UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TIDIANE KONE,

Plaintiff-Appellant,

v.

JUSTIN BROWN, Lieutenant; COX, SSgt; LAPINSKAS; KAMARA, Sgt.; FOLTZ, Officer; GACEL, Officer; JOSHUA KOMAREK; KEVIN NUSHART; DOYLE BRUECKNE; BAUER, Officer; BRIAN MORRIS; JASON BROWN; COX; P. BAUER; COOP STORE, Spring Creek Coop Store; W. LAPINSKAS,

Defendants-Appellees.

No. 22-35797

D.C. No. 3:19-cv-00307-RRB
District of Alaska,
Anchorage

ORDER

Before: FRIEDLAND, SANCHEZ, and H.A. THOMAS, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing.

Dkt. No. 45.

The petition for panel rehearing, Dkt. No. 45, is **DENIED.**

AB

NOT FOR PUBLICATION

FILED

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MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Submitted March 19, 2024**
San Francisco, California

Before: FRIEDLAND, SANCHEZ, and H.A. THOMAS, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Alaska state prisoner Tidiane Kone appeals pro se from the district court's order denying his motion for summary judgment and granting summary judgment to defendants-appellees in his 42 U.S.C. § 1983 action alleging violations of his First, Eighth, and Fourteenth Amendment rights. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a grant of summary judgment. *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th Cir. 2004). We affirm.[1]

1. The district court did not err in granting summary judgment to defendants-appellees on Kone's First Amendment retaliation claim against Brown and Cox, his Eighth Amendment failure to protect claim against Komarek, Cox, and Foltz, or his Fourteenth Amendment equal protection claim against Komarek, Cox, and Foltz. Kone failed to raise a genuine dispute of material fact as to whether Brown and Cox's allegedly adverse actions were causally connected to his complaints or advanced a legitimate correctional purpose. *See Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (setting forth the elements of a retaliation claim in the prison context). Kone failed to raise a genuine dispute of material fact as to whether Komarek, Cox, and Foltz were deliberately indifferent to a "substantial risk of serious harm" to Kone's safety. *See Farmer v. Brennan*, 511 U.S. 825, 834–37

[1] We **DENY** Kone's three motions filed on February 6, 2023, and March 22, 2023. Dkt. Nos. 19–20, 25. Because Kone filed his reply brief within fourteen days of the answering brief's filing, we **DENY** as moot Kone's motion for an extension of time to file his reply brief, filed June 8, 2023. Dkt. No. 36.

(1994). And Kone also failed to raise a genuine dispute of material fact as to whether he was purposefully discriminated against on the basis of race. *See Furnace v. Sullivan*, 705 F.3d 1021, 1030–31 (9th Cir. 2013).

2. To the extent Kone asserts claims that the district court dismissed in its Third Screening Order or that he otherwise did not properly raise before the district court, we do not consider them. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]n appellate court will not consider issues not properly raised before the district court."); *see also id.* (arguments not raised in an opening brief are forfeited).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

TIDIANE KONE, Plaintiff, vs. FOLTZ et al., Defendants.	Case No. 3:19-cv-00307-RRB **ORDER OF DISMISSAL DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT & GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Dockets 75, 78, 92)**

I. INTRODUCTION

Plaintiff, a self-represented prisoner, seeks relief pursuant to 42 U.S.C. § 1983 for violation of his civil rights, claiming violations of the First, Eighth, and Fourteenth Amendments.[1] After several amendments to the Complaint, Plaintiff proceeds "only on his claims against Officer Foltz, Sgt. Komarek, and Sgt. Cox for the violation of his Eighth Amendment right to be protected from harm and for racial discrimination under the Equal Protection Clause [of the Fourteenth Amendment], and against Lt. Brown and Sgt. Cox for retaliation for the exercise of his rights under the First Amendment and to voluntarily dismiss all other claims and Defendants in this case."[2]

[1] *See* Dockets 19, 21, 25.
[2] Docket 25 at 1.

Plaintiff moves for summary judgment pursuant to Rule 56(c).[3] Defendants have filed a cross-motion for Summary Judgment.[4]

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[5] The moving party bears the initial burden of proof for showing that no fact is in dispute.[6] If the moving party meets that burden, then it falls upon the non-moving party to refute with facts that would indicate a genuine issue of fact for trial.[7] When considering the evidence on a motion for summary judgment, courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing summary judgment.[8]

Plaintiff also seeks leave to file a Third Amended Complaint, which Defendants oppose.[9]

II. DISCUSSION

Plaintiff argues generally that Defendants "routinely, voluntarily, and in a negligent manner" discriminated and retaliated against him for filing a grievance, that they lied during investigations, and repeatedly fired him from his prison employment.[10]

Defendants argue, in response, that "[d]espite considerable leeway in [Plaintiff's] pleadings due to his status as a *pro se* inmate litigant, . . . his claims are

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[3] Dockets 75, 76.
[4] Docket 78, 79.
[5] Fed. R. Civ. P. 56(a).
[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
[7] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).
[8] *Scott v. Harris*, 550 U.S. 372, 378 (2007).
[9] Dockets 92, 95, 96.
[10] Docket 76.

conclusory and without corresponding evidence."[11] They argue that the evidence shows "a pattern of Mr. Kone grieving or threatening civil action when he was held accountable or when a DOC decision did not reach his preferred outcome."[12] Defendants request, on the other hand, that this Court grant their motion for summary judgment and dismiss all claims against all Defendants with prejudice, arguing that there is no genuine issue of material fact, and that Defendants are entitled to judgement as a matter of law.

A. Equal Protection Clause of the Fourteenth Amendment

To state a claim for a violation of the Equal Protection Clause, a plaintiff must show that "defendants acted with an intent or purpose to discriminate against [him] based upon membership in a protected class."[13] Racial discrimination in the assignment of prisoner jobs violates equal protection.[14] Accordingly, Plaintiff must show that Defendants contemplated his race when making decisions related to his prison employment.

Plaintiff provides a summary of periods of prison employment from May 2019 through April 2020.[15] In that twelve-month period, Plaintiff was employed on five separate occasions, anywhere from two days to more than two months at a time. During those periods, Plaintiff also filed multiple complaints and grievances, noted herein. Defendants argue that Plaintiff's grievances "merely merged vague and conclusory

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[11] Docket 79 at 32.
[12] *Id.*
[13] *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013).
[14] *Walker v. Gomez*, 370 F.3d 969, 973 (9th Cir. 2002).
[15] Docket 76 at 11. Plaintiff makes no argument with respect to an earlier period of employment between August and December 2018.

discrimination allegations with his continued quest to transfer" to a different facility, and that "a list of [employment] dates alone fails to prove that the intent or purpose for terminating his employment was to discriminate against him based upon his race."[16]

Plaintiff worked as a Mod Worker from May 8 to June 18, 2019.[17] However, Defendant Brown removed Plaintiff from his position, apparently for his own protection, after Plaintiff reported that an inmate housed in the Mod had threatened his life.[18] Plaintiff then was employed for a week in July 2019, but that employment was terminated because Plaintiff had an "Administration Segregation classification of 10" due to disciplinary actions, and therefore he was not eligible for work as a Mod Worker.[19]

During the remaining three periods of employment, Plaintiff was fired each time for poor behavior. Plaintiff was employed from September 6 to October 11, 2019,[20] when documentation supports that he was fired from that position for lying to staff.[21] Shortly thereafter, on November 27, 2019, Plaintiff filed his Complaint in this matter.[22] Plaintiff again was employed as a Mod Cleaner on December 17, 2019,[23] but another incident report dated two days later documented Plaintiff flinging dirty water into other

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[16] Docket 86 at 18.

[17] Docket 76 at 11.

[18] Docket 79 at 23, 29, citing Dockets 78-11, 78-12, 78-13 (Exhibits J, K, L). On two occasions in July and August 2019, Plaintiff requested a transfer because of gang activity and concerns about his safety. Docket 76-1 at 7–8; Docket 78-3 (Exhibit B).

[19] Docket 78-12 at 2 (Exhibit K).

[20] Docket 76 at 11.

[21] Docket 79 at 30 (citing Docket 78-16 (Exhibit O)). Plaintiff filed a grievance on October 4, 2019, claiming he had been denied access to the law library and that he was the victim of "corruption," requesting a transfer to another facility, and threatening to file a civil lawsuit. Documentation shows that he was not denied access to the law library. Docket 78-6 (Exhibit E).

