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5
6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

8 * * *

9 BRANDYN GAYLER,

Case No. 2:17-cv-00431-JCM-VCF

10 Plaintiff,

ORDER

11 v.

12 STATE OF NEVADA, *et al.*,13 Defendants.
14
15

16 Presently before the court is defendants Jay Barth, James Dzurenda, James
17 Cox, Ryan Hesler, Jerry Howell, Jennifer Nash, Duane Wilson, Brian Williams,
18 Benjamin Estill, and Bethany Yeats (collectively, “defendants”) motion for summary
19 judgment. (ECF No. 31). Plaintiff Brandyn Gayler (“Gayler”) responded in opposition
20 (ECF No. 41), to which defendants replied (ECF No. 51).

21 Also before the court is Gayler’s motion to file exhibits under seal. (ECF No.
22 43). Defendants responded in opposition. (ECF No. 48). Gayler did not reply and
23 the time to do so has passed.

24 **I. BACKGROUND**

25 This matter concerns the allegedly inadequate quality and quantity of food that
26 High Desert State Prison (“HDSP”) general population (“gen-pop”) inmates prepared
27 for protective segregation (“p-seg”) inmates, including Gayler, between 2015 and
28 2017.

1 Plaintiff originally filed his complaint on February 8, 2017. (ECF No. 1). In its
2 screening orders (ECF Nos. 5, 8), the court dismissed all but three of Gayler's claims
3 against all but fourteen defendants.¹ Those claims are supported by the allegations
4 contained in Gayler's first amended complaint. (ECF No. 7).

5 Claim one alleges Fourteenth Amendment equal protection violations by
6 defendants Cox, Dzurenda, Williams, Nash, Howell, and Wilson regarding allegedly
7 contaminated food. Claim two alleges Eighth Amendment violations by those same
8 defendants regarding allegedly inadequate quality and quantity of food. Claim three
9 alleges a First Amendment violation by defendants Barth, Hesler, Estill, and Yeats
10 regarding their alleged retaliation against Gayler.

11 Defendants now move for summary judgment on all of Gayler's remaining
12 claims. (ECF No. 31).

13 **II. LEGAL STANDARD**

14 Summary judgment is proper when the record shows that "there is no genuine
15 dispute as to any material fact and the movant is entitled to a judgment as a matter of
16 law."² Fed. R. Civ. P. 56(a). The purpose of summary judgment is "to isolate and
17 dispose of factually unsupported claims or defenses," *Celotex Corp. v. Catrett*, 477
18 U.S. 317, 323–24 (1986), and to avoid unnecessary trials on undisputed facts. *Nw.*
19 *Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).

20 When the moving party bears the burden of proof on a claim or defense, it must
21 produce evidence "which would entitle it to a directed verdict if the evidence went
22 uncontroverted at trial." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213
23 F.3d 474, 480 (9th Cir. 2000) (internal citations omitted). In contrast, when the

24
25 ¹ However, plaintiff timely served only these ten movant defendants. (ECF Nos.
14, 15, 38).

26 ² The court can consider information in an inadmissible form at summary
27 judgment if the information itself would be admissible at trial. *Fraser v. Goodale*, 342
28 F.3d 1032, 1036 (9th Cir. 2003) (citing *Block v. City of Los Angeles*, 253 F.3d 410,
418–19 (9th Cir. 2001) ("To survive summary judgment, a party does not necessarily
have to produce evidence in a form that would be admissible at trial, as long as the
party satisfies the requirements of Federal Rules of Civil Procedure 56.")).

1 nonmoving party bears the burden of proof on a claim or defense, the moving party
2 must “either produce evidence negating an essential element of the nonmoving party’s
3 claim or defense or show that the nonmoving party does not have enough evidence
4 of an essential element to carry its ultimate burden of [proof] at trial.” *Nissan Fire &*
5 *Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

6 If the moving party satisfies its initial burden, the burden then shifts to the party
7 opposing summary judgment to establish a genuine issue of material fact. See
8 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). An
9 issue is “genuine” if there is an adequate evidentiary basis on which a reasonable
10 factfinder could find for the nonmoving party and a fact is “material” if it could affect
11 the outcome under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
12 248–49 (1986).

