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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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VINCENT PINDER,

Plaintiff,

v.

RENEE BAKER, *et al.*,

Defendants.

Case No. 3:13-cv-00572-MMD-WGC

ORDER ACCEPTING AND ADOPTING
REPORT AND RECOMMENDATION
OF MAGISTRATE JUDGE
WILLIAM G. COBB

I. SUMMARY

Before the Court is the Report and Recommendation of United States Magistrate Judge William G. Cobb (dkt. no. 80) (“R&R”) relating to Defendants’ Motion for Summary Judgment (dkt. no. 66). Defendants filed a partial objection. (Dkt. no. 81.) Plaintiff filed an objection (dkt. no. 83) to which Defendants have responded (dkt. no. 84), and Plaintiff has replied (dkt. no. 85). Plaintiff has moved for an extension of time to file his objection. (Dkt. no. 82.) The Court will grant Plaintiff’s extension request.

II. BACKGROUND

Plaintiff, proceeding *pro se*, is an inmate in the custody of the Nevada Department of Corrections (“NDOC”). Plaintiff asserts claims pursuant to 42 U.S.C. § 1983 concerning conduct that occurred while he was held at Ely State Prison. After screening pursuant to 28 U.S.C. § 1915A, the Court permitted Plaintiff to proceed on his four claims: count I for first Amendment retaliation against Mullins; count II for First

1 Amendment retaliation against Witter; count III for Eighth Amendment excessive force
2 claim; and count IV for First Amendment retaliation against Moore. (Dkt. no. 3.) The
3 Court also found that Plaintiff states a colorable supervisory liability claim against Baker.
4 (*Id.* at 8.)

5 The R&R recites in details Plaintiff's allegations and the parties' respective
6 arguments presented in the briefs relating to Defendants' Motion. (Dkt. no. 80.) The
7 Court adopts these discussions from the R&R.

8 **III. LEGAL STANDARD**

9 This Court "may accept, reject, or modify, in whole or in part, the findings or
10 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
11 timely objects to a magistrate judge's report and recommendation, then the court is
12 required to "make a *de novo* determination of those portions of the [report and
13 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). Where a party
14 fails to object, however, the court is not required to conduct "any review at all . . . of any
15 issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985).
16 Indeed, the Ninth Circuit has recognized that a district court is not required to review a
17 magistrate judge's report and recommendation where no objections have been filed.
18 *See United States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the
19 standard of review employed by the district court when reviewing a report and
20 recommendation to which no objections were made); *see also Schmidt v. Johnstone*,
21 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003) (reading the Ninth Circuit's decision in
22 *Reyna-Tapia* as adopting the view that district courts are not required to review "any
23 issue that is not the subject of an objection."). Thus, if there is no objection to a
24 magistrate judge's recommendation, then the court may accept the recommendation
25 without review. *See, e.g., Johnstone*, 263 F. Supp. 2d at 1226 (accepting, without
26 review, a magistrate judge's recommendation to which no objection was filed).

27 "The purpose of summary judgment is to avoid unnecessary trials when there is
28 no dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*,

1 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the
2 pleadings, the discovery and disclosure materials on file, and any affidavits “show that
3 there is no genuine issue as to any material fact and that the moving party is entitled to
4 a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An
5 issue is “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-
6 finder could find for the nonmoving party and a dispute is “material” if it could affect the
7 outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
8 242, 248 (1986). Where reasonable minds could differ on the material facts at issue,
9 however, summary judgment is not appropriate. *See id.* at 250-51. “The amount of
10 evidence necessary to raise a genuine issue of material fact is enough ‘to require a jury
11 or judge to resolve the parties’ differing versions of the truth at trial.’” *Aydin Corp. v.*
12 *Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l Bank v. Cities Serv.*
13 *Co.*, 391 U.S. 253, 288-89 (1968)). In evaluating a summary judgment motion, a court
14 views all facts and draws all inferences in the light most favorable to the nonmoving
15 party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir.
16 1986).