[22] Docket 1.

[23] Docket 76 at 11.

prisoners' cells while he was supposed to be working, which was captured on video.[24] He again was terminated.[25] And, finally, Plaintiff was employed on February 8, 2020,[26] until another fight was documented on April 13, 2020.[27] The following day, a correctional officer fired him "for dumping toilet waste into [another prisoner's] cell."[28]

On June 5, 2020, Plaintiff filed his First Amended Complaint.[29] Plaintiff then filed another grievance on July 13, 2020, alleging racial discrimination related to employment decisions.[30] His grievance was dismissed on September 14, 2020, when the Standards Administrator determined that Plaintiff "did not show where the Facility . . . failed to follow department policy with respect to work opportunities and assignments," and concluded that Plaintiff's request for relief "that the facility treat you like every other inmate was approved and appropriately addressed in the initial investigation."[31]

In order to prevail on a § 1983 claim alleging race discrimination, Plaintiff first must prove that Defendants purposefully discriminated against him because of race.[32] "[D]etermining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[33] But Plaintiff has

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[24] Docket 78-5 (Exhibit D at 3).

[25] Docket 78-5 (Exhibit D at 4). The incident report states "all the Alpha prisoners were mad at Mr. Kone" after Kone "brought the bucket and brush used to clean the showers . . . and started dipping the brush in the bucket" and flinging the dirty water through the cell hatch.

[26] Docket 76 at 11.

[27] Docket 78-4 (Exhibit C).

[28] Docket 78-5 (Exhibit D at 5–6).

[29] Docket 10.

[30] Docket 78-5 (Exhibit D).

[31] Docket 78-5 at 11.

[32] *Lowe v. City of Monrovia*, 775 F.2d 998, 1010 (9th Cir. 1985), *amended*, 784 F.2d 1407 (9th Cir. 1986).

[33] *Id.* at 1011.

offered no evidence, and very little substantive argument, to justify his accusation that the actions of Defendants were racially motivated, rather than responsive to Plaintiff's documented behaviors. One alleged occasion of the use of the "n" word is not sufficient to show that Plaintiff was fired from his job on multiple occasions over the course of several months as a result of racial discrimination. The Court finds that "[w]hen considered in context with the reasons why he was fired, Mr. Kone's behavior was clearly the motivating factor,"[34] and agrees with Defendants that the decisions made by them regarding housing location and employment appear to be no more than "an effort to prevent Mr. Kone from harassing other inmates and to prevent the other inmates from retaliating against Mr. Kone."[35]

In light of the foregoing, Plaintiff's claims for violation of Equal Protection under the Fourteenth Amendment are **DISMISSED.**

B. Eighth Amendment Failure to Protect

Although the Constitution does not mandate "comfortable prisons," the Supreme Court has clearly stated that it also does not permit "inhumane ones."[36] The prohibition of "cruel and unusual punishments," under the Eighth Amendment prohibits excessive physical force against prisoners, requires officials to provide humane conditions of confinement, including "adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates[.]"[37]

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[34] Docket 86 at 18.
[35] Docket 79 at 21.
[36] *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal citations omitted).
[37] *Id.*

"[A] prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious,'" resulting in the denial of "the minimal civilized measure of life's necessities."[38] Second, "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." To violate the Cruel and Unusual Punishments Clause, a prison official must have a "sufficiently culpable state of mind," specifically one of "deliberate indifference" to inmate health or safety.[39] Claimant "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."[40] "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact."[41] Accordingly, "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of *and* disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[42] Prison officials also may avoid liability by proving that they "responded reasonably to the risk, even if the harm ultimately was not averted."[43] In short, "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."[44]

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[38] *Id.* at 834.
[39] *Id.*
[40] *Id.* at 842.
[41] *Id.*
[42] *Id.* at 837.
[43] *Id.* at 844–45.
[44] *Id.* at 845.

The Ninth Circuit distills the foregoing into a four-part test. Plaintiff must prove the following by a preponderance of the evidence:

1. The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;

2. Those conditions put the plaintiff at substantial risk of suffering serious harm;

3. The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious;[45] and

4. By not taking such measures, the defendant caused the plaintiff's injuries.[46]

Plaintiff alleges three specific incidents that violated the Eighth Amendment. Defendants argue that Plaintiff has failed to meet his burden of establishing through admissible evidence that there are no genuine issues of material fact in relation to each element of his failure to protect claim. Defendants' motion for summary judgement, incorporated by reference, seeks summary judgement on Plaintiff's Eighth Amendment Claim against Sergeant Komarek, Sergeant Cox, and CO Foltz, as a matter of law.[47]

[45] At this step, the defendant's conduct must be both objectively unreasonable and done with a subjective awareness of the risk of harm. In other words, the defendant must have known facts from which an inference could be drawn that there was a substantial risk of serious harm, and the defendant must have actually drawn that inference.

[46] *See* Ninth Circuit Model Criminal Jury Instruction 9.28.

[47] Docket 86 at 21 (citing Docket 79 at 12–22).

(1) March 2019 incident

Plaintiff alleges that he got into a fight with two other inmates in Fox Mod on March 16, 2019, and that no officers intervened.[48] Plaintiff alleges that Defendants Foltz and Komarek instead watched the fight from the office and then transferred him to segregation.[49] He further alleges that after he got out of segregation and was transferred to a different Mod, Defendant Foltz intentionally moved the "same gang" into that Mod six months later.[50] Plaintiff alleges that Defendant Komarek intentionally allowed racial conflicts to continue, instead of removing him from danger.[51]

Defendants Foltz and Komarek both deny that they watched the fight from the office. Defendant Foltz states that he "was not even on-shift" when the events transpired, and that his decisions regarding housing and employment were "clearly an effort to prevent Mr. Kone from harassing other inmates and to prevent the other inmates from retaliating against Mr. Kone."[52] Defendant Komarek argues that he learned about the fight approximately nine hours after it occurred by watching the video, not by watching from his office.[53]

Plaintiff's conclusory allegations that Defendants observed the fight from the office is wholly without evidentiary support, and contrary to the incident reports that were filed.[54] However, even if Plaintiff's allegations that Defendants watched the fight but did

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[48] Docket 19-3 at 2.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Docket 79 at 21.
[53] Docket 79 at 15.
[54] Docket 78-2 (Exhibit A).

not intervene are true, descriptions of the video footage of the fight describe Plaintiff as the aggressor. Plaintiff has alleged neither a "substantial risk of suffering serious harm," of which Defendants should have been aware, nor has he alleged any actual injuries from the fight. Moreover, Plaintiff's complaint that the "gang members" were transferred into his Mod six months later, without more, does not meet the Eighth Amendment standard. Accordingly, the Eight Amendment Claims against Defendants Foltz and Komarek are **DISMISSED**.

(2) October 2019 incident

Plaintiff wrote three RFIs to the superintendent, on October 11, 14, and 15, 2019, because he wanted "to report this ongoing discrimination to State Trooper."[55] He also filed grievances on October 14 and 16, 2019, requesting to call AST for a "complaint against staff for discrimination and corruption."[56] He claims that Defendant Cox called Plaintiff the "n" word, to encourage inmate harassment against him, and that Defendant Cox then showed this RFI request to speak with State Troopers to other inmates.[57] Defendant Cox argues that Plaintiff's conclusory claim that he failed to protect him is legally insufficient, without evidence, and should be dismissed.[58] Specifically, although Cox denies all of the factual allegations, he argues that even if he showed other inmates Plaintiff's request to speak with State Troopers, "nothing about Mr. Kone's desire to make a civil complaint to law enforcement over termination of his employment would be of

[55] Docket 78-8 (Exhibit G).
[56] Exhibit G at 3–4.
[57] Docket 19 at 23; Docket 78-9 (Exhibit H).
[58] Docket 79 at 20.

import to any other inmate or pose a risk of threat to [Plaintiff]."[59] Similarly, Defendant Cox argues that even if he had used a racial slur (which he denies), doing so would not constitute an intentional decision with respect to Plaintiff's conditions of confinement, nor put Plaintiff at substantial risk of suffering serious harm.[60]

