

1

2

3

4

5

6

## UNITED STATES DISTRICT COURT

7

## DISTRICT OF NEVADA

8

\* \* \*

9

JOSEPH MIZZONI,

Case No. 3:15-cv-00313-MMD-VPC

10

Plaintiff,

ORDER REGARDING REPORT AND  
RECOMMENDATION OF  
MAGISTRATE JUDGE  
VALERIE P. COOKE

11

v.

12

C/O ALLISON, *et. al.*,

13

Defendants.

14

**I. SUMMARY**

15

Before the Court is the Report and Recommendation of United States Magistrate Judge Valerie P. Cooke (ECF No. 71) (“R&R”) relating to Defendants’ Motion for Summary Judgment (“Defendants’ Motion”) (ECF No. 52). The Magistrate Judge recommends granting summary judgment on Plaintiff’s retaliation claim and denying summary judgment on Plaintiff’s excessive force claim. (ECF No. 72.) Defendants filed their partial objection to the R&R. (ECF No. 74.) Defendant Steven Crowder filed a joinder to Defendants’ partial objection. (ECF No. 79.) Plaintiff did not file an objection or a response to Defendants’ partial objection.

16

17

18

19

20

21

22

23

**II. BACKGROUND**

24

After screening pursuant to 28 U.S.C. § 1915A, the Court permitted Plaintiff to proceed on his First Amendment retaliation claim and Eighth Amendment excessive force claims as alleged in his first amended complaint. (ECF No. 41.) The excessive force claim arises from an incident on March 28, 2015 at Northern Nevada Correction Center (“NNCC”) where Plaintiff alleged he was severely beaten with his head slammed

25

26

27

28

1 against the concrete floor several times, dragged across the prison yard, among other  
2 things, after a search of his cell. (ECF No. 40 at 5-6, 10-11, 14-16.) The relevant facts  
3 are recited in the R&R, which this Court adopts. (ECF No 71.)

### 4 **III. LEGAL STANDARD**

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

23 “The purpose of summary judgment is to avoid unnecessary trials when there is  
24 no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,  
25 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the  
26 pleadings, the discovery and disclosure materials on file, and any affidavits “show there  
27 is no genuine issue as to any material fact and that the movant is entitled to judgment as  
28 a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is

1 “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-finder could  
2 find for the nonmoving party and a dispute is “material” if it could affect the outcome of  
3 the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49  
4 (1986). Where reasonable minds could differ on the material facts at issue, however,  
5 summary judgment is not appropriate. See *id.* at 250-51. “The amount of evidence  
6 necessary to raise a genuine issue of material fact is enough ‘to require a jury or judge to  
7 resolve the parties’ differing versions of the truth at trial.’” *Aydin Corp. v. Loral Corp.*, 718  
8 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l Bank v. Cities Service Co.*, 391 U.S.  
9 253, 288-89 (1968)). In evaluating a summary judgment motion, a court views all facts  
10 and draws all inferences in the light most favorable to the nonmoving party. *Kaiser*  
11 *Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

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

#### 24 **IV. DISCUSSION**

25 The Magistrate Judge recommends granting summary judgment on Plaintiff’s First  
26 Amendment retaliation claim and denying summary judgment on Plaintiff’s Eighth  
27 Amendment excessive force claim asserted against Defendants C. Smith, Ardinger,  
28 Allison, Henley, Roberson, John Hill, Lee Grider, Hightower, Crowder, and Garnica. The

1 Court will adopt the recommendation to grant summary judgment on Plaintiff's retaliation  
2 claim to which Plaintiff does not object. *See Thomas*, 474 U.S. at 149. The Court will  
3 conduct a *de novo* review to determine whether to adopt the recommendation to deny  
4 summary judgment on the excessive force claim to which Defendants object.

