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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICHARD DEEDS
and SANDRA DEEDS

Plaintiffs,

vs.

DONALD HELLING, *et al.*,

Defendants.

3:07-cv-00060-ECR-VPC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

February 19, 2009

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court are plaintiffs’ motion for summary judgment re: suspension of visitation (#71) and defendants’ motion for summary judgment (#84). Defendants opposed plaintiffs’ motion (#83) and plaintiffs replied (#96). Plaintiffs opposed defendants’ motion (#104) and defendants replied (#96). The court has thoroughly reviewed the record and the motions and recommends that defendants’ motion for summary judgment (#84) be granted, and plaintiffs’ motion for summary judgment re: suspension of visitation (#71) be denied.

I. HISTORY & PROCEDURAL BACKGROUND

Richard Deeds and Sandra Deeds (collectively “plaintiffs”) filed their amended complaint on August 17, 2007. Richard Deeds (“Mr. Deeds”) is a *pro se* inmate currently incarcerated at Northern Nevada Correctional Center (“NNCC”) in the custody of the Nevada Department of Corrections (“NDOC”), and Sandra Deeds (“Ms. Deeds”) is a former NDOC employee (#26). They are married. *Id.* On November 1, 2007, the court ordered that this action was to proceed as to: “(a) the substantive due process claim regarding the suspension of visitation privileges against defendant Helling; (b) the retaliation claim against defendant Helling; (c) the deprivation of personal property claim against defendants Peabody and Helling.” The court dismissed all other

1 claims (#32, p. 3-4). Plaintiffs and defendants each filed competing motions for summary
2 judgment (#71 and #84). Plaintiffs' motion requests summary judgment only with regard to their
3 visitation allegations, and does not discuss either their retaliation claim or deprivation of personal
4 property claim (#71). However, both plaintiffs and defendants raise the same arguments in their
5 own motion for summary judgment and in their opposition to each other's motion for summary
6 judgment. Each incorporates their motion or opposition by reference.¹ Therefore, both plaintiffs'
7 motion and defendants' motion will be discussed here.

8 The court notes that plaintiffs are proceeding *pro se*. "In civil cases where the plaintiff
9 appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit
10 of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988); *see*
11 *also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

12 II. DISCUSSION & ANALYSIS

13 A. Discussion

14 1. Summary Judgment Standard

15 Summary judgment allows courts to avoid unnecessary trials where no material factual
16 disputes exist. *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th
17 Cir. 1994). The court grants summary judgment if no genuine issues of material fact remain in
18 dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56©. In
19 deciding whether to grant summary judgment, the court must view all evidence and any
20 inferences arising from the evidence in the light most favorable to the nonmoving party. *Bagdadi*
21 *v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). In inmate cases, the courts must

22 [d]istinguish between evidence of disputed facts and disputed
23 matters of professional judgment. In respect to the latter, our
24 inferences must accord deference to the views of prison
25 authorities. Unless a prisoner can point to sufficient evidence

26 ¹In their opposition to plaintiffs' motion for summary judgment, defendants "incorporate by
27 reference the Statement of Pertinent Undisputed Facts from Defendants' Motion for Summary
28 Judgment, filed concurrently with this Opposition" (#83). Defendants also note that all exhibit
citation reference in the opposition is to the exhibits attached to their motion for summary judgment.
Id. In plaintiffs' opposition to defendants' motion for summary judgment, they incorporate by
reference the exhibits attached to their motion for summary judgment (#104).

1 regarding such issues of judgment to allow him to prevail on the
2 merits, he cannot prevail at the summary judgment stage.

3 *Beard v. Banks*, 548 U.S. 521, 526, 126 S.Ct. 2572, 2576 (2006). Where reasonable minds could
4 differ on the material facts at issue, however, summary judgment should not be granted.

5 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

6 The moving party bears the burden of informing the court of the basis for its motion, and
7 submitting evidence which demonstrates the absence of any genuine issue of material fact.
8 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,
9 the party opposing the motion may not rest upon mere allegations or denials in the pleadings but
10 must set forth specific facts showing that there exists a genuine issue for trial. *Anderson*, 477
11 U.S. at 248. Rule 56(c) mandates the entry of summary judgment, after adequate time for
12 discovery, against a party who fails to make a showing sufficient to establish the existence of an
13 element essential to that party's case, and on which that party will bear the burden of proof at
14 trial. *Celotex*, 477 U.S. at 322-23.

14 **B. Analysis**

15 **1. Counts I, III, and IV - Denial of Visitation**

16 In counts I, III, and IV, plaintiffs assert that defendant Helling violated their Fourteenth
17 Amendment substantive due process rights because he permanently suspended their visitation
18 rights in a manner "which was clearly arbitrary and unreasonable with no substantial relationship
19 to a legitimate concern" (#26, p. 4). Plaintiffs claim that they have a state-conferred liberty
20 interest in continued visitation. *Id.* p. 7-8.

21 The facts underlying this case began in 2001. Ms. Deeds was employed as a nurse at
22 NNCC until September 19, 2000 (#104, exh. p. 215). Presumably, she met and developed an
23 acquaintance with Mr. Deeds during her employment. It is unclear when the Deedes developed
24 a romantic relationship, but they corresponded by mail since at least September 26, 2000 (#84,
25 exh. 1G). Ms. Deeds (then Sweeney) submitted an application for visitation with Mr. Deeds on
26 January 25, 2001. *Id.*, exh. 1I. Former Warden David Meligan denied her application on February
27

1 2, 2001, stating that the denial was due to the fact that Ms. Deeds was a “former NDOP
2 employee.”*Id.* ex. 1J. Ms. Deeds appealed this denial to former director of the NDOC, Jackie
3 Crawford. *Id.* ex. 1K. Director Crawford denied her appeal, explaining that “former NDOP
4 employees must be recommended for visitation by the Warden of the facility, with this
5 recommendation forwarded to me for approval. Both Warden Meligan and the Assistant Director
6 of Operations have denied your visiting privileges and I uphold their decisions.” *Id.* ex. 1O.

7 Ms. Deeds applied for visitation privileges a second time on February 21, 2001. *Id.* ex.
8 1L. Warden Meligan denied this application on February 23, 2001, again citing her former
9 employment at NNCC. *Id.* ex. 1M and 1N. Director Crawford also denied Ms. Deeds’s request,
10 stating that Warden Meligan’s decision to deny visitation was final. *Id.* ex. 1Q. Mr. Deeds filed
11 an application for visitation on June 21, 2001. This application was again denied with the reason
12 for denial stated as “per Director Crawford, this visitor remains denied. An application will not
13 be mailed out at this time.” *Id.* ex. 1R. During this application process, the Deedes married at
14 NNCC on May 9, 2001. *Id.* ex. 1P. Although it is unclear if either Mr. or Ms. Deeds filed
15 another visitation application, Warden David Meligan granted Ms. Deeds’s request to visit on
16 July 27, 2001. He informed her that she should contact the NNCC visiting officer for visitation
17 regulations and a schedule. He also forwarded his approval letter to Director Crawford. *Id.* ex.
18 1S. Warden Meligan did not inform plaintiffs that they were required to take any further action,
19 and it is unclear whether Director Crawford ever followed up and sent a letter confirming the
20 approval of visitation. However, Mr. Deeds’s visitation log notes that Ms. Deeds was approved
21 for visitation “per AG office 7/27/01.” *Id.* ex. 1T. Therefore, the court presumes that someone
22 in the Warden’s office or the Director’s office discussed the decision to grant visitation to Ms.
23 Deeds with the Office of the Attorney General. Mr. Deeds’s visitation log also shows that Ms.
24 Deeds visited Mr. Deeds fifty-six times between August 6, 2001 and April 20, 2006, with the
25 majority of visits taking place in 2001 and 2002. *Id.*

26 Defendant Helling suspended Ms. Deeds’s visiting privileges with Mr. Deeds on May 23,
27 2006. His letter reads in full: “Effective immediately your visiting privileges with your husband
28 Mr. Deeds NDOC #14946 are suspended due to your past employment with the Department of

1 Corrections. An error occurred allowing you to visit. Any concerns or questions should be
2 forwarded to this office.” *Id.*, exh. 1V. Defendants state that Defendant Helling, “as the new
3 Warden of NNCC,” was not informed that Ms. Deeds was a former employee until May 23, 2006,
4 when Aurelia Ewing, Administrative Assistant II, told him, and this knowledge compelled him
5 to suspend Ms. Deeds’s visitation privileges. *Id.* p. 4, exh. 1U.

6 In discovery responses, Defendant Helling states that prior to making the decision to
7 suspend Ms. Deeds’s visits, he contacted Director Whorton and explained that the error of
8 allowing Ms. Deeds to visit “occurred due to the fact that [Mr. and Ms. Deeds] had not visited
9 for a lengthy period of time and visiting staff were not aware of [the policy of not allowing former
10 NDOC or NDOP staff to visit inmates], i.e. an oversight occurred by allowing these visits to
11 happen.” *Id.* exh. 1U. Director Whorton agreed that further visiting would not be allowed
12 “regardless of previous visits.” *Id.* In other discovery responses, defendant Helling states that he
13 decided to suspend Ms. Deeds’s visiting privileges because of “the compromise of staff occurred
14 during her employment (#104, exh. p. 12). Additionally, defendant Helling states that “it was
15 common knowledge among staff and inmates that Ms. Deeds was a former employee.” *Id.* exh.
16 p. 19. Defendants do not explain the apparent discrepancy between their contentions that
17 defendant Helling and visiting staff were unaware that Ms. Deeds was a former employee until
18 May 23, 2006, but that it was common knowledge among staff that Ms. Deeds was a former
19 employee.

20 Ms. Deeds wrote to defendant Helling on June 5, 2006, expressing her concern that her
21 visiting privileges had been suspended on the basis of her former employment (#71, exh. p. 11).
22 She wrote: “My employment with the State of Nevada ended in June 2000. I married Richard in
23 May 2001. Per Warden Melligan (sic), per NRS regulations, I was not permitted to visit for a year
24 after my employment terminated. I was granted visiting privileges in August 2001.” *Id.* Defendant
25 Helling responded to this letter on June 8, 2006, stating that the “Nevada Department of
26 Corrections policy is not to allow former employees to visit incarcerated persons. NNCC is
27 enforcing this policy....An error was made in allowing these visits to occur...” (#84, exh. 1Y).
28 Additionally, Director Whorton responded to Ms. Deeds’s inquiry on July 6, 2006, informing her

1 that the “Nevada Department of Corrections has a problem with former employees who have
2 developed relationships with inmates causing serious security and safety concerns with this
3 department. This very fact of allowing visits can and has encouraged inmates to compromise staff.
4 This is evident of escape, resulting in violent crimes from NNCC in the last year.” *Id.* exh. 1BB.
5 In response to an inmate request form (#71, exh. p. 9), Defendant Helling also sent a
6 memorandum to Mr. Deeds on June 2, 2006, which stated in full: “The Department’s policy is
7 not to allow ex-employees to visit an inmate. This policy is being enforced in your case” (#84,
8 exh. 1W). Plaintiffs’ visiting privileges have not been reinstated since they were revoked in May
9 2006. Plaintiffs commenced the instant action on February 6, 2007, alleging that the suspension
10 of their visiting privileges violates their substantive due process rights under the Fourteenth
11 Amendment (#1, #26).

12 Defendants contend they are entitled to summary judgment on plaintiffs’ substantive due
13 process claim regarding the suspension of visitation because plaintiffs have no constitutional
14 liberty interest in visitation (#84, p. 8-9; #83, p. 4-5). Further, defendants’ decision to suspend
15 visitation was reasonably related to legitimate penological objectives. *Id.* Finally, defendant
16 Helling is entitled to qualified immunity. *Id.*

17 Plaintiffs acknowledge that the Constitution does not itself create a right to visitation (#71,
18 p. 9). However, their position is that they have a state-created liberty interest in continued
19 visitation. They argue that NDOC officials granted them visitation privileges based on
20 Administrative Regulation (“AR”) 719, and that this regulation, along with Nev. Rev. Stat. §
21 209.423, created a liberty interest which prohibited defendants from suspending visitation without
22 complying with the confines of AR 719. *Id.* p. 10. Additionally, “even in the absence of such a
23 liberty interest...a permanent withdrawal of visitation, or one applied arbitrarily to a particular
24 inmate, would warrant relief.” *Id.*, citing *Overton v. Bazzetta*, 539 U.S. 130, 137 (2003). Plaintiffs
25 claim that defendant Helling acted arbitrarily because he “singled them out” in withdrawing their
26 visitation privileges (#104, p. 7). Plaintiffs also assert that they are entitled to strict scrutiny
27 because the right to marry is involved. *Id.* Finally, defendant Helling is not entitled to qualified
28 immunity because plaintiffs “retained protection against arbitrary state action” and “the Nevada

1 inmate disciplinary process has been previously ruled to create a liberty interest” (#71 p. 11-12).

2 Defendants reply that plaintiffs have no right to visitation and that the regulation that
3 controls their rights is constitutional (#83, p. 4-5). Additionally, plaintiffs are not entitled to strict
4 scrutiny. *Id.* p. 6. Defendants set out some of the applicable sections of AR 719 and IP 7.14 to
5 argue that visiting is a privilege and that the warden has the right to suspend visitation at any time.
6 *Id.* p. 7. Defendants also contend that plaintiffs’ visiting privileges were never “properly
7 approved” because they “never received the necessary approval of the Director as required by
8 [AR 719].” *Id.* p. 9. Finally, defendants apply the *Turner* test to the policy disallowing visitation
9 between an inmate and a former employee, stating that the “suspension of visitation between an
10 inmate and a former employee spouse as provided in AR 719 and IP 7.14 is reasonably related
11 to legitimate penological concerns. *Id.* p. 10, #96, p. 5-10.

12 **(a) AR 719 and IP 7.14**

13 AR 719 governs an inmate’s rights to visitation (AR 719, #84, exh. 1A). The AR begins
14 by stating that “visitation is a privilege for inmates assigned to the Department of Prisons.” *Id.*
15 The AR allows visitation restriction to be “governed by institutional space and personnel
16 resources and [to] be imposed to prevent injuries to persons, to maintain the safety and security
17 of the institution, and to prevent the introduction of items or substances which inmates are not
18 permitted to possess.” *Id.* The AR sets out a procedure for former employees to request visitation
19 with inmates. It states:

20 Former employees of the Nevada Department of Prisons may request
21 visiting privileges with an inmate on an individual basis. The request will
22 be submitted to the Warden/designee for initial consideration and then to
the Office of the Director for final approval based upon the
recommendation of the Warden/designee.

23 *Id.*

24 AR 719 also sets out the procedure for terminating and suspending visitation. *Id.* “Visiting
25 privileges may be suspended upon orders from the Warden/designee. A notice should be given
26 to both the inmate and visitor of the reasons for the suspension” *Id.* The AR also gives specific
27 reason why visiting privileges may be suspended for “up to six months.” The reasons all relate
28 to visitor or inmate misconduct (inebriation, violation of rules, uncontrolled children,

1 unacceptable physical conduct). *Id.* Additionally, “visiting privileges that have been terminated
2 indefinitely due to the seriousness of the offense, i.e. introduction of contraband, should be
3 reviewed every six (6) months for re-consideration by the Warden at the written request of the
4 visitor.” *Id.* Any suspension of visitation “shall be documented for inclusion in the inmate’s
5 institutional file...[and] shall clearly explain the reason for the action, the length of time the action
6 will apply, the circumstances under which the action will be reconsidered, and instructions for
7 appealing the action taken.” *Id.*

8 IP 7.14 provides “specific information and guidelines to inmates partaking in visiting that
9 is unique to NNCC” (NNCC IP 7.14, #84, exh. 1B). With regard to visitation by former
10 employees, IP 7.14 includes the same language as AR 719, plus one final sentence: “All other
11 approval processes must be complete prior to the last review step.” *Id.* The IP also includes
12 language on suspension. It states:

13 4. The Warden or designee may suspend visiting privileges. This is
14 generally done because of a disciplinary situation with the inmate or if
15 adverse information is received on a visitor already on the approved
visiting list. A visitor’s visiting privileges may be suspended without
formal discipline of the inmate, i.e. the visitor is found to be at fault.

16 5. When a decision is made to suspend visiting privileges, a notice shall
17 be given to both the inmate and the subject visitor, stating that reasons for
suspension of visiting. An inmate may appeal through the established
inmate grievance system.

18 *Id.*

19
20 **(b) Case Law**

21 The issue here is whether Mr. Deeds has any constitutionally protected interest in
22 visitation, whether contact or noncontact, with a particular person, namely, Ms. Deeds. This case
23 does not involve the denial of all visitation, as Mr. Deeds does not claim that he has been denied
24 visitation with other people. The Ninth Circuit law regarding a prisoner’s right to visitation is not
25 fully developed. It is clear that the Due Process Clause does not directly guarantee prisoners a
26 right to unfettered visitation. *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 460
27 (1989). However, the Supreme Court has held that “state law may create enforceable liberty
28 interests in the prison setting.” *Id.* at 461. In *Thompson*, the Court held that “the use of ‘explicitly

1 mandatory language,’ in connection with the establishment of ‘specified substantive predicates’
2 to limit discretion, forces a conclusion that the State has created a liberty interest.” *Id.* at 463,
3 quoting *Hewitt v. Helms*, 459 U.S. 460, 472 (1983).

4 However, in *Sandin v. Connor*, the Supreme Court abandoned “the *Hewitt* approach,”
5 stating that it has led “to the involvement of federal courts in the day-to-day management of
6 prisons, often squandering judicial resources with little offsetting benefit to anyone.” 515 U.S.
7 472, 482 (1995). The Court instead decided to follow the test it had previously set out in *Wolff*
8 *v. McDonnell*, 418 U.S. 539 (1974), which narrowed the scope of when a state law creates a
9 liberty interest. The Court stated:

10 Following *Wolff*, we recognize that States may under certain
11 circumstances create liberty interests which are protected by the Due
12 Process Clause. But these interests will be generally limited to freedom
13 from restraint which, while not exceeding the sentence in such an
unexpected manner as to give rise to protection by the Due Process
Clause of its own force, nonetheless imposes atypical and significant
hardship on the inmate in relation to the ordinary incidents of prison life.

14 *Sandin*, 515 U.S. at 483-84 (internal citations omitted).

15 Subsequently, in *Overton v. Bazzetta*, the Supreme Court stated that “[t]he very object of
16 imprisonment is confinement. Many liberties and privileges enjoyed by other citizens must be
17 surrendered by the prisoner. An inmate does not retain rights inconsistent with proper
18 incarceration. And, as our cases have established, freedom of association is among the rights least
19 compatible with incarceration.” 539 U.S. 126, 131 (2003) (citations omitted). Although the Court
20 in *Overton* found that not all rights to intimate association are terminated by incarceration, courts
21 will uphold visitation restrictions which “bear a rational relation to legitimate penological
22 interests.” *Id.* at 132; see also *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004). If a prison
23 regulation “impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably
24 related to legitimate penological interests.” *Turner v. Safley*, 482 U.S. 78, 89 (1987). The court
25 is to review four factors to the reasonableness of a regulation. *Id.* “First, there must be a ‘valid,
26 rational connection’ between the prison regulation and the legitimate governmental interest put
27 forward to justify it.” *Id.* at 90. Second, the court must determine “whether there are alternative
28 means of exercising the right that remain open to prison inmates.” *Id.* Third, the court must

1 consider “the impact accommodation of the asserted constitutional right will have on guards and
2 other inmates, and on the allocation of prison resources generally.” *Id.* Fourth, “the absence of
3 ready alternatives is evidence of the reasonableness of a prison regulation.” *Id.*

4 The Ninth Circuit has held that prisoners do not have a right to contact visitation. *Barnett*
5 *v. Centoni*, 31 F.3d 813 (9th Cir. 1994). Additionally, “the loss of the right to intimate associate
6 is simply part and parcel of being imprisoned for conviction of a crime...[as] [i]ncarceration is
7 simply inconsistent with the vast majority of concomitants to marriage, privacy, and personal
8 intimacy.” *Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir. 2002). The court in *Gerber* found that
9 prisoners do not have a constitutional right to contact visits or conjugal visits, nor do they have
10 the right to procreate. *Id.* at 622-23. The court stated that “while the intangible and emotional
11 aspects of marriage survive incarceration, the physical aspects do not.” *Id.* at 623.

12 **(c) Analysis**

13 As an initial matter, plaintiffs do not have a right to strict scrutiny. The court has
14 previously found plaintiffs’ right to marry is not at issue in this case because plaintiffs are already
15 married (#27, p. 5, fn 3).

16 As there is very little Ninth Circuit law discussing a prisoner’s right to visitation,
17 defendants cite to two cases from the Eleventh Circuit and from the Northern District of Ohio.
18 In *Caraballo-Sandoval v. Honsted*, a case very similar to this one, prison officials suspended an
19 inmate’s visitation privileges with his wife, who had previously been employed by the prison as
20 a “career resource coordinator.” The Eleventh Circuit granted summary judgment for the
21 defendants based on qualified immunity. The court stated that “inmates do not have an absolute
22 right to visitation, such privileges being subject to the prison authorities’ discretion provided that
23 the visitation policies meet legitimate penological objectives. We believe that the concerns that
24 former prison employees visiting inmates may pose a threat to security because of their
25 knowledge of security procedures constitutes a legitimate penological objective.” 35 F.3d 521,
26 525 (11th Cir. 1994). In *Blair v. Loomis*, the district court for the Northern District of Ohio found
27 that a state statute did not create a liberty interest in visitation because “the types of liberty
28 interests created by states are ‘generally limited to freedom from restraint....[or that which]

1 imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of
2 prison life.” 1 F.Supp.2d 769, 772 (N.D. Ohio 1998), *quoting Sandin*, 515 U.S. at 430.

3 Other courts have also found that visitation regulations do not create liberty interests. *See*
4 *Ware v. Morrison*, 276 F.3d 385 (8th Cir. 2002) (holding that a prisoner has no constitutionally
5 protected interest implicated by the suspension of his visitation privileges because the suspension
6 of visitation did not impose an atypical and significant hardship); *Lynott v. Henderson*, 610 F.2d
7 340 (5th Cir. 1980) (holding that limitations on visitation may be imposed if they are necessary
8 to meet legitimate penological objectives); *Billups v. Galassi*, 202 F.3d 272 (7th Cir. 2000)
9 (holding that the denial of visitation with a specific visitor is not an atypical and significant
10 hardship).

11 Based on the cases discussed above, the court agrees that plaintiffs do not have a liberty
12 interest in visitation. These cases create a standard that prison regulations only create a liberty
13 interests in actions that impose an “atypical and significant hardship on [an] inmate in relation to
14 the ordinary incidents of prison life.” Given that the Supreme Court’s examples of atypical and
15 significant hardships were freedom from restraint and the involuntary administration of
16 psychotropic drugs, the courts above have all found that visitation regulations do not create a
17 liberty interest that is protected by the Constitution. Therefore, AR 719 does not confer plaintiffs
18 a state-created liberty interest.

19 The court notes that defendants do not recite AR 719 in its entirety. They ignore the
20 provisions which state visiting privileges are normally only suspended for punitive reasons or for
21 violations of visitation rules. Defendants also do not explain how the “error” occurred allowing
22 Ms. Deeds to visit. Plaintiffs complied with the application process to the extent that they could.
23 The Director received a copy of Warden Meligan’s letter approving visitation. Defendants do not
24 attempt to explain why Director Crawford did not respond to this letter. Therefore, any “error”
25 that occurred was not the fault of plaintiffs. Defendants claim that they learned “adverse
26 information” about Ms. Deeds on May 23, 2006, which caused them to suspend her visiting
27 privileges, specifically that she was a former employee. The fact that Ms. Deeds was a former
28 employee does not appear to the court to be the type of “adverse information” that AR 719

1 envisioned, as this information was disclosed when Ms. Deeds applied for visitation, and she was
2 granted privileges in spite of it. It is also unclear why defendants did not notice that a former
3 employee was permitted to visit for five years. Defendants state that it was widely known that Ms.
4 Deeds was a former employee, but fail to explain why she was allowed to visit for five years.
5 Plaintiffs also state that NDOC's policy is not to allow former employees to visit with inmates.
6 However, AR 719 does not reflect this policy. Rather, it appears to reflect the exact opposite
7 policy, since it creates a method whereby former employees can request and be granted visiting
8 privileges. Further, this policy was never disseminated to prison employees. It seems bizarre to
9 enact a policy with regard to who may visit, but not inform the visiting officers about this policy.
10 However, because the court has already found that AR 719 does not give plaintiffs a state-created
11 liberty interest in visitation, defendants have not violated plaintiffs' substantive due process
12 rights.

13 The court also finds that defendants' policy of disallowing visits between inmates and
14 former employees meets the *Turner* test and is reasonably related to a legitimate penological
15 interest. First, this policy does have a valid, rational connection to safety and security. Defendants
16 contend that former employees can be compromised and disclose security measures to inmates.
17 They base this concern in part on a recent inmate escape which occurred after the inmate
18 compromised a former employee (#84, exh. 1BB). Prison officials have a legitimate interest in
19 the safety and security of the institution. Second, plaintiffs have alternative means to exercise their
20 asserted right. Plaintiffs can still communicate by telephone and letter. The court realizes this may
21 not be ideal, but it is a sufficient alternative. *Overton*, 539 U.S. at 135. Third, defendants have
22 demonstrated that allowing visitation between inmates and former employees would have a
23 significant impact on prison staff, inmates, allocation of prison resources, and safety of visitors
24 (#84, p. 15). Defendants state that allowing visits "would have a significant impact on prevention
25 of security breaches that might risk danger to the correctional staff, other inmates, and the public."
26 *Id.* Plaintiffs have not demonstrated that such an impact would not occur. Fourth, plaintiffs have
27 not demonstrated that there are ready alternatives to the regulation. Therefore, plaintiffs have not
28 demonstrated that the suspension of visitation between inmates and former employees fails to

1 meet legitimate penological interests.

2 **(d) Qualified Immunity**

3 Defendants contend that even if plaintiffs had some right to visit, Defendant Helling
4 would nonetheless be entitled to qualified immunity (#84, p. 17). The defense of qualified
5 immunity protects state officials sued in their individual capacities unless the conduct complained
6 of violates a clearly established constitutional or statutory right of which a reasonable person
7 would have known. *Jackson v. City of Bremerton*, 268 F.3d 646, 650 (9th Cir. 2001). A qualified
8 immunity analysis begins with a threshold question of whether, based upon facts taken in the light
9 most favorable to the party asserting the injury and in light of such clearly established law, an
10 official's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If
11 no constitutional right was violated, the court need not inquire further. *Id.* However, if a
12 constitutional violation occurred, the court's second inquiry is whether the official could
13 nevertheless have reasonably, but mistakenly, believed that his or her conduct did not violate a
14 clearly established constitutional right. *Id.* Qualified immunity protects "all but the plainly
15 incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 355, 341
16 (1986).

17 A qualified immunity analysis involves three steps: (1) the identification of the right
18 allegedly violated; (2) a determination of whether that right was "clearly established" at the time
19 of the incident such that a reasonable officer would know the constitutional parameters; and (3)
20 the determination of whether a reasonable officer could have believed lawful the particular
21 conduct at issue. *Sloman v. Tadlock*, 21 F.3d 1462, 1467 (9th Cir. 1994).

22 Plaintiffs allege that defendants violated their Fourteenth Amendment substantive due
23 process rights by arbitrarily denying them visitation. As set forth in the previous discussion, the
24 court has concluded that Mr. Deeds does not have a constitutional right to visitation with respect
25 to particular persons based on Supreme Court and Ninth Circuit precedent. Further, even if the
26 court is wrong and plaintiffs have a cognizable constitutional claim, any right they had was not
27 clearly established. Many courts have held that inmates do not have a substantive due process
28 right to visitation with a particular person. Therefore, plaintiffs do not have a clearly established

1 right to visitation. As such, defendant Helling is entitled to qualified immunity on plaintiffs'
2 visitation claims. Defendants' motion for summary judgment (#84) is granted as to counts I, III,
3 and IV, and plaintiffs' motion for summary judgment re: suspension of visitation (#71) is denied.

4 **2. Count II - Retaliation**

5 Plaintiffs allege that defendant Helling suspended plaintiffs' visitation privileges in
6 retaliation because Mr. Deeds previously filed a civil rights action against Helling and other
7 prison staff (#26, p. 6). Defendants claim that they are entitled to summary judgment on count II
8 because plaintiffs "fail to demonstrate a nexus between the suspension of Plaintiff's visitation and
9 the existence of the 2003 case, the settlement conference, the prison guard allegation, or the
10 March 7, 2006 incident" (#84, p. 20). Additionally, plaintiffs have not demonstrated the absence
11 of a legitimate penological goal served by the suspension of visitation. *Id.*, p. 21. Further,
12 defendant Helling is entitled to qualified immunity. *Id.* p. 21-22. Plaintiffs respond that they have
13 shown circumstantial evidence of retaliation. They state that defendant Helling knew of the
14 previous lawsuit Mr. Deeds filed against him and other prison officials because he was present
15 at a settlement conference (#104, p. 20). This knowledge is evidence of retaliation because
16 defendant Helling "suspended [plaintiffs'] visitation based on the report of C/O Barats," another
17 defendant in the previous suit. *Id.* Defendants reply that plaintiffs have not demonstrated that Mr.
18 Deeds's naming defendant Helling as a defendant in a previous suit, *Deeds v. Bayer*, caused
19 defendant Helling to retaliate against Mr. Deeds (#96, p. 11). Additionally, plaintiffs failed to
20 respond to defendants' qualified immunity argument, which results in plaintiffs' "concession that
21 defendant Helling is entitled to qualified immunity." *Id.* p. 12.

22 Prisoners have a right to meaningful access to the courts, and prison authorities may not
23 penalize or retaliate against an inmate for exercising this right. *Bradley v. Hall*, 64 F.3d 1276,
24 1279 (9th Cir. 1995). Prison officials may be sued under Section 1983 for retaliating against a
25 prisoner for exercising his or her constitutional rights. *Pratt v. Rowland*, 65 F.3d 802, 806 & n.4
26 (9th Cir. 1995). A retaliation claim involves five elements: "(1) An assertion that a state actor took
27 some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and
28 that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action

1 did not advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th
2 Cir. 2004).

3 Retaliation claims must be evaluated in light of the deference accorded to prison officials.
4 *Id.* at 807. The inmate bears the burden of pleading and proving the absence of legitimate
5 correctional goals for the alleged retaliatory action. *Id.* at 806; *Bruce v. Ylst*, 351 F.3d 1283, 1288
6 (9th Cir. 2003). The Ninth Circuit has recognized that “timing can properly be considered as
7 circumstantial evidence of retaliatory intent.” *Pratt*, 65 F.3d at 808.

8 Even viewing the evidence in the light most favorable to Mr. Deeds, he has presented no
9 conclusive evidence that defendant Helling retaliated against him. Defendant Helling states that
10 he did not suspend plaintiffs’ visitation privileges based on a settlement conference in another
11 case, and plaintiffs have pointed to no evidence that demonstrates otherwise. Further, defendant
12 Helling states that he did not recall any specific details about the case or whether he was a named
13 defendant in *Deeds v. Bayer*. *Id.* p. 20-21, exh. 1AA. Plaintiffs have presented no evidence to
14 contest that defendant Helling did not recall he was a named defendant or details of Mr. Deeds’s
15 previous lawsuit. The fact that Mr. Deeds filed numerous lawsuits against NDOC officials,
16 naming defendant Helling in one of these suits, is not sufficient evidence of retaliation.
17 Additionally, as discussed previously with regard to plaintiffs’ visitation claims, plaintiffs have
18 not demonstrated that the suspension of visitation does not advance a legitimate correctional goal.
19 Because Mr. Deeds has not introduced evidence sufficient to raise any issues of fact, defendants’
20 motion for summary judgment is granted as to count II.

21 **3. Count V - Deprivation of Personal Property**

22 Mr. Deeds alleges that on February 26, 2006, defendant Peabody confiscated his personal
23 property, pursuant to AR 711, which disallows inmate possession of excessive personal property
24 (#26, p. 9). Mr. Deeds claims that his property was confiscated pursuant to defendant Helling’s
25 policy. *Id.* Mr. Deeds also states that his laundry and headphones were stolen by other inmates
26 because of prison policies. *Id.* Through the alleged conduct, Mr. Deeds claims that defendants
27 have violated his “Fourteenth Amendment prohibition of unlawful deprivation of personal
28 property in authorized manner.” *Id.*

1 Defendants' position is that they did not violate Mr. Deeds's Fourteenth Amendment
2 rights because he does not have a liberty interest in the possession of excessive property (#84, p.
3 23-24). Defendants claim that defendant Peabody "properly followed AR 711 in confiscated
4 plaintiff's personal property....[and] the enforcement of AR 711 does not create an 'atypical,
5 significant' hardship on inmates compared to the normal incidents of prison life." *Id.* p. 27.
6 Defendants also argue that Mr. Deeds fails to allege that defendant Helling had any personal
7 involvement in the deprivation of plaintiff's personal property, as required by section 1983. *Id.*
8 p. 28. Defendants also assert that they are entitled to qualified immunity. *Id.* p. 28-29.

9 Plaintiffs respond that defendant "Peabody manipulated procedures to deny Deeds a
10 hearing, and by not charging him with being in possession of contraband did exceed his
11 discretion" (#104, p. 22). Plaintiffs claim that defendant Peabody placed Mr. Deeds's appliances
12 into his storage boxes, which is why he appeared to have excess property. *Id.* Further, defendant
13 Peabody completed "an unauthorized property form in lieu of conducting a 'full inventory.'" *Id.*
14 Defendant Peabody also filed a notice of charges that was "demonstrably false." *Id.* Plaintiffs
15 claim that the deprivation of Mr. Deeds's property was a "dramatic departure from the conditions
16 of confinement." *Id.* p. 23. Further, defendant Helling's policies allow property to be confiscated
17 and stolen. *Id.*

18 Defendants reply that plaintiffs fail to demonstrate the creation of a liberty interest
19 regarding possession of excess property (#96, p. 13). Further, "even if plaintiff could demonstrate
20 a protected liberty interest, which he cannot, he cannot demonstrate a liberty interest which 'will
21 be generally limited to freedom from restraint which...impose atypical and significant hardship
22 on the inmate in relation to the ordinary incidents of prison life.'" *Id.* Moreover, Mr. Deeds has
23 not demonstrated a deprivation of procedural due process as he was able to choose from four
24 options in an unauthorized property notification and use the inmate grievance system. *Id.* p. 15.
25 Defendants also contend that plaintiffs' allegations with regard to no limit being placed on the
26 amount of property Mr. Deeds is allowed to purchase at the inmate canteen in order to increase
27 profits for the prison are irrelevant. *Id.* p. 14-15. Defendants again argue that defendant Helling
28 was not personally involved in confiscating plaintiff's property and that both defendants are

1 entitled to qualified immunity. *Id.* p. 17-18.

2 **(a) Nevada Revised Statutes § 212.010(2) and 209.239**

3 Nevada Revised Statute § 212.010(2) reads: “A conviction of crime does not work a
4 forfeiture of any property, real or personal, or of any right or interest therein unless otherwise
5 specifically authorized by statute.” Nev. Rev. Stat. § 209.239 specifically authorizes the warden
6 of each institution to adopt regulations regarding personal property of inmates. It states in full:

7 Subject to the approval of the Director, the warden of each institution and
8 manager of each facility shall adopt and issue a written policy statement
9 regulating the personal property which an offender may retain in his
10 possession, including, but not limited to: (1) Procedures necessary to
11 ensure that offenders are permitted to retain reasonable amounts of
12 personal property, consistent with security and proper functioning of the
13 institution or facility. (2) Necessary procedures for the careful handling
14 and secure storage of the personal property of an offender.

12 **(b) AR 711 and IP 7.00**

13 AR 711 governs an inmate’s right to possession of personal property (#84, exh. 2A).
14 Among others, the AR states as its purposes: “To prescribe limitations for the volume and type
15 of personal property to be maintained in an inmate’s possession,” and “to limit the amount of
16 personal property, which may be acquired and retained consistent with the available space, health,
17 sanitation, and security needs.” AR 711, p. 1-2 (#84, exh. 2A). The AR allows inmates to possess
18 property that will fit into one approved footlocker or one fire retardant box that does not exceed
19 24"x18"x18". Inmates may also possess three appliances that do not need to fit in the boxes. *Id.*,
20 AR 711.01.1.4.1. The AR states that “inmates may not accumulate excess property that cannot
21 be properly stored.” *Id.* Further, “[p]roperty limitations will be enforced any time movement and
22 inventory of property is required, i.e., placed in more restrictive housing, transferred, etc. It will
23 be the inmate’s responsibility to dispose of any excess property per AR 711.” *Id.* AR
24 711.01.1.4.2. AR 711.08 lists all authorized property and sets forth which types of property must
25 be purchased through the inmate canteen (e.g. appliances). *Id.* AR 711.08. The final section of
26 AR 711.08 states: **“INMATES PURCHASE ALL ITEMS AT THEIR OWN RISK. Upon
27 transfer to another institution, inmates will be required to dispose of all property not
28 permitted at the receiving location. *Id.* AR 711.08.1.12 (emphasis in original).**

1 IP 7.00 also governs an inmate's possession of personal property. It sets forth "specific
2 rules unique to the Northern Nevada Correctional Center" and indicates "the amounts and variety
3 of personal property permitted and the safe keeping, disposal and storage of inmate personal
4 property." *Id.*, exh. 2C, IP 7.00. The IP sets out the type of property inmates are allowed to
5 possess. IP 7.00©. It also describes how inmates' property should be handled during housing
6 changes. IP 7.00(D). Specifically, the IP states that "when an inmate is placed in more restrictive
7 housing or otherwise prevented from returning to their housing assignment to control their
8 property, staff shall secure the property as soon as reasonably possible." *Id.* § (D)(3). Further, the
9 IP specifies that "inmates purchase all items at their own risk. Upon transfer, restrictions may be
10 place[d] on items not permitted due to custody, location, and property limitations. *Id.* § (D)(3)(g).

11 (c) Analysis

12 Even viewing the evidence in the light most favorable to Mr. Deeds, he has not
13 demonstrated that defendants violated his due process rights. AR 711 does not create a liberty
14 interest that is protected by the due process clause. The court has set out the law related to state-
15 created liberty interests in its discussion of visitation privileges above, and it will not repeat the
16 law here. The enforcement of AR 711 and confiscation of excess personal property does not
17 create an atypical hardship on inmates in relation to the ordinary incidents of prison life. The
18 evidence presented demonstrates that defendant Peabody followed the procedures set out in AR
19 711 when he confiscated plaintiff's excess property. Defendant Peabody filed an "Unauthorized
20 Property Notification" form listing plaintiff's property that did not fit in his "box or tub" (#84,
21 exh. 2G). AR 711 does not require an officer to file a notice of charges against an inmate for
22 possession of inmate property. Rather, an inmate is given four options of what he wants the prison
23 to do with his excess property. *Id.*, see also AR 711.02.1.2.1. Mr. Deeds chose to appeal the
24 unauthorized property notification and was given the opportunity to appeal through the inmate
25 grievance process (#84, exh. 2I-2O). Defendants responded to plaintiff's grievances. Mr. Deeds
26 does not have a right to unlimited property. Nevada Revised Statute § 209.239 gives prison
27 officials the authority to impose regulations that limit an inmate's possession of property to a
28 reasonable amount, consistent with security and functioning of an institution. Nev. Rev. Stat. §

1 209.239(1). NDOC created AR 711 pursuant on this statute. Defendants did not violate Mr.
2 Deeds's due process rights when they confiscated his excess property pursuant to AR 711.
3 Therefore, the court grants defendants' motion for summary judgment (#84) as to count V.

4 III. CONCLUSION

5 Based on the foregoing and for good cause appearing, the court concludes that:

- 6 1. There are no issues of fact as to whether defendant Helling violated plaintiffs'
7 substantive due process rights when he suspended their visitation privileges.
8 Plaintiffs do not have a substantive due process right to unfettered visitation and
9 they have failed to demonstrate that defendants' policy of not allowing former
10 employees to visit inmates is not reasonably related to a legitimate penological
11 interest. Further, defendant Helling is entitled to qualified immunity;
- 12 2. There are no issues of fact as to whether defendant Helling suspended plaintiffs'
13 visitation privileges in retaliation for Mr. Deeds's having previously filed a
14 lawsuit against him. Plaintiffs have presented no evidence of retaliatory intent;
- 15 3. There are no issues of fact as to whether defendants violated Mr. Deeds's due
16 process rights when they confiscated his personal property pursuant to AR 711,
17 because plaintiff does not have a liberty interest in possession of unlimited
18 property and defendants properly followed the provisions of AR 711 when they
19 confiscated plaintiff's excess property;

20 As such, the court recommends that defendants' motion for summary judgment (#84) be
21 **GRANTED** as to all counts, and plaintiff's motion for summary judgment re: visitation (#71) be
22 **DENIED**.

23 The parties are advised:

24 1. Pursuant to 28 U.S.C. § 636(b)(1)© and Rule IB 3-2 of the Local Rules of Practice,
25 the parties may file specific written objections to this report and recommendation within ten days
26 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
27 Recommendation" and should be accompanied by points and authorities for consideration by the
28 District Court.

2. This report and recommendation is not an appealable order and any notice of appeal
pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
judgment.

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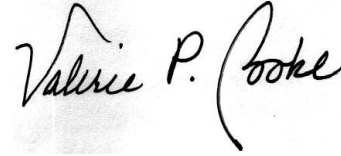
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IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that defendants' motion for summary judgment (#84) be **GRANTED** as to all counts, and plaintiff's motion for summary judgment re: visitation (#71) be **DENIED**.

DATED: February 19, 2009.



UNITED STATES MAGISTRATE JUDGE