Defendant Cox is correct. Neither of these allegations rises to the level of an Eighth Amendment violation. Plaintiff has not made any connection between the alleged disclosure of his complaint to other inmates, and any substantial risk of serious harm. Moreover, "verbal harassment generally does not violate the Eighth Amendment.[61] This claim against Defendant Cox is **DISMISSED.**

(3) December 2019 incident

Finally, Plaintiff alleges that in December 2019, Defendant Foltz took Plaintiff's request to call law enforcement regarding "racial discrimination" by officers and disclosed the request to rival inmates in an attempt to create racial conflict "by telling them I try to snitch on him."[62] Subsequently, those inmates threw human waste on Plaintiff. Defendant Foltz argues that even if he "had shown other inmates an RFI request to report a civil complaint to the State Troopers [which he denies], nothing about the subject of Mr. Kone's RFI would be of import to any other inmate or pose a substantial risk of serious harm."[63] Defendant Foltz argues that Plaintiff's conclusory claim that he failed to protect

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[59] Docket 79 at 19.
[60] Docket 79 at 20.
[61] *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), opinion amended on denial of reh'g, 135 F.3d 1318 (9th Cir. 1998).
[62] Docket 19 at 3.
[63] Docket 79 at 22.

him in violation of the Eighth Amendment is legally insufficient, without evidence, and should be dismissed with prejudice, as a matter of law.[64] The Court agrees. Plaintiff has not drawn any connection between Defendant Foltz's alleged actions, and a substantial risk of serious harm. Moreover, as discussed above, on December 19, 2019, Plaintiff was caught on video flinging dirty water into other prisoners' cells, which he stated was a response to those prisoners flinging urine on him.[65] The ongoing feud among prisoners was described in the report as a "two way street."[66] Once again, Plaintiff has not made a connection between the alleged behavior of the Defendant and any substantial risk of serious harm. The Eighth Amendment Claim against Defendant Foltz is **DISMISSED.**

C. First Amendment Retaliation

A First Amendment retaliation claim has five elements. Plaintiff must allege that:

1. The retaliated-against conduct is protected;
2. The defendant took an adverse action against the plaintiff;
3. There is a causal connection between the adverse action and the protected conduct;
4. The "official's acts would chill or silence a person of ordinary firmness from future First Amendment activities"; *and*

[64] Docket 79 at 22.
[65] Docket 78-5 at 3 (Exhibit D).
[66] *Id.*

5. The prison official's retaliatory action did not "advance legitimate goals of the correctional institution."[67]

Plaintiff claims Defendant Brown terminated his employment in retaliation for filing a complaint with the Alaska State Commission for Human Rights ("ASCHR").[68] Defendants agree that filing an ASCHR complaint is protected conduct and Plaintiff alleged an adverse action—termination of his employment.[69] However, Defendants dispute the element of causation, and argue that Plaintiff "has failed to satisfy his burden to establish, through admissible evidence, that there are no genuine issues of material fact in relation to each element of his First Amendment Retaliation claim."[70]

As discussed above, Plaintiff worked as a Mod Worker from May 8 to June 18, 2019.[71] He was removed from that position, arguably for his own protection, after an inmate housed in the Mod had threatened Plaintiff's life.[72] Defendants argue that Plaintiff sent a complaint to the Alaska State Commission for Human Rights ("ASCHR") on June 24, 2019, *after* Lt. Brown terminated Mr. Kone's employment.[73] Accordingly, they reason that Plaintiff's retaliation claim against Brown is factually impossible where his employment was terminated *before* he filed his ASCHR complaint.

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[67] *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012).

[68] Docket 76 at 4. Plaintiff states that this complaint was made in March 2018, but there is no evidence of a complaint from that date, or that Plaintiff was employed as early as March 2018.

[69] Docket 86 at 9.

[70] Docket 86 at 10–11.

[71] Docket 76 at 11.

[72] Docket 79 at 23, 29.

[73] Docket 78-14 (Exhibit M). Plaintiff here refers to a complaint made in March 2019, Docket 76 at 7, but this date is not included in Exhibit M. In any event, if Plaintiff did file an ASCHR complaint in March, his employment commenced after that date. Therefore, there would be no causal connection between this complaint and his firing.