17 The moving party bears the burden of showing that there are no genuine issues
18 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once
19 the moving party satisfies Rule 56’s requirements, the burden shifts to the party
20 resisting the motion to “set forth specific facts showing that there is a genuine issue for
21 trial.” *Anderson*, 477 U.S. at 256. The nonmoving party “may not rely on denials in the
22 pleadings but must produce specific evidence, through affidavits or admissible
23 discovery material, to show that the dispute exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d
24 1404, 1409 (9th Cir. 1991), and “must do more than simply show that there is some
25 metaphysical doubt as to the material facts.” *Orr v. Bank of Am., NT & SA*, 285 F.3d
26 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
27 U.S. 574, 586 (1986)). “The mere existence of a scintilla of evidence in support of the
28 plaintiff’s position will be insufficient.” *Anderson*, 477 U.S. at 252.

1 **IV. DISCUSSION**

2 As an initial matter, the Court will address the briefs relating to Defendants'
3 objection. Local Rule IB 3-2(a) prescribes the procedure for a party to seek review of a
4 magistrate judge's decision involving matters over which the magistrate judge may not
5 make a final determination. It authorizes the filing of an objection to the magistrate
6 judge's decision and a response, but it does not provide for the filing of a reply. LR IB 3-
7 2(a). Here, Plaintiff filed an objection to the Magistrate Judge's R&R, as well as a reply
8 to Defendants' response. Because Local Rule IB 3-2(a) does not provide for such, the
9 Court will not consider Plaintiff's reply brief (dkt. no. 85) and orders that Plaintiff's reply
10 be stricken.

11 **A. Defendants' Objections**

12 The Magistrate Judge recommends denying summary judgment on the First
13 Amendment retaliation claim alleged in count II as it relates to the claim that Witter
14 withheld mail from Plaintiff's mother and the Eighth Amendment excessive force claim
15 alleged in count III, and on the issue of qualified immunity. (Dkt. no. 80.) Defendants
16 object to the recommendations relating to counts II and III, but not on qualified
17 immunity. The Court will adopt the recommendation to which Defendants do not object
18 and will conduct a *de novo* review to determine whether to adopt the recommendations
19 to which Defendants object. *See Thomas*, 474 U.S. at 149.

20 With respect to count I, the Magistrate Judge found that a genuine issue of
21 material fact exists as to whether Witter retaliated against Plaintiff by withholding and
22 then disposing of the mail from his mother because Plaintiff had filed several small
23 claims action against her. (*Id.* at 80.) The dispute that the Magistrate Judge found to be
24 material involves the reason Witter disposed of the mail from Plaintiff's mother. (*Id.*)
25 Plaintiff claims that when he received the unauthorized mail notice, he instructed Witter
26 to send it out at this expense. (Dkt. no. 4 at 8-9.) However, Witter claims that Plaintiff
27 initially instructed the mail staff to dispose of the mail. (Dkt. no. 66-5 at 3.) The
28 Magistrate Judge properly concludes that this factual dispute, along with the proximity in

1 time with the activities in the small claims actions, create a genuine factual dispute as to
2 whether Witter dispose of Plaintiff's mail as retaliation. (Dkt. no. 80 at 13.) Viewing this
3 evidence in the light most favorable to Plaintiff, a rational trier of fact could find that
4 Witter withheld and disposed of Plaintiff's mail because he filed small claims actions
5 against her. The Court agrees with the Magistrate Judge's findings.

6 Defendants argue that Plaintiff was attempting to misuse the mail and was able
7 to file his opposition to the motion to dismiss. (Dkt. no. 81 at 7.) But these arguments do
8 not show an absence of a material issue of fact on the issue of causation. Defendants
9 also challenge Plaintiff's claim as to Witter's motive for confiscating his mail. (*Id.*)
10 However, as the Magistrate Judge noted, whether there is a causal connection between
11 the destruction of Plaintiff's mail and the small claims actions is a factual issue that must
12 be decided by the jury.

