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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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FRANK M. PECK,

Case No. 2:18-cv-00237-APG-VCF

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Plaintiff,

ORDER

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v.

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STATE OF NEVADA, *ex rel* et al.,

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Defendants.

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Frank M. Peck, a prisoner in the custody of the Nevada Department of Corrections (“NDOC”), has submitted an ex parte motion to reconsider (ECF No. 9) this Court’s order (ECF No. 6) dismissing his motion for a temporary restraining order (ECF No. 4). Peck also requests that this Court seal his ex parte motion in order to protect a witness from retaliation. (ECF No. 9 at 1, 3). Peck has also submitted a motion to preserve evidence and a motion to proceed *in forma pauperis*. (ECF No. 1, 8). The matter of the filing fee shall be temporarily deferred.

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I. MOTION TO RECONSIDER AND SEAL

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Peck has filed an ex parte motion to reconsider the dismissal of his temporary restraining order, and further requests that this Court file his motion under seal for the next 90 days in order to protect a witness from retaliation. (ECF No. 9 at 1).

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A. Reconsideration of Temporary Restraining Order

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In Peck’s motion for a temporary restraining order, Peck claims that Defendants are continuing to retaliate against him, impeding his legal claims. (ECF No. 4 at 2-3).

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Peck is concerned that Defendants are conspiring to make false disciplinary charges

1 against him in order to get him sent to Ely State Prison (“ESP”), where Peck will not have
2 access to a law library. (*Id.* at 4). Additionally, Peck is concerned that a transfer will
3 decrease his safety. (*Id.*) Peck makes other claims about the general lack of safety in
4 protective custody at HDSP due to gangs, inmate frustration at the new grievance system,
5 lack of tier time, and lack of medical care. (*Id.* at 5-7).

6 Peck requests that Defendants be restrained from further retaliatory acts intended
7 to increase Peck’s disciplinary score and get him transferred to ESP. (*Id.* at 8).

8 In Peck’s motion for reconsideration, he claims that his caseworker, non-party Mr.
9 Fierro, told Peck that an unnamed person told Fierro to transfer Peck to ESP. (ECF No.
10 9 at 2). Fierro also told Peck that the person requesting the transfer said the request was
11 because Peck is a “pain in the ass!” (*Id.*) Fierro said he refused to transfer Peck. (*Id.*)
12 Fierro also told Peck that he is retiring in 90 days. (*Id.*)

13 Peck also makes claims about limited law library time and lack of access to a copy
14 machine, as well as a claim that his 100,000+ legal papers were “scrambled” in a July 16,
15 2018 search that was conducted in a retaliatory fashion. (*Id.* at 3). The search, which
16 violated AR-722, also caused Plaintiff to lose important legal documents relevant to
17 current litigation, including his habeas case and this action, and also including his
18 brother’s will. (*Id.* at 3-4). Peck is now afraid to file any further grievances since Fierro
19 confirmed that Defendants are intending to transfer Peck to ESP, where there is no direct
20 access to a law library, and where he will therefore be impeded in his ability to litigate his
21 claims. (*Id.* at 4).

22 Temporary restraining orders are governed by the same standard applicable to
23 preliminary injunctions. See *Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs.,*
24 *Inc.*, 181 F.Supp. 2d 1111, 1126 (E.D. Cal. 2001). Injunctive relief, whether temporary or
25 permanent, is an “extraordinary remedy, never awarded as of right.” *Winter v. Natural*
26 *Res. Defense Council*, 555 U.S. 7, 24 (2008). “A plaintiff seeking a preliminary injunction
27 must establish that he is likely to succeed on the merits, that he is likely to suffer
28 irreparable harm in the absence of preliminary relief, that the balance of equities tips in

1 his favor, and that an injunction is in the public interest.” *Am. Trucking Ass’ns, Inc. v. City*
2 *of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20).

3 Furthermore, a temporary restraining order “should be restricted to serving [its]
4 underlying purpose of preserving the status quo and preventing irreparable harm just so
5 long as is necessary to hold a hearing, and no longer.” *Granny Goose Foods, Inc. v. Bhd.*
6 *of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974).

7 The Court finds that, while Peck states a colorable claim based on the allegations
8 in the complaint, the Court is still not convinced that Peck will suffer irreparable harm in
9 the absence of an injunction. The instant case is currently on a 90-day stay while the
10 parties mediate Peck’s claims. In his motion for reconsideration, Peck states that Fierro
11 will not transfer Peck to ESP, and Fierro is not retiring for 90 days. Peck may raise his
12 claims while in mediation with Defendants, and if a satisfactory settlement is not reached,
13 Peck may refile his motion for temporary restraining order with this Court, if he so
14 chooses. Therefore, Peck’s motion for temporary restraining order shall not be reopened
15 and his motion for reconsideration is dismissed, without prejudice.

16 **B. Sealing**

17 Rule 26(c) authorizes the district court to issue *any* order which justice requires to
18 protect a party or person from annoyance, embarrassment, oppression, or undue
19 burden. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th
20 Cir. 2002) (quotation omitted). A party seeking to seal judicial records must show that
21 compelling reasons supported by specific factual findings outweigh the general history of
22 access and the public policies favoring disclosure.” *F.T.C. v. Johnson*, No. 2:10-CV-
23 02203-MMD, 2013 WL 2460359, at *2 (D. Nev. June 6, 2013) (*citing Pintos v. Pac.*
24 *Creditors Ass’n*, 605 F.3d 665, 677–78 (9th Cir. 2010)). However, “a different standard
25 applies to “private materials unearthed during discovery,” or documents that are not part
26 of the judicial record. *Pintos*, 605 F.3d at 678. “[M]aterial attached to nondispositive
27 motions may be entitled to protection upon the showing of good cause,” which presents
28 a lower burden than the compelling reasons standard. *Golden Boy Promotions, Inc. v.*

1 *Top Rank, Inc.*, No. 2:10-CV-01619-RLH, 2011 WL 686362, at *1 (D. Nev. Feb. 17, 2011)
2 (citing Fed.R.Civ.P. 26(c)(1) and *Pintos*, 605 F.3d at 678). To demonstrate good cause
3 to seal a document, “the party seeking protection bears the burden of showing specific
4 prejudice or harm will result if no protective order is granted.” *Phillips ex rel. Estates of*
5 *Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir.2002)).

6 The Court finds that Peck fails to show that specific harm will come to Fierro if the
7 motion and order are not sealed. Peck says he fears that Defendants will retaliate against
8 Fierro before Fierro retires in 90 days. Peck does not say what form he fears the
9 retaliation will take, nor that Fierro himself was afraid of retaliation, nor that Fierro was
10 threatened by Defendants. Further, if Defendants do retaliate against Fierro prior to his
11 pending retirement, Fierro may pursue a retaliation claim against them under federal
12 and/or Nevada employment discrimination law. Therefore, Peck’s motion for sealing is
13 denied.

14 **II. MOTION TO PRESERVE EVIDENCE**

15 Peck has filed a motion to preserve evidence. (ECF No. 8). In his motion, Peck
16 claims that Defendant Sergeant Dugan searched Peck’s cell on July 6, 2018, in violation
17 of AR 422 and with the malicious intent to destroy Peck’s ability to litigate this case, as
18 well as other cases he has pending, by “scrambling” over 100,000 pages of Peck’s legal
19 documents. (*Id.* at 2-3). Peck requests that the Court issue an order to Defendants to
20 preserve the video recording of unit 12-c-6 made on July 6, 2018 for this litigation. (*Id.* at
21 4).

22 Parties have a duty to preserve evidence relevant to pending litigation. *Kronisch*
23 *v. United States*, 150 F.3d. 112, 126 (2d Cir. 1998)). “The duty to preserve evidence
24 arises when the party has notice that the evidence is relevant to litigation, for example,
25 ‘when a party should have known that the evidence may be relevant to future
26 litigation.’” *Stedeford v. Wal-Mart Stores, Inc.*, No. 2:14-CV-01429-JAD-PAL, 2016 WL
27 3462132, at *5 (D. Nev. June 24, 2016) (citing *Kronisch*, 150 F.3d. at 126). This duty
28 includes the institution of a "litigation hold" on any document retention/destruction policies

1 in effect. *In re Napster, Inc. Copyright Litigation*, 462 F.Supp.2d 1060, 1070 (N.D. Cal.
2 2006).

3 Spoliation is the “destruction or significant alteration of evidence or the failure to
4 preserve property for another's use as evidence in pending or reasonably foreseeable
5 litigation.” *Micron Technology, Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1320 (9th Cir. 2011).
6 “This is an objective standard, asking not whether the party in fact reasonably foresaw
7 litigation, but whether a reasonable party in the same factual circumstances would have
8 reasonably foreseen litigation.” *Id.* “Sanctions may be imposed against a litigant who is
9 on notice that documents and information in its possession are relevant to litigation, or
10 potential litigation, or are reasonably calculated to lead to the discovery of admissible
11 evidence, and destroys such documents and information.” *Wm. T. Thompson Co. v. Gen.*
12 *Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).

13 At this stage in the litigation process, Peck is scheduled for mediation with
14 Defendants, and the litigation is on a 90-day stay. (See ECF No. 6 at 25-26). Defendants
15 have not yet been served Peck’s complaint. Therefore, a motion to preserve evidence is
16 premature. However, the Court interprets Peck’s motion as notice to Defendants to
17 preserve the relevant video evidence. Should the parties not settle Peck’s claims and
18 litigation ensue, Defendants are so notified through Peck’s filing and this order.

19 **III. CONCLUSION**

20 For the foregoing reasons, it is ordered that a decision on the application to
21 proceed *in forma pauperis* (ECF No. 1) is deferred.

22 It is further ordered that the Court interprets Peck’s motion for preservation of
23 evidence (ECF No. 8) as notice to Defendants to preserve the relevant video evidence.
24 Defendants are so notified through Peck’s filing and this order.

25 It is further ordered that Peck’s motion for temporary restraining order (ECF No. 4)
26 shall not be reopened and his motion for reconsideration (ECF No. 9) is dismissed,
27 without prejudice.

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It is further ordered that Peck's motion for sealing of his motion for reconsideration (ECF No. 9) and this order is denied.

Dated: August 13, 2018.



ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE