

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Moore v. Akabike

Case No. 1:20-cv-01089-KES-HBK (PC) · No. 1:20-cv-01089 · Decided April 23, 2025

SUMMARY

The United States District Court for the Eastern District of California issued Findings and Recommendations addressing Defendant Dr. Nkiruka Akabike/Ndu’s motion for summary judgment in a prisoner’s 42 U.S.C. § 1983 action. The court assumed that Plaintiff’s foot condition constituted a serious medical need but recommended granting summary judgment because the record did not show deliberate indifference to his medical needs. The document also addresses Plaintiff’s claims concerning orthotics, orthopedic shoes, and a light-duty work restriction.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Helena M. Barch-Kuchta
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	April 23, 2025
DOCKET	1:20-cv-01089
DISPOSITION	affirmed
PROCEDURAL POSTURE	Findings and recommendations on Defendant's motion for summary judgment in a prisoner civil rights case.
STANDARD OF REVIEW	Summary judgment under Fed. R. Civ. P. 56(a); no genuine dispute of material fact and movant entitled to judgment as a matter of law.
PRECEDENTIAL VALUE	unpublished

TOPICS

- prisoners rights
- qualified immunity
- civil rights
- summary judgment
- civil procedure

PRACTICE AREAS

- civil rights
- prisoners rights
- health law
- civil procedure

QUESTIONS PRESENTED

1. Whether Defendant's denial of orthotics and a light-duty work chrono constituted deliberate indifference to Plaintiff's serious medical needs under the Eighth Amendment.
2. Whether Defendant is entitled to summary judgment on the § 1983 medical deliberate indifference claim.

HOLDINGS

1. Defendant was not deliberately indifferent because the undisputed facts show Plaintiff did not disclose foot pain to Defendant until March 2022, after which Defendant ordered therapeutic shoes, and Plaintiff failed to provide evidence that Defendant's chosen course of treatment was medically unacceptable under the circumstances.
2. No evidence shows Defendant knew of and disregarded an excessive risk to Plaintiff's health regarding the light-duty chrono request, as Plaintiff never formally requested one and the record shows only a request for orthotics.

FACTUAL BACKGROUND

Plaintiff Steven Paul Moore, a state prisoner, alleged Defendant Dr. Nkiruka Akabike (now Ndu) acted with deliberate indifference by denying him orthotics and a light-duty work chrono. Plaintiff had severe foot conditions including arthritis and a ganglion cyst. In 2018, a specialist recommended orthotics and Plaintiff's prior primary care physician issued a medical authorization. Defendant, as Plaintiff's new physician in 2019, independently examined Plaintiff and concluded orthotics were not medically necessary. Plaintiff did not report foot pain to Defendant until March 2022, after which Defendant ordered therapeutic shoes. Other medical providers also deferred further treatment during this period.

PROCEDURAL HISTORY

Plaintiff, a state prisoner, filed a pro se § 1983 complaint alleging deliberate indifference to medical needs. After screening, the court identified a cognizable Eighth Amendment claim against Defendant Dr. Nkiruka Ndu (formerly Akabike). Defendant filed a motion for summary judgment, which the magistrate judge considered and is now recommending be granted.

DISPOSITION

affirmed

CASES CITED

- Celotex Corp. v. Catrett, 477 U.S. 317 (1986)
- Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)
- Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)
- T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Assoc., 809 F.2d 626 (9th Cir. 1987)
- Henry v. Gill Indus., Inc., 983 F.2d 943 (9th Cir. 1993)
- Manley v. Rowley, 847 F.3d 705 (9th Cir. 2017)

- Orr v. Bank of America, NT & SA, 285 F.3d 764 (9th Cir. 2002)
- Scott v. Harris, 550 U.S. 372 (2007)
- Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000)
- Arpin v. Santa Clara Valley Transportation Agency, 261 F.3d 912 (9th Cir. 2001)
- Estelle v. Gamble, 429 U.S. 97 (1976)
- Snow v. McDaniel, 681 F.3d 978 (9th Cir. 2012)
- Wilhelm v. Rotman, 680 F.3d 1113 (9th Cir. 2012)
- Jett v. Penner, 439 F.3d 1091 (9th Cir. 2006)
- Farmer v. Brennan, 511 U.S. 825 (1994)
- Gibson v. County of Washoe, Nevada, 290 F.3d 1175 (9th Cir. 2002)
- Toguchi v. Chung, 391 F.3d 1051 (9th Cir. 2004)
- Jackson v. McIntosh, 90 F.3d 330 (9th Cir. 1996)
- Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404 (9th Cir. 1985)
- Hallett v. Morgan, 296 F.3d 732 (9th Cir. 2002)
- Washington v. Brown, 2009 WL 160311 (E.D. Cal. Jan. 21, 2009)
- Hollis v. Lee, 2007 WL 963319 (N.D. Cal. Mar. 30, 2007)
- Lopez v. Scribner, 2007 WL 184831 (E.D. Cal. Jan. 23, 2007)
- Sandoval v. County of San Diego, 985 F.3d 657 (9th Cir. 2021)
- District of Columbia v. Wesby, 138 S. Ct. 577 (2018)
- Reichle v. Howards, 566 U.S. 658 (2012)
- Harlow v. Fitzgerald, 457 U.S. 800 (1982)
- Vos v. City of Newport Beach, 892 F.3d 1024 (9th Cir. 2018)
- Malley v. Briggs, 475 U.S. 335 (1986)
- S.B v. County of San Diego, 864 F.3d 1010 (9th Cir. 2017)
- Anderson v. Virga, 2018 WL 1556806 (E.D. Cal. Mar. 30, 2018)
- Isayeva v. Sacramento Sheriff's Dep't, 872 F.3d 938 (9th Cir. 2017)
- Moran v. Washington, 47 F.3d 839 (9th Cir. 1995)
- Wilkerson v. Wheeler, 772 F.3d 834 (9th Cir. 2014)
- Fresno Rock Taco, LLC v. Nat'l Sur. Corp., No. CV F 11-0845 LJO BAM, 2012 WL 3260418 (E.D. Cal. Aug. 8, 2012)
- Blaine v. Adams, No. 1:05-CV-00088 DGC, 2009 WL 2824743 (E.D. Cal. Sept. 1, 2009)
- Anderson v. Krpan, No. 1:14-CV-01380 AWI, 2015 WL 402086 (E.D. Cal. Jan. 29, 2015)
- FTC v. Publishing Clearing House, 104 F.3d 1168 (9th Cir. 1997)
- Washington v. Rouch, 2018 WL 3770203 (E.D. Cal. Aug. 7, 2018)
- Walker v. Aranas, 2012 WL 3230561 (D. Nev. June 20, 2012)
- Solvey v. Zepp, 2023 WL 5917993 (E.D. Cal. Sept. 11, 2023)
- Wilkins v. Barber, 562 F. Supp. 3d 943 (E.D. Cal. 2021)

- Peralta v. Dillard, 744 F.3d 1076 (9th Cir. 2014)

OPINION

(PC) Moore v. Diaz

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 11 STEVEN PAUL MOORE, Case No. 1:20-cv-01089-KES-HBK (PC) 12 Plaintiff,

FINDINGS AND RECOMMENDATIONS TO

GRANT DEFENDANT’S MOTION FOR

13 v. SUMMARY JUDGMENT¹

14 NKIRUKA AKABIKE,

FOURTEEN-DAY OBJECTION PERIOD

15 Defendant. (Doc. No. 38) 16 17 Pending before the Court is Defendant’s Motion for Summary Judgment. (Doc. No. 38, 18 “MSJ”). For the reasons set forth below, the undersigned finds that no genuine dispute of 19 material fact exists as to whether Defendant acted with deliberate indifference to Plaintiff’s 20 serious medical condition. Therefore, the Court recommends that Defendant’s MSJ be granted

21 I. BACKGROUND

22 A. Procedural History 23 Plaintiff Steven Paul Moore, a state prisoner, is proceeding pro se and in forma pauperis 24 on his Complaint filed under 42 U.S.C. § 1983. (Doc. No. 1). On December 13, 2022, this Court 25 issued a screening order for Plaintiff’s Complaint. (Doc. No. 13). As discussed in the Court’s

26 December 13, 2022 Screening Order, the Complaint stated a cognizable Eighth Amendment

27 1 This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 28 (E.D. Cal. 2023). 1 claim for medical deliberate indifference to Plaintiff’s medical needs against Defendant Dr. 2 Nkiruka Ndu, formerly known as Dr. Nkiruka Akabike,² but no other claim. (See id. at 4–6). On

3 December 30, 2022, Plaintiff filed his response to December 13, 2022 Screening Order, stating he

4 wished to voluntarily dismiss Defendant Diaz and his American Disabilities Act (“ADA”) and 5 Rehabilitation Act (“RA”) claims. (Doc. No. 14). In accordance with Plaintiff’s response, the 6 Court voluntarily dismissed Defendant Diaz and his ADA and RA claims. (Doc. No. 15). On

7 December 10, 2024, Defendant filed a merits-based Motion for Summary Judgment on the

8 remaining claim against her. (Doc. No. 38). Plaintiff filed his Objection to Summary Judgment³

9 (Doc. No. 41) and Defendant filed a Reply (Doc. No. 42). 10 B. Defendant’s MSJ 11 Supporting her MSJ, Defendant submits: (1) a memorandum of points and authorities 12 (Doc. No. 38); (2) a

separate statement of undisputed facts (Doc No. 38-1); (3) the sworn 13 declaration of N. Ndu (Doc. No. 38-2); (4) Exhibits A-G to the declaration of N. Ndu (Doc. No. 14 38-3); (5) the sworn declaration of D. Gamez (Doc. No. 38-4); (6) Exhibit A to the declaration of 15 D. Gamez (Doc. No. 38-5); (7) the sworn declaration of N. Guerrero (Doc. No. 38-6); (8) Exhibit 16 A to the declaration of N. Guerrero (Doc. No. 38-7); and (9) Defendant's Rand Warning to 17 Plaintiff (Doc. No. 38-8). Plaintiff's Objection to Summary Judgment includes (1) a response to 18 Defendant's separate statement of undisputed facts and (2) Plaintiff's separate statement of 19 undisputed facts. (Doc. No. 41).

20 II. APPLICABLE LAW

21 A. Summary Judgment Standard 22 The "purpose of summary judgment is to pierce the pleadings and to assess the proof in 23 2 Defendant's last name was changed from Akabike to Ndu during her treatment of Plaintiff. (Doc. No. 24 38-2 at 2, ¶ 3). 3 On January 6, 2025, Plaintiff filed an unsigned and undated objection to Defendant's Motion for 25 Summary Judgment. (Doc. No. 40). On January 10, 2025, Plaintiff filed a nearly identical pleading that was signed and dated. (Doc. No. 41). Although these pleadings are nearly identical, the Court will only 26 consider the January 10, 2025 filing. See *Fresno Rock Taco, LLC v. Nat'l Sur. Corp.*, No. CV F 11-0845 LJO BAM, 2012 WL 3260418, at *7 (E.D. Cal. Aug. 8, 2012) (refusing to consider unsigned declaration 27 on summary judgment); *Blaine v. Adams*, No. 1:05-CV-00088 DGC, 2009 WL 2824743, at *2 (E.D. Cal. Sept. 1, 2009) (same); see also *Anderson v. Krpan*, No. 1:14-CV-01380 AWI, 2015 WL 402086, at *2 28 (E.D. Cal. Jan. 29, 2015) ("The Court cannot consider unsigned filings . . ."). 1 order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. Ltd. v. Zenith 2 Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). Summary judgment is appropriate 3 when there is "no genuine dispute as to any material fact and the movant is entitled to judgment 4 as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment should be entered "after adequate 5 time for discovery and upon motion, against a party who fails to make a showing sufficient to 6 establish the existence of an element essential to that party's case, and on which that party will 7 bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The 8 moving party bears the "initial responsibility" of demonstrating the absence of a genuine issue of 9 material fact. *Id.* at 323. An issue of material fact is genuine only if there is sufficient evidence 10 for a reasonable fact finder to find for the non-moving party, while a fact is material if it "might 11 affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 12 U.S. 242, 248 (1986). 13 If the moving party meets its initial burden, the burden then shifts to the opposing party 14 to present specific facts that show there to be a genuine issue of a material fact. See Fed R. Civ. 15 P. 56(e); *Matsushita*, 475 U.S. at 586. An opposing party "must do more than simply show that 16 there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 587. The 17 party is required to tender evidence of specific facts in the form of affidavits, and/or admissible 18 discovery material, in support of its contention that a factual dispute exists. Fed. R. Civ. P. 19 56(c); *Matsushita*, 475 U.S. at 586 n.11. The opposing