13 The Magistrate Judge recommends denying summary judgment on count III
14 because the question of whether the force used was excessive involves material factual
15 disputes. More precisely, the dispute centers on the parties' competing versions of what
16 transpired in the approximately 4 minutes between the time Defendants entered
17 Plaintiff's cell to extract him to when they escorted Plaintiff out. (Dkt. no. 80 at 20.)

18 Defendants argue that there they were compelled to decide whether to maintain
19 order given Plaintiff's conduct (i.e., Plaintiff had refused orders to surrender his
20 restraints and Plaintiff and his cellmates had stacked boxes in front of the door). This
21 argument misses the point because Plaintiff's claim of excessive force centers on the
22 force used after the officers entered Plaintiff's cell. (Dkt. no. 4 at 10-11.) Indeed, Plaintiff
23 conceded that he would not surrender to be uncuffed until he spoke with Baker. (Dkt.
24 no. 76 at 10.)

25 Defendants also contend that the Magistrate Judge failed to give proper
26 deference to the officers in determining the force necessary to maintain order. When a
27 prison official stands accused of using excessive physical force in violation of the cruel
28 and unusual punishment clause of the Eighth Amendment, the question turns on

1 whether force was applied in a good-faith effort to maintain or restore discipline, or
2 maliciously and sadistically for the purpose of causing harm. *Hudson v. McMillian*, 503
3 U.S. 1, 7 (1992) (citing *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). In determining
4 whether the use of force was wanton and unnecessary, it is proper to consider factors
5 such as the need for application of force, the relationship between the need and the
6 amount of force used, the threat reasonably perceived by the responsible officials, and
7 any efforts made to temper the severity of the forceful response. *Id.* at 7.

8 The video footage of the extraction does not support Defendants' version of the
9 events, or of Plaintiff's versions. (Dkt. no. 69 (second video).) Plaintiff contends that he
10 was restrained after the officers entered his cell and did not resist being restrained, but
11 the officers nevertheless beat him. (Dkt. 4 at 10-11; dkt. no. 76 at 43, 45.) Plaintiff also
12 disputes Defendants' contention that he attacked them by using and swinging a sock
13 with soap inside as a weapon. (Dkt. no. 76 at 37, 43.) The video footage does not give
14 the viewer a picture of what transpired after officers entered Plaintiff's cells. The door to
15 the cell appeared to have been blocked with boxes of papers. However, all that is visible
16 after the officers entered the cell is their movements and it appears they were hovering
17 over Plaintiff for a few minutes but even this is not clear. While noises could be heard,
18 including banging and yelling, the sources of the noises are not clear. Viewing Plaintiff's
19 allegations and drawing all inferences in his favor, a rational trier of fact could find that
20 Plaintiff had complied with the order to be restrained after the officers entered the cell to
21 extract him, but they purportedly beat him anyways. A rational trier of fact could infer
22 from these facts that the officers did not have a good faith reason to use force and did
23 so maliciously for the purpose of causing harm. Accordingly, the Court agrees with the
24 Magistrate Judge and will adopt his recommendation.

25 **B. Plaintiff's Objections**

26 The Magistrate Judge recommends granting summary judgment on count I,
27 count II as it relates to withholding of mail stored in Plaintiff's laundry bag, and count IV,
28 and on the claim that Baker should be liable as a supervisor. (Dkt. no. 80.) Plaintiff

1 objects to the Magistrate Judge's recommendations with respect to count I, count II and
2 supervisory liability.¹ The Court will therefore adopt the Magistrate Judge's
3 recommendation to grant summary judgment on count IV. *See Thomas*, 474 U.S. at
4 149.

5 The Magistrate Judge recommends granting summary judgment because of the
6 absence of evidence to show a causal connection between Plaintiff's filing of his
7 grievances and the searches of his cell. (Dkt. no. 80 at 8.) First, the Magistrate Judge
8 found Plaintiff failed to dispute Mullins' claim that he was not aware that Plaintiff had
9 filed any grievance against him. (*Id.*) Second, the Magistrate Judge found that the legal
10 work that was removed on March 30, 2013, was improperly stored in Plaintiff's laundry
11 bag, and Plaintiff failed to refute Mullins' claim that to the extent he took any blank
12 grievance forms on May 11, 2013, he only took them because they were excessive, and
13 the legal boxes taken on May 25, 2013, were not used to store legal documents. (*Id.*)
14 Plaintiff raises several arguments in his objection which the Court will address.

15 In count I, Plaintiff alleges he filed a grievance against Mullins on March 8 and 16
16 2013, April 13 and 17, 2013, and May 20, 2013. (Dkt. no. 4 at 6-7.) He alleges that
17 Mullins and another officer conducted a search of his cell on March 30, 2013, April 11,
18 2013, and May 11 and 25, 2013, in retaliation. (*Id.*) NDOC policy provides that searches
19 may be conducted at any time and at a minimum once a month. (Dkt. no. 66-3 at 2.)
20 The March 30 search revealed that Plaintiff was storing his legal work in his laundry bag
21 and using it as weight.² (*Id.*) The May 25 search resulted in legal boxes being taken
22 away because they were not used to store legal documents. (*Id.* at 3.) In his objection,
23

24 ¹Plaintiff's objection includes a discussion on qualified immunity. (Dkt. no. 83 at
25 15-23.) However, the Magistrate Judge found that a genuine dispute of material facts
26 exists to preclude a finding of qualified immunity in favor of Witter, Rigney, Montoya,
27 Hammock and Deeds. (Dkt. no. 80 at 25-26.) This recommendation is in favor of
28 Plaintiff. The Court will assume that Plaintiff does not object to the ruling. In any event,
the Court agrees with the Magistrate Judge's recommendation.

²In his objection, Plaintiff claims he had to store legal documents in his laundry
bag because of the limited space in his cell. (Dkt. no. 83 at 6.) Plaintiff's reason for
using the laundry bag not for its intended purpose is irrelevant here.

1 Plaintiff contends he refuted that legal boxes were being used improperly by demanding
2 that Mullins provide an unauthorized property form, which Mullins refused. (Dkt. no. 83
3 at 6.) Plaintiff claims Mullins did not log the May 25 search in the log book as required
4 under NDOC policy. (Dkt. no. 76 at 10, 42.) Mullins could not recall whether he did.
5 (Dkt. no. 77 at 3.)

6 Prisoners have a First Amendment right to file prison grievances and to pursue
7 civil rights litigation in the courts. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir.
8 2004). To state a viable First Amendment retaliation claim in the prison context, a
9 plaintiff must allege: “(1) [a]n assertion that a state actor took some adverse action
10 against an inmate (2) because of (3) that prisoner’s protected conduct, and that such
11 action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action
12 did not reasonably advance a legitimate correctional goal.” *Id.* at 567-68.

13 Plaintiff argues that he has offered evidence in his opposition brief to show that
14 Mullins was aware that he had filed a grievance against Mullins. (Dkt. no. 83 at 5.) In
15 Plaintiff’s March 8, 2013 grievance, Plaintiff complained about Mullins’ alleged abusive
16 comment in response to Plaintiff’s request to be taken back to his cell. (Dkt. no. 76 at
17 48-49.) In the informal level response, Moore denied the grievance, stating: “Staff deny
18 your allegations of abusive language.” (*Id.* at 50.) In response to Plaintiff’s first level
19 grievance signed on March 20, 2013, Baker stated, in pertinent part: “These allegations
20 have been investigated and there is no proof that these statements were made to you
21 by the Senior Officer.” (*Id.* at 51-52.) Viewing this evidence in the light most favorable to
22 Plaintiff, a rational trier of fact could find that Mullins was aware by March 20, 2013, that
23 Mullins had filed a grievance against him because he was informed of it during the
24 investigation that led to the denial of the grievance. This finding would support the
25 causation element of Plaintiff’s retaliation claim.

26 As to the other elements, the Court finds that Plaintiff has offered evidence to
27 raise a triable issue of fact. The March 30 and subsequent searches were close in time
28 to Plaintiff’s March 8 grievance of which Mullins was aware. While NDOC policy

1 provides for searches to be conducted at a minimum once a month, Plaintiff's cell was
2 searched four times during a 30 day period: March 30, 2013, April 11, 2013, and May
3 11 and 25, 2013. Defendants do not offer evidence to dispute Plaintiff's contention that
4 Mullins failed to log the May 25 search in violation of NDOC's policy. Mullins' claim that
5 he could not recall whether he did is not enough to resolve a material issue of fact.
6 Finally, that the searches on March 30, May 11 and May 25 resulted in items being
7 properly confiscated may not lend legitimacy to the searches if they were conducted as
8 a pretext for retaliation.³ Viewing these evidence and drawing all inferences in favor of
9 Plaintiff, a rational trier of fact could find that the searches chilled Plaintiff's exercise of
10 his First Amendment rights and did not advance a legitimate correctional goal.

11 In sum, the Court finds that Plaintiff's has met his burden in opposing summary
12 judgment and will deny summary judgment on count I.

13 The Magistrate Judge recommends granting summary judgment as to the First
14 Amendment retaliation claim against Witter in count II that is predicated on the
15 withholding of legal mail stored in Plaintiff's laundry bag because Plaintiff offers no
16 evidence to dispute the reason the legal mail was taken — it was improperly stored in
17 Plaintiff's laundry bag. (Dkt. no. 80 at 11-12.) Plaintiff contends that he stored his legal
18 mail in the laundry bag because there was no space in his cell. (Dkt. no. 83 at 8.)
19 However, that he may have a reason for using the laundry bag in an unauthorized
20 manner does not show that the legal mail was improperly confiscated or withheld. The
21 Court agrees with the Magistrate Judge's recommendation and will grant summary
22 judgment on this part of count II.

23 The Magistrate Judge found that the undisputed evidence does not support
24 imposition of supervisory liability. (Dkt. no. 80 at 22-25.) Plaintiff argues that he has

25 ³Defendants argue that the items taken during the searches advanced a
26 legitimate penological interest. (Dkt. no. 84 at 4.) While the items improperly stored in
27 legal boxes and laundry bags may have been properly confiscated pursuant to
28 legitimate NDOC policy, the question is whether Plaintiff has shown that the purportedly
random searches themselves did not reasonably advance a legitimate correctional goal.
That the searches led to items being properly confiscated does not justify an action that
may have been taken to chill Plaintiff's exercise of his constitutional rights.

1 offered evidence to show that Baker was deficient in the training, supervision or control
2 of her subordinates. (Dkt. no. 83 at 11-15.) The Court agrees with the Magistrate
3 Judge's findings and will adopt his recommendation.

4 **V. CONCLUSION**

5 It is therefore ordered, adjudged and decreed that the Report and
6 Recommendation of Magistrate Judge William G. Cobb (dkt. no. 80) be accepted and
7 adopted in in part and rejected in part. Defendants' Motion for Summary Judgment (dkt.
8 no. 66) is granted in part and denied in part as follows:

9 (1) The Motion is denied as to the First Amendment retaliation claim against
10 Mullins in count I;

11 (2) The Motion is granted as to the First Amendment retaliation claim against
12 Witter in count II that is predicated on the withholding of legal mail stored in
13 Plaintiff's laundry bag and is denied as to the claim in count II that is predicated
14 on the withholding of mail sent in by Plaintiff's mother;

15 (3) The Motion is denied as to the Eighth Amendment excessive force claim in
16 count III against Rigney, Montoya, Hammock and Deeds;

17 (4) The Motion is granted as to the retaliation claim in count IV against Moore;
18 and


19 (5) The Motion is granted as to the supervisory liability claim against Baker.

20 It is further ordered that Plaintiff's reply (dkt. no. 85) is stricken.

21 It is further ordered that Plaintiff's motion for extension of time (dkt. no. 82) is
22 granted *nunc pro tunc*.

23 The Clerk is directed to grant judgment in favor of Defendants Moore and Baker
24 in accordance with this Order.

25 DATED THIS 23rd day of March 2016.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE