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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

PHILLIP J. LYONS,

Plaintiff,

vs.

PATRICIA LEONHARDT, *et al.*,

Defendants.

Case No. **03:05-cv-0400-JCM (VPC)**

DEFENDANTS' TRIAL BRIEF

Defendants PAUL LUNKWITZ, SANTERREN WARD, and JAY BARTH ("Defendants"), by and through counsel, Catherine Cortez Masto, Attorney General of the State of Nevada, William J. Geddes, Senior Deputy Attorney General, and Brian Hagen, Deputy Attorney General herein submit *Defendants' Trial Brief.* This *Trial Brief* is made pursuant to the following Points and Authorities, the pleadings and papers on file in this action, and any oral arguments the Court may entertain at any hearing set for this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case is an inmate-civil-rights litigation, wherein Plaintiff Phillip J. Lyons ("Lyons") has challenged the conditions of his confinement as violative of the U.S. Constitution. (*See*

generally Lyons's Amended Complaint, Docket No. 61.) Lyons alleges that, on March 9, 2005, he was housed with another inmate, Marcel McKnight, at High Desert State Prison ("HDSP") in violation of the prison's rules. (*Plaintiff's Amended Complaint* ("*Complaint*"), Docket No. 053, p. 13, ¶ 57.) Lyons had just arrived at HDSP earlier in the evening, having been transferred from Lovelock Correctional Center ("LCC") in Lovelock, Nevada. (*Complaint*, Docket No. 053, p. 13, ¶ 61.) HDSP is somewhat close[1] to the Las Vegas Area, and the purpose of Lyons' transfer to HDSP on March 9, 2005 was to enable him to attend a small claims trial at the Las Vegas Justice Court. (*See Complaint*, Docket No. 053, p. 13, ¶ 61.)

Thus, upon being placed in a cell with inmate McNight at HDSP on the evening of March 9, 2005, Lyons complained to prison officials that the two inmates should not have been housed together, without first having been classified to be cellmates at HDSP. (*See Complaint*, Docket No. 053, p. 13, ¶¶ 62-64.) In point of fact, Lyons was incorrect about this classification matter because, under prison rules, prison officials actually had *three (3) days* after Lyons' arrival at HDSP, to complete his reclassification, and such a reclassification actually occurred *the very next day*, March 10, 2013, *within one (1) day of his arrival at HDSP*. *See* NDOC Administrative Regulation ("AR") 506 and 507.[2] When communicating this

[1] Las Vegas is about fifty-eight miles from High Desert State Prison. (Source: https://maps.google.com/maps?ie=UTF-8&gl=us&daddr=High+Desert+State+Prison,+22010+Coldcreek+Rd,+Indian+Springs,+NV+89018&saddr=Las+Vegas,+NV&panel=1&f=d&fb=1&dirflg=d&geocode=KdF99aSCt76AMaN5s9Xm1cw6%3BIee71MyF3kr-&ei=E0uRUbCOH6WZiAKZo4GYBw&ved=0CC8Q-A8wAA (last accessed May 13, 2013).

[2] Under an analysis of either NDOC Administrative Regulation ("AR") 506 or AR 507, prison officials had three (3) days to classify inmate Lyons and McKnight, after their arrival at HDSP. AR 506 (**Trial Exhibit No. 561**) actually governs here, but inmate Lyons preferred to characterize his confinement as "essentially" one of administrative segregation, which he argued is governed by AR 507 (**Trial Exhibit No. 502**). Again, under either scenario, three (3) days is afforded to prison officials to classify inmate Lyons. Here Lyons and McKnight were actually classified the very next day—within this three-day period—mooting Lyons' concerns about classification at HDSP. *See* AR 506.03.1.2.2.1 (upon an inmate's transfer/arrival from another institution or facility, a classification hearing will be conducted within three (3) working days); *see also* AR 507.02.1.2 *See* AR 507.02.1.2 (inmates placed in administrative segregation will be initially housed in a single cell whenever possible); and AR 507.02.1.3 (inmates placed in administrative segregation temporarily will receive an initial administrative segregation hearing within three (3) working days of that temporary placement). Administrative segregation is a form of separation from the general population to promote security and order of the prison. *See* AR 507.02.1.2 (inmates placed in administrative segregation will be initially housed in a single cell whenever possible); and AR 507.02.1.3 (inmates placed in administrative segregation temporarily will receive an initial administrative segregation hearing within three (3) working days of that temporary placement).