5 Defendants raise two primary arguments in their objection. First, Defendants  
6 argue that they presented evidence which prove, both directly and circumstantially, that  
7 they did not use excessive force and therefore satisfy their burden of production.  
8 Defendants argue in the alternative that the evidence they offered does not support  
9 Plaintiff's allegations and therefore show a lack of any evidence supporting Plaintiff's  
10 case. Defendants contend that under either scenario, they have satisfied their burden of  
11 production and are entitled to summary judgment because Plaintiff did not provide  
12 evidence sufficient to create a genuine issue of material fact, particularly when they  
13 offered extensive documents, including incident reports, disciplinary reports, medical  
14 records, pictures, sworn declarations, in support of their Motion. Second, Defendants  
15 argue that Plaintiff cannot rely on his own declaration to create a genuine issue of  
16 material fact. However, both arguments are grounded on Defendants' contention that  
17 Plaintiff's declaration is conclusory and insufficient to defeat summary judgment. The  
18 Court disagrees.

19 First and foremost, the Court must consider Plaintiff's FAC as well as his  
20 opposition brief to determine whether a genuine issue of material fact exists to preclude  
21 summary judgment. *See Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004) (finding that  
22 courts must consider a pro se party's contentions offered in motions and pleadings as  
23 evidence in his opposition to the motion for summary judgment "where such contentions  
24 are based on personal knowledge and set forth facts that would be admissible in  
25 evidence, and where [he] attested under penalty of perjury that the contents of the  
26 motions or pleadings are true and correct.") Plaintiff attested to the facts stated in his  
27 opposition to Defendants' motion and signed his opposition brief under penalty of ///  
28 perjury. (ECF No 60 at 35.) Plaintiff also signed his FAC under penalty of perjury. In fact,

1 the FAC makes detailed allegations as to the excessive nature of the force used.<sup>1</sup> Thus,  
2 Defendants' argument that Plaintiff failed to offer evidence in opposition to their Motion is  
3 without merits.

4 Moreover, the Court agrees with the Magistrate Judge's findings that the  
5 competing evidence presented by the parties show versions of the events that "clearly  
6 differ." (ECF No. 71 at 10.) Plaintiff describes the force used as "maliciously and  
7 sadistically" applied and causing him injuries and continued pain. (ECF No. 60 at 10-11,  
8 21.) Viewing all facts and drawing all inferences in Plaintiff's favor, the Court agrees with  
9 the Magistrate Judge that a reasonable jury could find that the force used was  
10 excessive.

11 **V. CONCLUSION**

12 It is therefore ordered, adjudged and decreed that the Report and  
13 Recommendation of Magistrate Judge Valerie P. Cooke (ECF No. 71) is accepted and  
14 adopted in full.

15 It is further ordered that Defendants' Motion for Summary Judgment (ECF No. 52)  
16 is granted as to Plaintiff's retaliation claim and denied as to Plaintiff's excessive force  
17 claim.

18 DATED THIS 15<sup>th</sup> day of August 2017.

19   
20 \_\_\_\_\_  
21 MIRANDA M. DU  
22 UNITED STATES DISTRICT JUDGE  
23

24 \_\_\_\_\_  
25 <sup>1</sup>For example, Plaintiff alleged that shortly after Smith hand wrestled him to the  
26 ground and placed him in handcuffs, several other correctional officers, including Allison,  
27 Ardingner, and Henley, arrived, jumped on Plaintiff, stepped on him, dragged him, put him  
28 in a chokehold, and Henley began to slam Plaintiff's head into the concrete floor  
repeatedly, saying "you hit my c/o?" (ECF No. 40 at 5.) According to Plaintiff, correctional  
officers, including John Hill, Lee Grider, Hightower, Henley, and Crowder, then dragged  
Plaintiff from the unit, across the courtyard, to RMF Unit 8 (*id.* at 6, 14-15); and Hill  
pulled Plaintiff's left thumb backwards to break it and the other correctional officers were  
bending his cuffed wrists upward which caused severe pain (*id.*)