13 “When a pro se litigant opposes summary judgment, his or her contentions in
14 motions and pleadings may be considered as evidence to meet the non-party’s burden
15 to the extent: (1) contents of the document are based on personal knowledge, (2) they
16 set forth facts that would be admissible into evidence, and (3) the litigant attested
17 under penalty of perjury that they were true and correct.” *Matthews v. Reubart*, No.
18 3:19-CV-0221-MMD-CLB, 2021 WL 4899478, at *3 (D. Nev. Sept. 29, 2021), *report*
19 *and recommendation adopted*, No. 3:19-cv-00221MMDCLB, 2021 WL 4900972 (D.
20 Nev. Oct. 20, 2021) (citing *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004)).

21 The opposing party does not have to conclusively establish an issue of material
22 fact in its favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,
23 630 (9th Cir. 1987). But it must go beyond the pleadings and designate “specific facts”
24 in the evidentiary record that show “there is a genuine issue for trial.” *Celotex*, 477
25 U.S. at 324. In other words, the opposing party must show that a judge or jury has to
26 resolve the parties’ differing versions of the truth. *T.W. Elec. Serv.*, 809 F.2d at 630.

27 The court must view all facts and draw all inferences in the light most favorable
28 to the nonmoving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990); *Kaiser*

1 *Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). The
2 court's role is not to weigh the evidence but to determine whether a genuine dispute
3 exists for trial. *Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be
4 believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if
5 the evidence of the nonmoving party is merely colorable or is not significantly
6 probative, summary judgment may be granted. *See id.* at 249–50.

7 **III. DISCUSSION**

8 Gayler brings all three of his remaining claims under 42 U.S.C. § 1983 ("Section
9 1983"), which "provides a remedy to individuals whose constitutional rights have been
10 violated by persons acting under color of state law." *Caballero v. Concord*, 956 F.2d
11 204, 206 (9th Cir. 1992). For each Section 1983 claim, Gayler must show that 1)
12 defendants acted under color of state law while committing the conduct at issue, and
13 2) the conduct deprived Gayler of some right, privilege, or immunity protected by the
14 Constitution or laws of the United States. 42 U.S.C. § 1983; *Shah v. City of Los*
15 *Angeles*, 797 F.2d 743, 746 (9th Cir. 1986).

16 Defendants do not dispute that they acted under color of state law during the
17 conduct at issue. (See ECF No. 31 at 9). Instead, defendants argue that they are
18 entitled to summary judgment because 1) the applicable statute of limitations bars
19 Gayler's claims for conduct occurring earlier than February 8, 2015; 2) Gayler failed
20 to exhaust his retaliation claim against defendants Hesler, Barth, and Estill; 3) Gayler
21 is not a member of a protected class for his equal protection claim; 4) defendants did
22 not personally participate in the alleged Eighth Amendment violations; 5) Gayler fails
23 to show that defendant Yeats took any adverse action against him; and, in the
24 alternative, 6) defendants are entitled to qualified immunity.

25 1. The statute of limitations bars Gayler's pre-February 8, 2015, allegations

26 Defendants argue that the statute of limitations bars all of Gayler's grievances
27 for events that occurred more than two years before he first filed this action on
28 February 8, 2017. (ECF No. 31 at 8). Gayler does not dispute this issue.

1 The court agrees with defendants and strikes from consideration all Gayler's
2 allegations for individual instances of conduct occurring before February 8, 2015, two
3 years before the date Gayler filed his first complaint. See *Owens v. Okure*, 488 U.S.
4 235, 235 (1989); NEV. REV. STAT. 11.190(4)(e).

5 2. Gayler failed to exhaust his retaliation claim against Hesler, Barth, and Estill

6 The Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996)
7 (the "PLRA"), requires prisoners to exhaust available administrative remedies before
8 filing Section 1983 actions in federal court. See 42 U.S.C. § 1997e(a). Exhaustion is
9 required under this provision regardless of the type of relief sought and the type of
10 relief available through administrative procedures. See *Booth v. Churner*, 532 U.S.
11 731, 741 (2001).

12 "[T]he PLRA exhaustion requirement requires proper exhaustion." *Woodford*
13 *v. Ngo*, 548 U.S. 81, 93 (2006); see also *Sapp v. Kimbrell*, 623 F.3d 813, 821 (9th Cir.
14 2010); *Harvey v. Jordan*, 605 F.3d 681, 683–84 (9th Cir. 2010). Therefore, "a prisoner
15 must complete the administrative review process in accordance with the applicable
16 procedural rules, including deadlines, as a precondition to bringing suit in federal
17 court[.]" *Woodford*, 548 U.S. at 88; see also *Sapp*, 623 F.3d at 621–27.

18 Defendants argue that Gayler failed to exhaust his retaliation claim against
19 defendants Hesler, Barth, and Estill. Gayler argues that he did exhaust his claim when
20 he filed "grievance 20063011275." (ECF No. 34 at 112). However, Gayler's attached
21 copy of that grievance (ECF No. 47 at 336–46) shows that Gayler took it only to the
22 first level of appeal.

23 The Nevada Department of Corrections' ("NDOC") administrative regulation
24 ("AR") 740 provides that, at HDSP, inmates must first file an informal grievance
25 assigned to a caseworker, then can appeal a rejected grievance to the "first level."
26 (ECF No. 33-1 at 9–22, 100, 103). If the grievance is again denied at the first level,
27 inmates can then appeal to the "second level," which ends the formal grievance
28 process. (*Id.* at 104). Thus, a grievance is exhausted once an inmate appeals to the

1 second level and is again denied.

2 Accordingly, Gayler's retaliation claim against defendants Hesler, Barth, and
3 Estill, is dismissed for Gayler's failure to exhaust.³

4 3. Gayler's equal protection claim fails because he is not a member of a
5 protected class

6 The court determined that Gayler's equal protection claim survived screening
7 on a "class of one" theory. (ECF No. 8 at 8–9). The court instructed Gayler that to
8 state a "class-of-one" equal protection claim, Gayler must identify the group of
9 individuals with whom he is similarly situated, identify some allegedly intentional and
10 disparate treatment, and show that there was no rational basis for the different
11 treatment. (*Id.* at 8); *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011).

12 Here, Gayler attempted to identify a group of individuals he is similarly situated
13 to by classifying himself as a "class-two" inmate who does not qualify for general
14 population housing at his prison. According to Gayler, class-two inmates are those
15 who committed "taboo" crimes like sex crimes as well as those who are disfavored by
16 "class-one" inmates—those inmates who are permitted to enter general population
17 housing—due to legal conduct like testifying for the government and dropping out of
18 gangs. (ECF No. 41 at 5–6). Gayler claims that he is similarly situated to the "class-
19 two" inmates at other prisons, like the Lovelock Correctional Center ("LCC") and the
20 Warm Springs Correctional Center ("WSCC"). (ECF No. 41 at 32).

21 Gayler alleges that defendants intentionally treated HDSP's class-two inmates
22 disparately from their class-two counterparts at LCC and WSCC. According to Gayler,
23 LCC and WSCC require that class-two inmates prepare the food for other class-two
24 inmates rather than allow class-one inmates to prepare food for all inmates. Gayler
25 argues that this disparity shows defendants violated Gayler's right to equal protection
26 because it subjects HDSP's class-two inmates to inadequate quality and quantity of

27 ³ Gayler exhausted the remainder of his claims. (See ECF No. 42 at 153
28 (retaliation against Yeats), 178 and 189 (inadequate quantities of food), 195
(contaminated food)).

1 food without a rational basis.

2 Yet, Gayler substantiates his disparate treatment claims with evidence that
3 other class-two inmates in HDSP received similar food as he did. (ECF No. 41 at 32).
4 Gayler is not a class of one if he received the same treatment as all the other p-seg
5 inmates at HDSP. Nor can Gayler state an equal protection claim merely by dividing
6 all persons not injured into one class and alleging that they received better treatment
7 than he did. *See Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005).
8 Thus, Gayler's own conduct refutes a finding that he is a "class of one."

9 Further, Gayler fails to show that there was no rational basis for defendants'
10 decision to allow gen-pop inmates to prepare the food for all of HDSP's inmates. As
11 will be discussed below, HDSP has several policies in place to ensure that only the
12 best-behaved inmates are permitted to work in the culinary department and to ensure
13 that no food is contaminated before being served to any inmates. *Supra* Part III.4. As
14 Gayler fails to identify a policy pointing to the contrary, his equal protection claim would
15 fail even if he was a class of one.

16 Finally, even if the court were to liberally construe Gayler's complaint to assert
17 a new protected class, Gayler fails to establish that his proposed class of "class-two"
18 inmates is a protected class. His entire basis for this classification is that he was
19 subject to different housing than other inmates, but he supports this classification by
20 arguing that gen-pop inmates view p-seg inmates harshly for independent, subjective
21 reasons. There is no class for protected segregation inmates based on discrimination
22 from gen-pop inmates.

23 Accordingly, Gayler's equal protection claim fails as a matter of law.

24 4. Gayler's Eighth Amendment claim fails as no defendant personally
25 participated in unconstitutional conduct

26 To challenge the conditions of confinement under the Eighth Amendment, a
27 plaintiff must meet both an objective and subjective test. *LeMaire v. Maass*, 12 F.3d
28 1444, 1456 (9th Cir. 1993). The objective prong requires a showing that the
deprivation was sufficiently serious to form the basis for an Eighth Amendment

1 violation. *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). “[E]xtreme
2 deprivations are required to make out a conditions-of-confinement claim.” *Hudson v.*
3 *McMillian*, 503 U.S. 1, 9 (1992).

4 Here, Gayler provides his own affidavits, inmate grievances, journal entries,
5 and the declarations and affidavits of other inmates alleging that HDSP served
6 inadequate quality and quantity of food to p-seg inmates, including Gayler, against
7 HDSP’s policies. (ECF Nos. 42, 44, 46, 47). According to the affidavits, p-seg
8 inmates’ food was often contaminated with human waste, semen, and insects, and
9 was often served in portions smaller than what HDSP’s menu called for. Further, the
10 evidence shows that HDSP officers often refused inmates’ requests to correct or
11 substitute the inadequate food.

12 Assuming all facts and drawing all inferences in favor of Gayler, these
13 deprivations of Gayler’s right to receive adequate food are sufficiently serious to
14 satisfy the objective prong of this analysis. *Cf. LeMaire*, 12 F.3d at 1456.

15 As to the subjective prong, inmates must establish prison officials’ “deliberate
16 indifference” to the unconstitutional conditions of confinement. *Farmer v. Brennan*,
17 511 U.S. 825, 834 (1994). To demonstrate that a prison official was deliberately
18 indifferent to a serious threat to the inmate’s safety, the inmate must show that “the
19 official [knew] of and disregard[ed] an excessive risk to inmate . . . safety; the official
20 must both be aware of facts from which the inference could be drawn that a substantial
21 risk of serious harm exists, and [the official] must also draw the inference.” *Id.* at 837.
22 Mere negligence is insufficient to show a violation of the Eighth Amendment. *Id.* at
23 835–36.

24 Deliberate indifference generally requires a showing that a defendant’s actions
25 or inactions caused the plaintiff harm. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.
26 2006). However, an inmate also establishes a cause of action under the Eighth
27 Amendment by showing that the official, with deliberate indifference, exposed the
28 inmate to conditions that pose an unreasonable risk of serious damage to his future

1 health. *Helling v. McKinney*, 509 U.S. 25, 35 (1993). When the issue is exposure to
2 a risk of future harm, deliberate indifference is assessed not based on a prison
3 official's awareness of current harm, but instead is assessed based on a prison
4 official's awareness of a serious risk of substantial harm. *Parsons v. Ryan*, 754 F.3d
5 657, 677 (9th Cir. 2014).

6 Here, Gayler does not allege that any defendant personally underserved or
7 contaminated p-seg inmates' food. Rather, Gayler argues that defendants were
8 deliberately indifferent to the risk posed by allowing gen-pop inmates to prepare food
9 for p-seg inmates because gen-pop inmates underserved and contaminated p-seg
10 inmates' food while working under the supervision of HDSP's culinary staff.

