presents matters outside the pleadings, the Court may consider them and treat the motion as
20 one for summary judgment. Fed. R. Civ. P. 12(d). On a motion for summary judgment, the
21 party seeking summary judgment must show that there is no genuine issue of material fact
22 and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When deciding
23 a motion for summary judgment, the Court views all evidence in the light most favorable to
24 the non-moving party. County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154
25 (9th Cir. 2001).

26 Here, Defendants allege that Plaintiff failed to exhaust his administrative

1 remedies with respects to Counts II, IV, and V. Plaintiff states that he properly exhausted
2 his administrative remedies with respect to Counts IV and V. Because Defendants
3 submitted evidence along with the Motion to Dismiss, the Court will treat it as a motion for
4 summary judgment and view the evidence in the light most favorable to Plaintiff.

5 While it is Defendants' burden to allege and prove Plaintiff's failure to exhaust
6 his administrative remedies, Plaintiff's response does not dispute that he did not exhaust
7 administrative remedies with respect to Count II. Accordingly, the Court will dismiss
8 Count II of Plaintiff's Complaint for failure to exhaust administrative remedies as required
9 by the PLRA.

10 Counts IV and V stem from Defendants terminating Plaintiff from his prison
11 work assignment and writing Plaintiff up on disciplinary charges for missing work to attend
12 Jewish services. Administrative Regulation 740 ("AR 740") outlines the grievance
13 procedure for inmates in NDOC custody and provides for one informal and two formal
14 levels of review. To exhaust his remedies, an inmate first must file an informal grievance.
15 If the inmate is not satisfied with how the grievance is resolved, the inmate then may appeal
16 the grievance to Level One, and then if still not satisfied, appeal to Level Two.

17 Defendants attached copies of Plaintiff's grievance history to their Motion to
18 Dismiss. Plaintiff's Complaint was filed December 11, 2009. Therefore, to comply with
19 the PLRA, Plaintiff must have exhausted his administrative remedies before that date.
20 According to Plaintiff's grievance history, Plaintiff initially filed an informal grievance on
21 October 13, 2009 relating to both the termination of his work assignment and the bringing
22 of disciplinary charges against him. Plaintiff appealed the denial of his grievance, receiving
23 Level One responses confirming the denial on November 6 and 25, 2009, and Level Two
24 responses confirming the denial on January 11 and 26, 2010. There is also a grievance
25 denial on December 3, 2009. The grievance history provides no indication of what level of
26 review prompted the December 3, 2009 denial. Because this grievance is unmarked, and

1 the Court must view evidence in the light most favorable to Plaintiff, an issue of fact
2 remains to whether the December 3, 2009 grievance denial was a Level Two denial.
3 Therefore, Defendants do not meet their burden of proving failure to exhaust administrative
4 remedies. Accordingly, Defendants' Motion to Dismiss Counts IV and V for failure to
5 exhaust administrative remedies will be denied.

6 **B. Failure to State a Claim for Which Relief May be Granted**

7 Federal Rule of Civil Procedure 8(a)(2) requires a pleading to contain "a short
8 and plain statement of the claim showing that the pleader is entitled to relief." Such a
9 statement is necessary to "give the defendant fair notice of what the . . . claim is and the
10 grounds upon which it rests." William O. Gilley Enter., Inc. v. Atl. Richfield Co., 588 F.3d
11 659, 667 (9th Cir. 2009) (per curiam) (quotation omitted). Dismissal of a claim under Rule
12 12(b)(6) for failure to state a claim is appropriate when the complaint fails to satisfy Rule
13 8(a). Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

14 There is a strong presumption against dismissing an action for failure to state a
15 claim. Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997). When deciding a
16 motion under Rule 12(b)(6), the Court accepts "all well-pleaded allegations of material
17 fact[] as true and construe[s them] in a light most favorable to the non-moving party."
18 Wyler Summit P'ship v. Turner Broad Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998).
19 However, the Court is not required to accept as true allegations that are merely conclusory.
20 Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). "The issue is not
21 whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer
22 evidence in support of the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)
23 (overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982)). To
24 survive a Rule 12(b)(6) motion, the plaintiff must do more than merely assert legal
25 conclusions; rather, the complaint must contain sufficient factual allegations to provide
26 plausible grounds for entitlement to relief. Twombly, 550 U.S. at 555-56 (mere recitation

1 of the legal elements of a cause of action is insufficient to survive a Rule 12(b)(6) motion).
2 However, “[p]ro se complaints are to be construed liberally and may be dismissed for
3 failure to state a claim only where it appears beyond doubt that the plaintiff can prove no set
4 of facts in support of his claim which would entitle him to relief.” Weilburg v. Shapiro,
5 488 F.3d 1202, 1205 (9th Cir. 2007) (quotation omitted).

6 Title 42 U.S.C. § 1983 “provides a federal cause of action against any person
7 who, acting under color of state law, deprives another of his federal rights.” Conn v.
8 Gabbert, 526 U.S. 286, 290 (1999). Section 1983 offers no substantive legal rights, but
9 rather provides procedural protections for federal rights granted elsewhere. Albright v.
10 Oliver, 510 U.S. 266, 271 (1994). To maintain a claim under § 1983, “a plaintiff must both
11 (1) allege the deprivation of a right secured by the federal Constitution or statutory law, and
12 (2) allege that the deprivation was committed by a person acting under color of state law.”
13 Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006).

14 When incarcerated, inmates retain their First Amendment rights to free exercise
15 of religion. O’Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987). To warrant protection
16 under the First Amendment, a religious belief must be sincerely held and the claim must be
17 rooted in religious belief. Malik v. Brown, 16 F.3d 330, 333 (9th Cir. 1994). The claimant
18 need not be a member of a particular organized religious denomination to demonstrate a
19 sincerely held belief. Frazer v. Ill. Dep’t of Emp’t Sec. Div., 489 U.S. 819, 834 (1989).
20 Additionally, protected beliefs are not limited to those that are shared by all members of a
21 religious community. Callahan v. Woods, 658 F.2d 679, 686 (9th Cir. 1981). The
22 government cannot rely on a rabbi or outside religious group to determine if an inmate is
23 Jewish. Jackson v. Mann, 196 F.3d 316 (2d Cir. 1999); Shilling v. Crawford, No. 205CV-
24 00889-PMP-GWF 2007 WL 2790623, *15 (D. Nev. Sept. 21, 2007) (unpublished), aff’d,
25 377 Fed. Appx 702 (9th Cir. 2010). Rather, the correct test is whether a belief is sincerely
26 held. Malik, 16 F.3d at 333.

1 However, a prison regulation may “impinge[] on inmates’ constitutional
2 rights . . . if it is reasonably related to penological interests.” Shakur v. Schiro, 514 F.3d
3 878, 884 (9th Cir. 2008). Courts balance four factors to determine whether a prison
4 regulation is reasonably related to legitimate penological interests: (1) whether there is a
5 valid rational connection between the prison regulation and the legitimate government
6 interest put forward to justify it; (2) whether there are alternative means of exercising the
7 right that remain open to prison inmates; (3) whether accommodation of the asserted
8 constitutional right will impact guards and other inmates or prison resources generally; and
9 (4) whether there is an absence of ready alternatives versus the existence of obvious, easy
10 alternatives. Turner v. Safely, 482 U.S. 78, 89-90 (1987).

11 The RLUIPA offers further protection of an inmate’s freedom to practice his
12 chosen religion and provides that:

13 No government shall impose a substantial burden on the religious exercise of a
14 person residing in or confined to an institution . . . even if the burden results from
15 a rule of general applicability, unless the government demonstrates that
16 imposition of the burden on that person- (1) is in furtherance of a compelling
17 governmental interest; and (2) is the least restrictive means of furthering that
18 compelling governmental interest.

19 42 U.S.C. § 2000cc-1(a). The RLUIPA is “to be construed broadly in favor of protecting
20 an inmate’s right to exercise his religious beliefs.” Warsoldier v. Woodford, 418 F.3d 989,
21 995 (9th Cir. 2005).

22 The Equal Protection Clause of the Fourteenth Amendment provides that no state
23 shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S.
24 Const., amend. XIV. It requires “that all persons similarly situated should be treated alike.”
25 Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). To state a Section 1983 claim
26 based on violation of the Equal Protection Clause, the plaintiff must allege the defendant
acted with intentional discrimination against the class to which the plaintiff belongs. Lowe
v. City of Monrovia, 775 F.2d 998, 1010 (9th Cir. 1985).

1 For an inmate to establish a prima facie case of retaliation, a plaintiff must allege
2 that the defendant acted to retaliate against the plaintiff for engaging in a protected activity,
3 and the defendant's actions did not serve a legitimate penological purpose. Barnett v.
4 Centoni, 31 F.3d 813, 816 (9th Cir. 1995). The prisoner bears the burden of establishing a
5 link between the exercise of constitutional rights and the retaliatory action. Pratt v.
6 Rowland, 65 F.3d 802, 806 (9th Cir. 1995). The timing of the events surrounding the
7 alleged retaliation may constitute circumstantial evidence of retaliatory intent. Soranno's
8 Gasco, Inc. v. Morgan, 874 F.2d 1310, 1316 (9th Cir. 1989).

9 1. Count I

10 In Count I of his Complaint, Plaintiff alleges Defendants Skolnik, Cox, Williams,
11 Burson, King, and Taylor violated Plaintiff's religious rights pursuant to the First
12 Amendment, RLUIPA, and Equal Protection under the Fourteenth Amendment when they
13 implemented and enforced a policy that denied Plaintiff kosher meals because his Jewish
14 faith was not verified by an outside entity. Because Defendants are employees of NDOC
15 and SDCC, the entities responsible for confining Plaintiff, they are acting under the color of
16 state law. Plaintiff sufficiently has alleged that he was improperly denied kosher meals
17 because he did not have his Jewish faith verified by an outside organization. Such
18 verification is not required for the religious belief of an inmate to be protected under the
19 First Amendment. Rather, all that is required is that the belief be sincerely held and that it
20 be rooted in religious belief. Malik, 16 F.3d at 333. Plaintiff adequately has alleged that he
21 sincerely believes a kosher diet is required of him. Additionally, Defendants have not
22 disputed that a kosher diet is something rooted in the Jewish faith.

23 Analysis of the Turner factors indicates that Plaintiff has sufficiently alleged
24 enough to survive a motion to dismiss. In regards to the first Turner factor, Defendants
25 argue that the government interest is the orderly administration of a program that allows
26 NDOC to accommodate the religious dietary needs of thousands of prisoners. Defendants

1 argue they cannot easily prepare kosher foods without disrupting the entire food service
2 process. Limiting the amount of inmates who receive kosher meals is reasonably related to
3 the government's interest in the orderly administration of its food service. However, while
4 kosher food may be more costly to prepare, Defendants do not provide any evidence of the
5 increased cost. Further, NDOC already provides kosher meals to some inmates. Thus,
6 Plaintiffs' allegations are sufficient to survive a motion to dismiss.

7 The second factor is whether there are alternative means of exercising the right
8 that remain open to prison inmates. Turner, 482 U.S. at 89. Where a prison regulation
9 requires a "believer to defile himself, according to the believer's conscience, by doing
10 something that is completely forbidden by the believer's religion," the second Turner factor
11 favors the inmate. Ward v. Walsh, 1 F.3d 873, 878 (9th Cir. 1993). Here, Plaintiff alleges
12 that a kosher diet is required by his religious beliefs. Consuming a non-kosher diet,
13 therefore, causes Plaintiff to do something forbidden by his religious beliefs. Accordingly,
14 this factor counsels against Defendants' regulation.

15 The third factor is whether accommodation of the asserted constitutional right
16 will impact guards and other inmates or prison resources generally. 482 U.S. at 89-90.
17 Perhaps preparation of kosher meals entails an increased administrative and budgetary
18 burden. Ward, 1 F.3d at 878. However, we are at the motion to dismiss stage and no
19 evidence regarding these facts has been provided. Accordingly, the Court cannot determine
20 in whose favor to weight this factor. Id. at 878-79.

21 The last factor is whether there is an absence of ready alternatives versus the
22 existence of obvious, easy alternatives. Turner, 482 U.S. at 90. Defendants' requirement
23 that inmates be verified as Jewish to receive a kosher diet violates the established test from
24 Malik where an inmates' beliefs must be sincerely held and rooted in religious belief. 16
25 F.3d at 333. Plaintiff alleges Defendants offer a kosher diet to white inmates of the Jewish
26 faith without requiring outside verification. The obvious, easy alternative is for Defendants

1 to provide a kosher diet to Plaintiff in the same manner. Accordingly, the fourth Turner
2 factor goes against Defendants' regulation. On the balance, the Turner factors counsel that
3 Plaintiff's allegations are sufficient to survive a motion to dismiss.

4 Defendants allege that Plaintiff's RLUIPA claim is moot because Defendants are
5 "in the process of changing" the regulation requiring outside verification for inmates to
6 receive kosher meals. However, courts are reluctant to invoke mootness where " a case has
7 become moot because the defendant has voluntarily ceased to pursue the challenged course
8 of action." Smith v. Univ. Washington Law Sch., 233 F.3d 1188, 1194 (9th Cir. 2000); see
9 also Seneca v. Ariz., 345 Fed. Appx. 226, 228 (9th Cir. 2009) (unpublished) (holding that
10 prison's voluntary policy change from policy requiring inmates to submit a verification
11 letter to change their religious designation to one which did not require a letter did not moot
12 the plaintiff's claims under RLUIPA).

13 Plaintiff adequately has alleged a violation of RLUIPA. Denying a kosher diet to
14 those whose Jewish faith is not verified by an outside entity substantially burdens an
15 inmate's religious exercise. Defendants argue this policy is in furtherance of a compelling
16 government interest, namely dealing with the increased costs associated with providing
17 kosher meals. However, Defendants have not met their burden of showing that this is the
18 least restrictive means of furthering that interest.

19 Plaintiff also alleges that white inmates of the Jewish faith do not need to have
20 their faith verified by an outside organization to receive a kosher meal plan whereas black
21 inmates do. This allegation is sufficient to state a claim for violation of the Equal
22 Protection Clause of the Fourteenth Amendment. Accordingly, Defendants' Motion to
23 Dismiss Count I for failure to state a claim is denied.

24 **2. Count III**

25 In Count III of his Complaint, Plaintiff alleges Defendants retaliated against him
26 and denied him equal protection of the laws when Defendants Cox and Taylor rescinded

1 Plaintiff's right to receive kosher meals. Defendants Cox and Taylor are employees of
2 SDCC responsible for confining Plaintiff and are acting under color of state law. However,
3 Plaintiff does not set forth the protected activity for which he is being retaliated against.
4 Accordingly, Plaintiff cannot establish a link between the exercise of his constitutional
5 rights and the rescinding of his right to receive kosher meals. Therefore, Count III of
6 Plaintiff's Complaint fails to state a claim for which relief may be granted and Defendants'
7 Motion to Dismiss Count III is granted. However, the Court will grant Plaintiff leave to
8 amend his complaint to allege facts consistent with a retaliation claim. Fed. R. Civ. P.
9 15(a); Foman v. Davis, 371 U.S. 178, 182 (1962).

10 **3. Count IV**

11 In Count IV of his Complaint, Plaintiff alleges Defendant Nicholas retaliated
12 against Plaintiff for exercising his First Amendment right to free exercise of religion and
13 subjected Plaintiff to racial discrimination in violation of the Equal Protection Clause of the
14 Fourteenth Amendment. Because Defendant Nicholas is an employee of NDOC and
15 SDCC, the entities responsible for confining Plaintiff, he is acting under color of state law.
16 Plaintiff alleges Defendant Nicholas terminated Plaintiff's prison work assignment for
17 attending Jewish services. Attendance of religious services is a protected activity so long as
18 the religious belief is sincerely held and the claim is rooted in religious belief. Malik, 16
19 F.3d at 333. Taking Plaintiff's factual allegations as true, Plaintiff sincerely believes he
20 must attend religious services and his claim is rooted in religious belief. The timing of
21 Plaintiff's attendance at Jewish services and the termination of Plaintiff's work assignment
22 is sufficient to show retaliatory intent. Further, Defendant Nicholas's retaliatory intent is
23 demonstrated by his alleged statements "You're no damn Jew," "You're right I'm firing
24 you," and "Around here I'm your god." Therefore, Plaintiff sufficiently has alleged
25 Defendant Nicholas retaliated against him.

26 Additionally, Plaintiff alleges that black inmates, but not white inmates, of

1 Jewish faith have their work assignments terminated for attending Jewish services. Taking
2 Plaintiff's factual allegations as true, Plaintiff sufficiently has alleged that Defendant
3 Nicholas treated similarly situated individuals differently based on racial motivation.
4 Therefore, Plaintiff sufficiently has alleged a violation of the Equal Protection Clause of the
5 Fourteenth Amendment. The Court will deny Defendants' Motion to Dismiss as it relates to
6 Count IV of Plaintiff's Complaint.

7 **4. Count V**

8 In Count V of his Complaint, Plaintiff alleges Defendants Nicholas and Klein
9 retaliated against Plaintiff for exercising his First Amendment right to free exercise of
10 religion and deprived Plaintiff of Equal Protection under the Fourteenth Amendment.
11 Because Defendants Nicholas and Klein are employees of NDOC and SDCC, the entities
12 responsible for confining Plaintiff, their actions are under color of state law. Plaintiff
13 alleges he was written up on disciplinary charges for attending Jewish services while white
14 inmates of Jewish faith are not written up on disciplinary charges for attending services.
15 Attending religious services is protected activity. Plaintiff alleges he was placed on
16 disciplinary charges because he attended services. The two days between Plaintiff's
17 attendance at Jewish services and his being written up on disciplinary charges is sufficient
18 to show retaliatory intent. Taking Plaintiff's factual allegations as true, Plaintiff sufficiently
19 has alleged that Defendants Nicholas and Klein retaliated against him for engaging in a
20 protected activity. Additionally, Plaintiff sufficiently has alleged that Defendants Nicholas
21 and Klein treated similarly situated individuals differently based on racial motivation.
22 Therefore, Plaintiff sufficiently has alleged a violation of the Equal Protection Clause of the
23 Fourteenth Amendment. The Court will deny Defendants' Motion to Dismiss as it relates to
24 Count V of Plaintiff's Complaint.

25 **C. Qualified Immunity**

26 Qualified immunity, "protects government officials from civil liability as long as,

1 ‘their conduct does not violate clearly established statutory or constitutional rights of which
2 a reasonable person would have known.’” *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct.
3 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified
4 immunity requires a two part inquiry: first, whether the facts alleged by a plaintiff establish
5 a violation of a constitutional right; and second, whether the right at issue was clearly
6 established. *Pearson*, 129 S. Ct. at 815-16.

7 The facts alleged by Plaintiff, taken as true, establish a violation of Plaintiff’s
8 First Amendment right to free exercise of religion and Fourteenth Amendment right to
9 equal protection before the law. The right of prisoners to practice their beliefs which are
10 sincerely held and rooted in religious belief is clearly established. Malik, 16 F.3d at 333;
11 see also Shilling v. Crawford, No. 205CV-00889-PMP-GWF 2007 WL 2790623 (D. Nev.
12 Sept. 21, 2007) (holding NDOC inmates’ religious beliefs, including kosher diets, are
13 protected if they are sincerely held). Additionally, it is clearly established and would be
14 known by a reasonable person that treating inmates differently based on race save for
15 necessities of prison security is unconstitutional. See Walker v. Gomez, 370 F.3d 969, 973
16 (9th Cir. 2004) (citing Cruz v. Beto, U.S. 319, 321 (1972) (per curiam)). Accordingly,
17 Defendants are not entitled to qualified immunity.

18 **III. CONCLUSION**

19 IT IS THEREFORE ORDERED that Defendants’ Motion to Dismiss for Failure
20 to State a Claim for Which Relief May be Granted (Doc. #24) is hereby GRANTED in part
21 and DENIED in part. Defendants’ Motion is granted with respect to Counts II and III of
22 Plaintiff’s Complaint and denied in all other regards.

23 ///

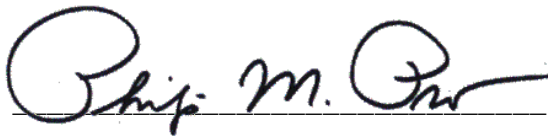
24 ///

25 ///

26 ///

1 IT IS FURTHER ORDERED that Plaintiff may file an amended complaint
2 correcting the deficiencies identified in this Order on or before April 18, 2011.
3

4 DATED: March 22, 2011

5
6 

7 PHILIP M. PRO
8 United States District Judge
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26