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complaint to prison officials, Lyons used an "emergency grievance," not an ordinary grievance. (*Complaint*, Docket No. 053, p. 14, ¶ 64 ("Plaintiff submitted an emergency grievance regarding the issue of being celled with another inmate without either inmate having been classified").) Mere classification issues are supposed to be complained about in *ordinary grievances*, not emergency grievances. *See generally* AR 740 (Inmate Grievance Process), including at AR 740, *Definition of "Regular Grievance"* (**Trial Exhibit 503** at **DEF 0029**) (a regular grievance is "[a] grievance that poses no immediate threat to the welfare, safety, or security of an inmate when processed through the normal procedural channels"); *see* AR 740.1.2 (**Trial Exhibit 503** at **DEF-0037**) (inmates may use the inmate grievance procedure to resolve addressable inmate claim including, but not limited to personal property, property damage, disciplinary appeals, personal injuries, any other tort claim, or civil rights claim relating to conditions of institutional life); *see* AR 740.1.4.1.1 (**Trial Exhibit 503** at **DEF 0039**) (the inmate shall file an informal grievance concerning classification issues within ten (10) calendar days of the issue arising); *see* AR 740, *Definition of "Emergency Grievance"* (**Trial Exhibit 503** at **DEF 0028**) (an Emergency Grievance is "[a] grievance that poses an immediate threat to the welfare, safety, or security of an inmate when processed through the normal channels"); and *see generally* AR 740.1.7 (emergency grievance procedure), including at AR 740.1.7.1 (**Trial Exhibit 503** at **DEF 0043**) ("[e]mergency grievances . . . shall be immediately delivered to a shift supervisor no later than is reasonable and necessary to prevent serious injury or breach of security"). If an inmate were threatened by his cellmate upon their being housed together, the basis for an emergency grievance would lie in the "immediate threat" to the physical safety of the inmate, not mere quibbling over classification issues. *See* AR 740.1.2; AR 740.1.4.1.1; AR 740, *Definition of "Regular Grievance"*; AR 740, *Definition of "Emergency Grievance"*; and AR 740.1.7.1.

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A. The Emergency Grievance

The emergency grievance ("Emergency Grievance") stated, in relevant part:

> I have been placed in the cell with another inmate without either of us having been classified upon our arrival a few hours ago. Thus we are essentially ad-seg until classified otherwise. AR and I.P. 507 forbids the double celling of ad-seg inmates. In fact, my celly was ad-seg at LCC. Ad-seg inmates are to be housed in a single cell according to AR and IP 507. This current double celling is thus a violation of AR and IP 507 and is a breach of institutional security.
>
> One of us must be moved to another cell right away to single occupancy until properly classified.

(*Emergency Grievance*, **Trial Exhibit 529** at **DEF 0303**.) In response, former defendant Lieutenant Powe—who has since been dismissed from this case—wrote the following words on the Emergency Grievance: "Not an Emergency Grievance, Submit[ ] thru normal channels." (*Id.* (top of page).)[3]

B. Alleged Response to Grievance as Retaliatory

According to Lyons, Defendants unlawfully retaliated against him, in response to his request for a written copy of his Emergency Grievance:

- "Defendant Lunkwitz then immediately ordered Plaintiff, in a very angry and authoritative manner, to get on the floor, face down." (*Complaint*, Docket No. 053, p. 15, ¶ 70);
- "All of the Defendants entered the cell. Plaintiff felt great pressure of knees on his thighs, buttocks, and lower back area as the Defendants pounced atop him and snatched his arms painfully behind him." (*Complaint*, Docket No. 053, p. 15, ¶¶ 70 and 73);
- "The Defendants placed handcuffs on Plaintiff's writs extremely tight, causing Plaintiff excruciating pain, as they snatched Plaintiff up from the floor and rushed him from the

[3] However, before receiving this *written* response, Lyons claims that the denial of the emergency grievance came by way of an *oral* response, over the intercom of his prison cell. (*See Complaint*, Docket No. 053, p. 14, ¶ 65.) Lyons claims that he wanted his response to be in *writing*, for purposes of appealing the matter through the grievance process. (*Complaint*, Docket No. 053, p. 14, ¶ 66.)