On July 5, 2019, Plaintiff filed another complaint with the Human Rights commissioner against Defendant Brown. On August 21, 2019, Plaintiff requested a transfer to another facility, again due to concerns about his safety.[74] Plaintiff later was employed on three additional occasions, beginning September 6, 2019.[75] All of the foregoing suggest that not only was Plaintiff's First Amendment right not chilled, but subsequent employment suggests that even if Plaintiff filed his complaint prior to his termination, it did not prevent Plaintiff's future employment in the prison system.

As for Defendant Cox, Plaintiff asserts that during the ASCHR investigation of Defendant Brown, Cox routinely "retaliated" against Plaintiff by firing him and calling him a racial slur.[76] On October 29, 2019, Mr. Kone filed a grievance listing various complaints, including that Defendant Cox allegedly fired him four times in two months.[77] But Plaintiff's job history, based on his own filing, shows that Plaintiff was fired only once in the prior two months, when he was fired just a few days earlier for lying.[78] The Court agrees with Defendants that Plaintiff's allegation that Defendant Cox terminated his employment in retaliation for the ASCHR discrimination complaint against Lt. Brown is mere conjecture. Plaintiff provides no evidence, other than his own suspicion, that shows Sergeant Cox knew or cared about Plaintiff's ASCHER complaint against Brown.[79] There

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[74] Docket 78-3 (Exhibit B).
[75] Docket 76 at 11.
[76] *Id.* at 6.
[77] Docket 78-7 at 1 (Exhibit F).
[78] Docket 76 at 11. Plaintiff's tendency to embellish and exaggerate lends further doubt to his allegations as a whole.
[79] Docket 79 at 26.

is no evidence, or even a plausible argument, that shows Cox took adverse action against Plaintiff because he engaged in protected conduct.

In the case of both Defendants Cox and Brown, there is no evidence of a causal connection between the adverse action and the protected conduct. Moreover, as also discussed above, extensive documentation shows that Plaintiff was fired for cause on multiple occasions. Therefore, the prison officials' actions, even if retaliatory in some way, advanced "legitimate goals of the correctional institution,"[80] and thus do not support a First Amendment violation.

For the foregoing reasons, Plaintiff's First Amendment retaliation claims are **DISMISSED**.

D. Motion to Amend Complaint

Plaintiff asks for leave to amend his Complaint for a third time.[81] As Defendants explain, such amendment will cause undue delay and prejudice Defendants, and appears futile.[82] Plaintiff seeks to add two new defendants based on completely unrelated allegations that occurred nearly two years after those alleged in his Second Amended Complaint against the current Defendants. The Motion at Docket 92 is untimely and appears to be futile on its face. It is therefore hereby **DENIED**.

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[80] *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012).
[81] Docket 92.
[82] *See* Docket 96.

III. CONCLUSION

When considering the evidence on a motion for summary judgment, courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing summary judgment.[83] Here, the Court has considered the facts in the light most favorable to Plaintiff. Even so, the Court finds that Plaintiff has failed to state a claim for a violation of the Equal Protection Clause, because he cannot show that "defendants acted with an intent or purpose to discriminate against [him] based upon membership in a protected class."[84] Plaintiff must show that Defendants contemplated his race when making decisions related to his prison employment, but all of the documentation supports a finding that Plaintiff was fired for cause, or removed from his position for his safety. This documentation of firing for cause also precludes Plaintiff's ability to show causation between his firing and any acts by Defendants that Plaintiff thinks are retaliatory, thus defeating any First Amendment claim. Finally, Plaintiff has not shown all of the elements of an Eighth Amendment claim, most importantly the "substantial risk of serious harm." Even assuming the relevant Defendants were present when Plaintiff says they were, Plaintiff has not alleged a "substantial risk of serious harm," or any actual injuries associated with his Eight Amendment claims of failure to protect.

Accordingly, Plaintiff's Motion for Summary Judgment at Docket 75 is **DENIED**. Defendants' Motion for Summary Judgment at Docket 78 is **GRANTED**. The

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[83] *Scott v. Harris*, 550 U.S. 372, 378 (2007).
[84] *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013).

Motion for Leave to Amend Complaint at Docket 92 is **DENIED**, as are the motions at Docket nos. 100 and 104. This matter is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED this 30th day of September, 2022, at Anchorage, Alaska.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE
Senior United States District Judge