11 The Ninth Circuit has unambiguously held that, "[t]here is no respondeat
12 superior liability under [Section] 1983." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
13 1989). "A supervisor is only liable for constitutional violations of his subordinates if
14 the supervisor [personally] participated in or directed the violations, or knew of the
15 violations and failed to act to prevent them." *Id.* "A showing that a supervisor acted,
16 or failed to act, in a manner that was deliberately indifferent to an inmate's Eighth
17 Amendment rights is sufficient to demonstrate the involvement—and the liability—of
18 that supervisor." *Starr v. Baca*, 652 F.3d 1202, 1206–07 (9th Cir. 2011).

19 Thus, Gayler's deliberate indifference claim survives summary judgment
20 against only each defendant that Gayler shows had "knowledge of and acquiescence
21 in unconstitutional conduct by his or her subordinates." *Starr*, 652 F.3d at 1207.

22 *A. Defendants Cox, Dzurenda, Williams, Nash, and Howell*

23 Defendants argue that defendants Cox, Dzurenda, Williams, Nash, and Howell
24 did not have knowledge and acquiescence in the alleged deprivation of Gayler's
25 Eighth Amendment rights because they did not directly deal with food service and did
26 not subjectively perceive a substantial risk to p-seg inmates' health. Gayler argues
27 that they did have knowledge both directly through the many inmate grievances about
28 the food and indirectly through HDSP's policies segregating gen-pop inmates from p-

1 seg inmates.

2 Gayler first argues that these defendants had knowledge because they or their
3 offices responded to inmate grievances about the food. (ECF No. 41 at 21). As to
4 directors Cox and Dzurenda, Gayler speculates that because their deputies
5 responded to inmate grievances, they must have been aware of the grievances. Yet,
6 Gayler provides no evidence showing that directors are advised of every prisoner
7 grievance that passes through their offices, nor evidence showing that directors Cox
8 and Dzurenda were personally aware of the grievances.

9 As to warden Williams and associate wardens Nash and Howell, Gayler argues
10 that they were aware because they personally responded to Gayler's grievances
11 about the food. Gayler provides evidence that warden Williams responded to Gayler's
12 grievances about food portions (ECF No. 47 at 382, 514); that Howell responded to
13 Gayler's informal grievance alleging the same quality and quantity of food issues he
14 alleges in this matter (ECF No. 47 at 418–436); and that Nash rejected one of his
15 grievances about the food (ECF No. 47 at 466).

16 While these defendants or their deputies may have responded to some
17 grievances, that alone is not enough to show that they subjectively knew about and
18 acquiesced their subordinates' ignorance of the risks to p-seg inmates' food. Prison
19 officials are not required to initiate an investigation into every inmate grievance filed
20 in their prison. Further, "[h]olding a prison official personally responsible for damages
21 simply because he is familiar with a prisoner's circumstances through direct
22 communications with the prisoner and through communications with his subordinates
23 [or caseworkers] is such a broad theory of liability that it is inconsistent with the
24 personal responsibility requirement for assessing damages against public officials in
25 a 42 U.S.C. § 1983 suit." *May v. Williams*, No. 2:10-cv-576-GMN-LRL, 2012 WL
26 1155390, at *3 (D. Nev. Apr. 4, 2012) (citing *Crowder v. Lash*, 687 F.2d 996, 1005-
27 1006 (7th Cir. 1982)).

28 . . .

1 Accordingly, as Gayler fails to provide evidence showing that defendants or
2 their offices did anything more than simply respond to his grievances, he fails to show
3 the level of personal participation required to sustain his Section 1983 action.

4 Gayler next argues that these defendants had knowledge of the violative
5 conduct because they implemented and enforced the policies which allowed the risk
6 of contaminated and inadequate quantities of food to reach p-seg inmates.
7 Specifically, Gayler argues that they were deliberately indifferent to the risk posed by
8 operating procedure (“OP”) 269’s allowing gen-pop inmates to prepare p-seg inmates’
9 food in spite of administrative regulation (“AR”) 509’s prohibiting gen-pop inmates from
10 physically visiting p-seg inmates because of the known danger gen-pop inmates pose
11 to p-seg inmates’ safety. (ECF No. 21). Gayler is mistaken.