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cell to the unit office." (*Complaint*, Docket No. 053, p. 16, ¶ 74);

- "In the unit office, Defendants sat Plaintiff in a chair, roughly, causing excruciating pain to his tightly-cuffed wrists and hips area where Plaintiff has eight (8) bi-metal screws inserted." (*Complaint*, Docket No. 053, p. 16, ¶ 76);
- "Defendant Lunkwitz and a couple of the other Defendants then began lambasting and cursing Plaintiff for having written the emergency grievance." (*Complaint*, Docket No. 053, p. 16, ¶ 77);
- "Plaintiff was terrified, and after about five to ten minutes of this torture, Defendants returned Plaintiff to his cell, placing him on his knees with his face to the wall before finally removing the painful handcuffs." (*Complaint*, Docket No. 053, p. 16, ¶ 78);
- "Defendant Lunkwitz told Plaintiff not to write anymore grievances as he and the other Defendants left Plaintiff's cell." (*Complaint*, Docket No. 053, p. 16, ¶ 78);
- Defendants knew or should have known, that the use of excessive force, torture, and torment against Plaintiff in retaliation for Plaintiff having submitted a grievance was a violation of Plaintiff's First and Eighth Amendment rights of the U.S. Constitution, Article 1, Sections 6, 9, and 10 of the Nevada Constitution, and the provisions of 42 U.S.C. Section 1983.

(*Complaint*, Docket No. 053, p. 16, ¶ 77); and

- Plaintiff was denied and deprived of his First Amendment right to petition the government for redress of grievances and his Eighth Amendment right to be free from cruel and unusual and inhumane punishment by Defendants Powe, Lunkwitz, Barth, Ward and John Does 1-4 when they collectively, and/or individually, retaliated against Plaintiff through the exercise of torture, torment, and excessive force for Plaintiff having submitted an emergency grievance challenging the fact that Plaintiff had been celled with another inmate without either inmate having been previously classified in accordance with prison regulations.

(*Complaint*, Docket No. 053, p. 27, ¶ 103).

As fully argued in Defendants' Motions *in Limine*, all references to physical harm, excessive force, and psychological and emotional harm that Lyons claims to have experienced should be excluded at trial because this Court already concluded that any physical contact, relating to Lyons being removed from his cell, restrained with restraints, walked to the unit office, sat down in a chair in the unit office, and returned to his cell, were

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de minimis. As these physical injuries are *de minimis*, at best, they are not cognizable at law, and the PLRA further restricts Lyons' from seeking damages for mental or emotional harm. To be sure, the only claim remanded for trial is the retaliation claim, which focuses on whether Defendants told Lyons not to file any more grievances. (*See generally Defendants' Motions in Limine Nos. 1-10*, Docket Nos. 184-193.)

C. Defendants Flatly Deny the Allegations of Their Culpable Conduct

Defendants flatly deny having engaged in any culpable conduct. On March 9, 2005 at HDSP Inmate Lyons submitted an *emergency request* for an *emergency response* in a *non-emergency situation*. Lyons knew that his situation did not present an emergency; being housed with Marcel McKnight on March 9, 2005 posed no immediate threat to Lyons' welfare, safety, or security. *See* AR 740.1.2; AR 740.1.4.1.1; AR 740, *Definition of "Regular Grievance"*; AR 740, *Definition of "Emergency Grievance"*; and AR 740.1.7.1. Nevertheless, Lyons summoned the emergency response of prison officials, unnecessarily. Lyons' emergency request for an emergency response was made in the form of an emergency grievance. When prison officials responded to inmate Lyons' emergency grievance, they discovered what Lyons already knew: that his situation did not present an emergency or an immediate threat to his welfare, safety, or security. Accordingly, they returned the emergency grievance to Lyons, according to the rules. (*See* **Trial Exhibit 503** at **DEF 0043**, AR 740.1.7.2, at the bullet point (if the emergency grievance is "determined not to be an emergency, this fact will be noted in writing on the emergency form and returned to the inmate").) Indeed, Lt. Powe instructed inmate Lyons on the returned grievance to resubmit his improper emergency grievance as an ordinary, *non-emergency* grievance. (*See*, **Trial Exhibit 529** at **DEF 0303** (Lt. Ollie Powe wrote on Lyons' emergency grievance that was returned to him: "Not an Emergency Grievance, Submit[ ] thru Normal Channels").)

In this regard, Defendants removed Lyons from his cell and interviewed him in an office away from the presence of his cell-mate, to determine whether Lyons had any security or safety problems with his cell-mate, as suggested by Lyons' statements. (*See* **Trial Exhibit 525**, *Defendant Lunkwitz' response to Plaintiff's Interrogatories, at Response Nos. 4-7*, at

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DEF 0234-0235 (explaining the nature of Lunkwitz' interaction with Lyons on March 9, 2005 concerning his emergency grievance); and *see* **Trial Exhibit 512,** *Lunkwitz Informational Statement in response to Plaintiff's Grievance*, at **DEF-0160-61** (same).) Upon being interviewed, Lyons confirmed that he had *no problem* with his cell-mate, thereby confirming that his grievance did not present an emergency situation. (*See Id.*) Defendant Lunkwitz explained to Lyons why his grievance was not an emergency grievance. (*See Id.*) Lyons was returned to his cell without further incident. (*See Id.*) Defendant Lunkwitz did *not* instruct Lyons not to file any grievances, but instructed him to pursue his *non-emergency* grievance through the ordinary, non-emergency grievance channels. (*See Id.*)

II. EVIDENCE AND ARGUMENT AT TRIAL

Regarding an inmate's First Amendment rights in prison:

> [A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.

Pell v. Procunier, 417 U.S. 817, 817-818 (1974).

A plaintiff suing prison officials pursuant to § 1983 for retaliation must prove sufficient facts that show that:

> (1) the retaliated-against First Amendment conduct is protected;
> (2) the defendant took adverse action against plaintiff;
> (3) there is a causal connection between the adverse action and the protected conduct;
> (4) the act would chill or silence a person of ordinary firmness from engaging in future First Amendment activities; and
> (5) the conduct does not further a legitimate penological interest.

Davis v. Powell, 901 F.Supp.2d 1196, 1213 (S.D.Cal. 2012) (quoting *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir.2012)); *Lacey v. Maricopa County*, 693 F.3d 896, 917 (9th Cir. 2012) (First Amendment retaliation claims consider whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities).

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Legitimate penological interests include: (1) regulating how inmate grievances should be filed; (2) maintaining prison security; (3) the consistent enforcement of prison rules; (4) preserving internal order and discipline; (5) managing the prison facility; and (6) ensuring safety and maintaining order in the prison. *See Garcia v. Maddock*, 64 Fed.Appx. 10, 12-13, 2003 WL 1793323, 1 (9th Cir. 2003) (retaliation claim did not lie where an inmate's grievances were rejected because he failed to follow prison regulations requiring him to first attempt to resolve his complaint informally with a supervisory official, and "the prison's attempts to restrict excessive nonemergency grievances support penological goals"); *O'Keefe v. Van Boening,* 82 F.3d 322, 326 (9th Cir.1996); *Bell v. Wolfish,* 441 U.S. 520, 540 and 546 (1979); *Hargis v. Foster*, 312 F.3d 404, 410 (9th Cir. 2002) (prison authorities have a legitimate penological interest in the consistent enforcement of prison rules); and *Rean v. City of Las Vegas*, 2012 WL 2326124, 3 (D.Nev. 2012).

Prison practices must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. Because the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions, prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *See Redman v. County of San Diego*, 942 F.2d 1435, 1441 (9th Cir. 1991), *abrogated on other grounds, as recognized in McGrath v. Scott*, 250 F.Supp.2d 1218 (D.Ariz. 2003).

Again, with respect to inmate-retaliation claims, "adverse action" is action that "would chill a person of ordinary firmness" from engaging in that activity." *See Pinard v. Clatskanie School Dist.,* 467 F.3d 755, 770 (9th Cir.2006); *White v. Lee,* 227 F.3d 1214, 1228 (9th Cir.2000); *see also Lewis v. Jacks,* 486 F.3d 1025, 1028 (8th Cir.2007); *see also Thomas v. Eby,* 481 F.3d 434, 440 (6th Cir.2007); *Bennett v. Hendrix,* 423 F.3d 1247, 1250-51 (11th Cir.2005); *Constantine v. Rectors & Visitors of George Mason Univ.,* 411 F.3d 474, 500 (4th Cir.2005); *Gill v. Pidlypchak,* 389 F.3d 379, 381 (2d Cir.2004); *Rauser v. Horn,* 241 F.3d 330, 333 (3d Cir.2001). However, not every allegedly adverse action will be sufficient to support a

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claim under section 1983 for retaliation; the action taken by the defendant must be *clearly adverse* to the plaintiff. *See Harris v. Kim*, 2009 WL 691975, 4 -5 (E.D.Cal. 2009) (citations omitted). Thus, the "ordinary-firmness test" is designed to weed out trivial matters from those deserving the time of the courts as real and substantial violations of the First Amendment. The test is an objective test, not a subjective test. The question is not whether Lyons, himself, was deterred from engaging in further rights of protest. Rather, the question is "What would a person of 'ordinary firmness' have done in reaction to Defendants' conduct?" *See Davis v. Powell*, 901 F.Supp.2d 1196, 1213 (S.D.Cal. 2012) ("the test is objective") (quoting *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir.2012)); and *Garcia v. City of Trenton*, 348 F.3d 726, 728-729 (8th Cir. 2003) ("[t]he test is an objective one, not subjective" and "[t]he question is not whether the plaintiff herself was deterred . . . . [but] [w]hat would a person of 'ordinary firmness' have done . . . . " (citing *Bart v. Telford,* 677 F.2d 622 (7th Cir.1982)). In this regard, with respect to the "adverse-action" element of Lyons' retaliation claim, prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered "adverse." *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999).

Here, Lyons cannot prove the elements of his § 1983 claim. First, he cannot show that Defendants took adverse action against him, when they instructed him to resubmit his *emergency* grievance as a *non-emergency* grievance. Although a prisoner has a right to petition the government for redress of grievances, a prisoner does not have a constitutional right to a *particular grievance procedure*. *See Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (a prisoner has a right to petition the government for redress of grievances, including a right of access to the courts); and *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 n.6 (1977) (the state did not hamper the ability of prison inmates to communicate their grievances to correctional officials by banning union solicitation, which affected one several ways in which inmates may voice their complaints to and seek relief from prison officials, where the prison used an alternate method for such grievances, an inmate-grievance procedure). Thus, Lyons cannot pick whatever grievance method he prefers—an emergency

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grievance, where the prison requires an ordinary, non-emergency grievance. Lyons doesn't get to make up the rules for doing so, in prison. To be sure, while the NDOC *does have* an administrative grievance procedure, there are separate rules in place for filing emergency grievances and ordinary, non-emergency grievances. *See generally* AR 740. *See* AR 740.1.2; AR 740.1.4.1.1; AR 740, *Definition of "Regular Grievance"*; AR 740, *Definition of "Emergency Grievance"*; and AR 740.1.7.1. (*See* **Trial Exhibit 503**.)

Thus, here, the NDOC was within its rights to tell inmate Lyons to refile his failed emergency grievance as a non-emergency grievance, and this does not constitute adverse action. Doing so does not constitute a First Amendment violation because the prison was advancing its legitimate penological interest, which Plaintiff cannot disprove. Again, prison officials have a legitimate interest in controlling the manner and method of filing grievances in prison. *Garcia*, 64 Fed.Appx. at 12-13, 2003 WL 1793323 at 1; *O'Keefe,* 82 F.3d 322 at 326; *Bell,* 441 U.S. at 540 and 546; *Hargis*, 312 F.3d at 410; and *Rean*, 2012 WL 2326124 at 3.

Accordingly, Lyons cannot show that the prison took adverse action against him, nor can Lyons show that the prison did not advance a legitimate penological interest, when they instructed him to refile his emergency grievance. Defendant Lunkwitz is the *only* Defendant alleged to have told Lyons not to file any more grievance. Hence, Defendants Ward and Barth are *not even alleged* to have given Lyons an intimidating admonition not to file any more grievances; their only alleged role pertained to lambasting Lyons for having inappropriately filed an emergency grievance. Thus, Defendants Ward and Barth should be *dismissed from this case*, as Defendants requested. (*See generally Defendants' Motion in Limine No. 5*, at Docket No. 188.) As for Defendant Lunkwitz, he will establish at trial that he *never told Lyons not to file any more grievances*, but, instead, instructed him to refile his inappropriately-filed, emergency grievance as a *non-emergency* grievance. Hence, no retaliation claim lies here. As well, Defendants will show that—regardless of whether inmate Lyons' First Amendment Right to file grievances was subjectively chilled---a person of *ordinary firmness* would *not* have been chilled from filing grievances.

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III. DAMAGES

A. Compensatory Damages

Lyons cannot recover compensatory damages for *physical injuries* or any *emotional or psychological harm*, as argued at length in *Defendants' Motion in Limine No. 3*, at Docket No. 186. (*See* Docket No. 186.) As established in *Defendants' Motion in Limine No. 1*, Lyons' excessive-force claims and resulting *de minimis* injuries were dismissed, and those claims and damages are *not* part of the *retaliation claim* headed to trial. (*See generally Defendants' Motion in Limine No. 1*, §III.) Thus, Lyons will be unable to prove he suffered any actual, physical injuries at trial. On the emotional damages front, the Prison Litigation Reform Act ("PLRA") bars the recovery of mental or emotional damages, where an inmate has not shown a prior physical injury. *See* PLRA, codified at 42 U.S.C. 1997e(e). The PLRA prohibits the recovery of compensatory damages for mental or emotional injuries unless the prisoner has suffered a physical injury that is more than *de minimis*. *Oliver v. Keller*, 289 F.3d 623, 626-28 (9th Cir. 2002). Lyons' *de minimis* injuries are not part of the retaliation claim. Thus, for purposes of compensating "actual" injuries trial, Lyons has neither physical injuries nor emotional injuries on which to base a damages award. *See* PLRA 42 U.S.C. 1997e(e); and *Keller*, 289 F.3d 623, 626-28; and *Klein*, 2012 WL 275264 at 2 ("[f]urthermore, the Prison Litigation Reform Act ('PLRA') precludes an inmate from recovering monetary damages for mental and/or emotional injuries absent a showing of physical injuries) (citing 42 U.S.C. § 1997e(e)).

Moreover, even if Lyons were somehow able to include any *de minimis* physical injuries he allegedly experienced as a result of Defendants' use of force into his retaliation claim—which he cannot for all the reasons stated in *Defendants' Motion in Limine No. 1*—he would *still not be able* to recover *actual money damages* to compensate him for any *emotional/mental injuries* sustained in the retaliation claim. This is true because the PLRA would first require that Lyons show that his prior physical injuries were more than *de minimis*, and this he cannot do. *See* 42 U.S.C. 1997e(e); and *Oliver v. Keller,* 289 F.3d 623, 639 (9th Cir. (Nev.) 2002)); *Oliver*, 289 F.3d at 626-28 (requisite physical injury must be more than *de*

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minimis for purposes of § 1997e(e)). Accordingly, there can be no award for compensatory damages for any mental or emotional injuries that the Plaintiff might have suffered as a result of any constitutional violation, including mental anguish, nervous shock and all highly unpleasant mental reactions such as fright or grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea. *See* 42 U.S.C. 1997e(e); *Oliver*, 289 F.3d at 626-28; and *see* Docket No. 186); *McCollough*, 637 F.3d 939, 957 (9th Cir. 2011); and see 9th CIR. MODEL JURY INST. 5.6 (law which applies to this case authorizes an award of nominal damages, not exceeding one dollar).

B. Nominal Damages

However, Lyons *could* pursue *nominal damages* for any *mere violation* of his constitutional rights. *See U.S. v. Marolf* 173 F.3d 1213, 1219 (9th Cir. 1999) ("[n]ominal damages are available where the violation of a legal or constitutional right produces no "actual damages") (citing *Wilks v. Reyes,* 5 F.3d 412, 416 (9th Cir.1993); and *Draper v. Coombs,* 792 F.2d 915, 921–22 (9th Cir.1986)); and *Monclova-Chavez v. McEachern*, 2011 WL 39118, 5-6 (E.D.Cal. 2011). Thus, Lyons *might* recover nominal, and potentially punitive damages, at trial, but not ordinary, compensatory damages.

B. Punitive Damages

If Lyons were to recover an award punitive damages, it would *not* be awarded to compensate him, but to punish and deter Defendants from committing similar acts in the future. Yet, in such a scenario, Lyons has the burden of proving that punitive damages should be awarded, and the amount, *by clear and convincing evidence*.[4] This means that the jury must be persuaded by the evidence that the claim or defense is *highly probable*. This is a *higher standard of proof than proof* than the preponderance-of-evidence standard. In this regard, any award of punitive damages must be based on a jury finding that Defendant's conduct was *malicious, oppressive or in reckless disregard of Lyons' rights*. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects a

[4] Here, Defendants have requested a bifurcated trial on damages amount, if any are returned in the first phase of trial.

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complete indifference to the plaintiff's safety or rights, or the defendant acts in the face of a perceived risk that his actions will violate the plaintiff's rights under federal law. An act is oppressive if the person who performs it injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking advantage of some weakness or disability or misfortune of the plaintiff. If a jury finds that punitive damages are appropriate, the jury must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. *See generally* 9th Circuit Model Jury Instructions, Instruction 5.5 (abridged); *see* NRS 42.005 ("[e]xcept as otherwise provided in NRS 42.007, in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant"); and *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 450 (Nev. 2006); *see Lopez v. Northern Arizona Coca-Cola Bottling Co.*, 2001 WL 1105129, 2 (D.Ariz. 2001) (applying Arizona state tort law in a § 1983 action, regarding the burden of proof required on punitive damages, applying the "clear-and-convincing-evidence"); *Adams v.* Kraft, 828 F.Supp.2d 1090, 1117 (N.D.Cal. 2011) (applying California state tort law in a §1983 1action, regarding the burden of proof required on punitive damages, applying the "clear-and-convincing" evidence standard; *Castro v. Melchor*, 760 F.Supp.2d 970, 999-1000 (D.Hawai'i 2010) (recognizing that in a §1983 action, the burden of proof required for punitive damages was the "clear-and-convincing-evidence" standard); and JCM STOCK CIVIL JURY INSTRUCTION – 1.4 (defining the "clear-and-convincing-evidence" standard). Hence, even if liability were established at trial, Defendants would have proven at trial that their conduct was not was malicious, oppressive or in reckless disregard of Lyons' rights. Hence, no award of punitive damages would be appropriate here.

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IV. CONCLUSION

FOR THE FOREGOING REASONS, Lyons will fail to carry his burden of proof at trial, that Defendants unlawfully retaliated against him. In the event that liability is somehow established against Defendants, Lyons will not be able to seek *compensatory damages* for physical or psychological harm. In such a scenario, Lyons would *only* be entitled to *nominal damages* of one dollar, and *possibly* punitive damages. However, Lyons will *not* recover punitive damages because he will fail to carry his burden of proof—according to the clear-and-convincing standard—that Defendants' conduct was malicious, oppressive or in reckless disregard of Lyons' rights.

If Lyons is *somehow* awarded punitive damages, any determination of such a punitive-damages award would need to be made in a subsequent phase of trial. Defendants have requested a *bifurcated trial* on the punitive-damages phase of trial, to avoid *unnecessary delay* and unfair prejudice arising from the premature suggestion of an award of punitive damages. As well, the Defendants wealth or nono-wealth should not be a factor in assessing liability, but could serve to unfairly prejudice or bias jury members against them. Hence, any such determination should be determine by the jury, according to the rules for doing so, in a second phase of trial.

Respectfully submitted this 12th day of June 2013.

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CERTIFICATE OF SERVICE

I certify I am an employee of the Office of the Attorney General, State of Nevada, and that on this 12th day of June 2013, I served a copy of the foregoing *Defendants' Trial Brief*, by Electronic Court Filing via "CM/ECF" to:

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