12 The procedures in place for culinary work at the time of Gayler’s grievances
13 imposed strict measures to protect p-seg inmates from food contamination or
14 inadequate quantities of food. Under OP 503 and 700, a subcommittee consisting of
15 a unit caseworker and unit officer assigned an inmate to culinary duty only if the inmate
16 had been discipline-free for 90 days and had not been found guilty of any major
17 disciplinary action within the preceding six months. (ECF No. 34 at 8, 99).

18 Additionally, under OP 269, any culinary staff member could remove an inmate
19 worker from culinary for “justified disciplinary reasons, i.e. . . . unsanitary habits”
20 (ECF No. 33 at 13). If an inmate was removed from culinary work for disciplinary
21 reasons, he could not return to culinary for six months. (*Id.*). OP 269 also provided
22 safety measure to prevent the contamination of food by requiring all inmate workers
23 entering the culinary area to submit to an unclothed body search. (ECF No. 33 at 18).

24 OP 269 further provided processes for inmates to dispute the quality and
25 quantity of food they receive. (ECF No. 33 at 15–17). Inmates could complain to their
26 unit officer, who then contacted the shift supervisor to evaluate the discrepancy. If the
27 shift supervisor determined the meal was questionable, he or she then contacted the
28 institutional cook on duty to make a final determination whether to serve or replace

1 the food complained of. If any food was unfit for human consumption, notice was
2 immediately given to the food service manager and shift supervisor and given within
3 a day to the warden. (ECF No. 33 at 17).

4 Defendants Cox, Dzurenda, Williams, Nash, and Howell cannot be said to be
5 deliberately indifferent to inmate safety and nourishment from their reliance on these
6 procedures. Even if the court determined that this reliance constituted deliberate
7 indifference due to the ignorance of AR 509's restriction on gen-pop inmates
8 physically visiting p-seg inmates, these defendants would be entitled to qualified
9 immunity because Gayler fails to show that clearly established law exists to the extent
10 any reasonable prison official would understand that allowing gen-pop inmates to
11 prepare p-seg inmate's food violates the p-seg inmates' Eighth Amendment right to
12 be free from contaminated food.

13 Accordingly, Gayler's Eighth Amendment claim fails as a matter of law against
14 defendants Cox, Dzurenda, Williams, Nash, and Howell.

15 *B. Defendant Wilson*

16 As to defendant Wilson, Gayler fails to show that genuine questions of material
17 fact exist as to whether Wilson was deliberately indifferent to p-seg inmate's risk of
18 receiving inadequate quality and quantity of food.

19 At all times relevant to this matter, Wilson was HDSP's food service manager.
20 Under administrative regulation ("AR") 269 and OP 269, Wilson had "total
21 responsibility for the day-to-day operation of the [c]ulinary and food service
22 operations," and was tasked with supervising "all inmates working in the food service
23 division." (See ECF No. 31 at 4, 10, 14).

24 Gayler argues that Wilson must have subjectively known of and ignored the risk
25 of contamination food in his kitchen because he saw several inmate grievances
26 concerning contaminated and inadequate portions of food. Gayler further argues that
27 Wilson acquiesced in violations of the administrative procedures put in place to
28 prevent contamination from happening because an officer under Wilson's supervision

1 once instructed inmates to serve food which was scooped off the floor.

2 Yet, none of Gayler's allegations show that Wilson personally acted or
3 subjectively recognized a risk of inadequate quality and quantity of food served out of
4 his kitchen. As discussed above, merely responding to a grievance does not
5 constitute deliberate indifference. Further, just because Wilson was responsible for
6 the kitchen does not mean that he was responsible for failing to change the policy
7 allowing gen-pop workers to prepare p-seg inmate's food. Thus, Gayler's allegations
8 against Wilson arise not to a deliberate indifference claim, but a negligence claim.

9 Gayler fails to provide any evidence that Wilson saw inmates contaminate food,
10 knowingly served contaminated food, personally rejected any inmate's request to
11 replace or substitute contaminated or inadequate portions of food, or intentionally
12 underserved p-seg inmates. Gayler's allegations all concern his unit's supervising
13 officers and lieutenants denying p-seg inmate's requests to replace food. Absent
14 some semblance of personal participation, Wilson is not liable for allegedly negligent
15 behavior in his role as food service manager.

16 Accordingly, Gayler's deliberate indifference claim against Wilson fails as a
17 matter of law.

18 5. Gayler's retaliation claim fails against Yeats because he suffered no harm

19 Defendants argue that Yeats is entitled to summary judgment on Gayler's third
20 claim because Gayler presents no evidence that Yeats retaliated. Gayler argues that
21 Yeat's retaliation is shown by Gayler's grievance regarding Yeats moving him to
22 another cell. (ECF No. 42 at 153).

23 According to Gayler, Yeats transferred him to a new unit where he was not
24 allowed to work in the kitchen within an hour of meeting with Gayler to discuss a
25 grievance Gayler filed regarding officer retaliation for Gayler's complaining about the
26 quantity of his food. Defendants argue that the transfer was not related to the
27 grievances, and that a transfer alone is not enough to support a retaliation claim
28 because it did not affect Gayler's rights or send him to a new prison.

1 Gayler's complaint that the transfer constitutes retaliation lacks merit. Due to
2 HDSP's then active policies, Gayler was not permitted to work in the culinary
3 department regardless of Yeats's opinion on the matter. Even if Yeats transferred
4 Gayler after Gayler's complaints of retaliation, Yeats merely transferred Gayler to
5 another p-seg unit with similar living conditions as his prior unit. Gayler does not even
6 contend that the transfers resulted in any harm, just that the only reason for the
7 transfer must have been to cause Gayler fear that if he continued to pursue
8 grievances, he may eventually end up housed with an inmate he was not compatible
9 with. Speculative future harm does not sustain a retaliation claim.

10 Accordingly, Gayler's third claim fails as a matter of law.

11 6. Gayler fails to show compelling reasons to seal his exhibits

12 There is a strong presumption in favor of public access to judicial records.
13 *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting
14 *Foltz v. State Farm Mutual Auto. Insurance Company*, 331 F.3d 1122, 1135 (9th Cir.
15 2003)). "[T]he public at large pays for the courts and therefore has an interest in what
16 goes on at all stages of a judicial proceeding." *Citizens First Nat. Bank of Princeton*
17 *v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (Posner, J.).

18 To overcome this presumption, the party seeking to seal a judicial record must
19 "articulate compelling reasons supported by specific factual findings that outweigh the
20 general history of access and the public policies favoring disclosure." *Kamakana*, 447
21 F.3d at 1178–79 (internal quotation marks and citation omitted). If the court seals a
22 judicial record, it must "base its decision on a compelling reason and articulate the
23 factual basis for its ruling, without relying on hypothesis or conjecture." *Id.* 447 F.3d
24 at 1179 (internal quotation marks omitted); *see also* LR IA 10-5 (outlining the
25 procedure to seal judicial records in this district).

26 ...

1 Gayler argues that sealing Appendix I (ECF Nos. 42, 47⁴) is necessary to
2 ensure that the witnesses whose declarations are contained within Appendix I do not
3 suffer retaliation for their participation in this matter. According to Gayler, “some of
4 the [d]efendants are capable of retaliating” (ECF No. 43 at 1).

5 Gayler’s arguments are neither compelling nor supported by specific factual
6 findings. The entirely speculative retaliation—which itself amounts merely to potential
7 cell transfers and loss of employment status—does not overcome the strong
8 presumption in favor of public access to judicial records. Accordingly, the court
9 DENIES Gayler’s motion to seal. (ECF No. 43).

10 **7. CONCLUSION**

11 Accordingly,

12 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants’
13 motion for summary judgment (ECF No. 31) be, and the same hereby is, GRANTED.

14 IT IS FURTHER ORDERED that Gayler’s motion to seal (ECF No. 43) is
15 DENIED.

16 The clerk is instructed to enter judgment in favor of defendants Jay Barth,
17 James Dzurenda, James Cox, Ryan Hesler, Jerry Howell, Jennifer Nash, Duane
18 Wilson, Brian Williams, Benjamin Estill, and Bethany Yeats and close this case.

19 DATED November 29, 2021.

20 
UNITED STATES DISTRICT JUDGE

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⁴ Gayler refiled Appendix I at ECF No. 47 due to a filing error with ECF No. 42. As both documents contain information Gayler moves to seal, the court reads Gayler’s motion as seeking to seal both.