party is not required to establish a material issue of fact conclusively in its favor; it is sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *T.W. Electrical Serv., Inc. v. Pacific Elec. Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir. 23 1987). However, “failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 323. 25 The court must apply standards consistent with Rule 56 to determine whether the 26 moving party demonstrated there is no genuine issue of material fact and showed judgment to be 27 appropriate as a matter of law. See *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993). 28 “[A] court ruling on a motion for summary judgment may not engage in credibility 1 determinations or the weighing of evidence.” *Manley v. Rowley*, 847 F.3d 705, 711 (9th Cir. 2 2017) (citation omitted). The evidence must be viewed “in the light most favorable to the 3 nonmoving party” and “all justifiable inferences” must be drawn in favor of the nonmoving 4 party. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 772 (9th Cir. 2002). A mere scintilla 5 of evidence is not sufficient to establish a genuine dispute to defeat an otherwise properly 6 supported summary judgment motion. *Anderson*, 477 U.S. at 252. However, where “opposing 7 parties tell two different stories, one of which is blatantly contradicted by the record” courts 8 “should not adopt that version of the facts for purposes of ruling on a motion for summary 9 judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007). 10 Plaintiff’s verified complaint may serve as an affidavit in opposition to summary 11 judgment if based on personal knowledge and specific facts admissible in evidence. *Lopez v. 12 Smith*, 203 F.3d 1122, 1132 n. 14 (9th Cir. 2000) (en banc). However, a complaint’s conclusory 13 allegations unsupported by specific facts, will not be sufficient to avoid summary judgment. 14 *Arpin v. Santa Clara Valley Transportation Agency*, 261 F.3d 912, 922 (9th Cir. 2001). And, 15 where a plaintiff fails to properly challenge the facts asserted by the defendant, the plaintiff may 16 be deemed to have admitted the validity of those facts. See Fed. R. Civ. P. 56(e)(2). 17 The undersigned has carefully reviewed and considered all arguments, points and 18 authorities, declarations, exhibits, statements of undisputed facts and responses thereto, if any, 19 objections, and other papers filed by the parties. The omission to an argument, document, paper, 20 or objection is not to be construed that the undersigned did not consider the argument, document, 21 paper, or objection. Instead, the undersigned thoroughly reviewed and considered the evidence it 22 deemed admissible, material, and appropriate for purposes of issuing these Findings and 23 Recommendations. 24 B. Eighth Amendment Medical Deliberate Indifference 25 The Constitution requires prison officials to provide inmates with reasonably adequate 26 medical care. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To hold an official liable for violating 27 this duty under the Eighth Amendment, the inmate must satisfy two prongs, an objective prong 28 and subjective prong. First, the inmate must suffer from a serious medical need (the objective 1 prong); and second the official must be deliberately indifferent to the inmate’s serious medical 2 need (the subjective prong). *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012), overruled in 3 part on other grounds, *Peralta v. Dillard*, 744 F.3d 1076, 1082–83 (9th

Cir. 2014); *Wilhelm v. 4 Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012). A medical need is “serious” if the failure to treat 5 “could result in further significant injury or the unnecessary and wanton infliction of pain.” *Jett 6 v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citations omitted). The “second prong— 7 defendant’s response to the need was deliberately indifferent—is satisfied by showing (a) a 8 purposeful act or failure to respond to a prisoner’s pain or possible medical need and (b) harm 9 caused by the indifference.” *Id.* (internal citations omitted). This standard requires that the 10 prison official must not only “be aware of facts from which the inference could be drawn that a 11 substantial risk of serious harm exists,” but that person “must also draw the inference.” *Farmer v. 12 Brennan*, 511 U.S. 825, 837 (1994). “If a [prison official] should have been aware of the risk, but 13 was not, then the [official] has not violated the Eighth Amendment, no matter how severe the 14 risk.” *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175, 1188 (9th Cir. 2002). This 15 “subjective approach” focuses only “on what a defendant’s mental attitude actually was.” 16 *Farmer*, 511 U.S. at 839. 17 Deliberate indifference is a higher standard than medical negligence or malpractice, and a 18 difference of opinion between medical professionals—or between a physician and the prisoner— 19 generally does not amount to deliberate indifference. See generally *Toguchi v. Chung*, 391 F.3d 20 1051 (9th Cir. 2004); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (A mere “difference 21 of medical opinion . . . [is] insufficient, as a matter of law, to establish deliberate indifference.”). 22 To prevail on a claim involving choices between alternative courses of treatment, a prisoner must 23 show that the chosen course of treatment “was medically unacceptable under the circumstances,” 24 and was chosen “in conscious disregard of an excessive risk to [the prisoner’s] health.” *Jackson*, 25 90 F.3d at 332. 26 Neither will an “inadvertent failure to provide medical care” sustain a claim. *Estelle*, 429 27 U.S. at 105. Misdiagnosis alone is not a basis for a claim, see *Wilhelm*, 680 F.3d at 1123, and a 28 “mere delay” in treatment, “without more, is insufficient to state a claim of deliberate medical 1 indifference,” *Shapley v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985). 2 Instead, a prisoner must show that a delay “would cause significant harm and that defendants 3 should have known this to be the case.” *Hallett v. Morgan*, 296 F.3d 732, 746 (9th Cir. 2002).

4 III. ANALYSIS

5 A. Allegations in Plaintiff’s Complaint 6 Plaintiff, a state prisoner currently confined at the California Substance Abuse Treatment 7 Facility (“SATF”), operated by the California Department of Corrections and Rehabilitation, 8 brings this action under 42 U.S.C. § 1983 against Defendant Dr. Nkiruka Ndu, a medical doctor at 9 the facility. (Doc. No. 1 at 1). Plaintiff asserts that Defendant acted with deliberate indifference 10 to his serious medical needs by denying him (1) orthotics or orthopedic shoes⁴ and (2) a light- 11 duty work chrono, in violation of the Eighth Amendment. (*Id.* at 2–4). 12 Plaintiff alleges he “suffers from severe crippling foot pain, toe pain, ganglionic cysts, 13 onychomycosis, onychocryptosis, paronychia, and edema.” (*Id.* at 4). On February 14, 2019, 14 Defendant denied Plaintiff’s request for orthotics, a recommendation

previously made by 15 specialist Dr. Zorrilla on July 11, 2018, and approved by Dr. Hails, Plaintiff's prior primary care 16 physician. (Id. at 3). Dr. Hails had issued a permanent medical chrono for durable medical 17 equipment authorizing orthopedic shoes and insoles. (Id.). Despite these prior medical 18 determinations, Defendant denied Plaintiff's request and told him that "there was no such thing as 19 a permanent chrono" while refusing to acknowledge Plaintiff's documented medical necessity. 20 (Id. at 4). Defendant informed Plaintiff that "due to state medical costs she was ordered to re- 21 evaluate [sic] everyone who requested new orthotics." (Id.) 22 Plaintiff experiences pain twenty-four hours a day. (Id.). Notably, Plaintiff "is forced to 23 perform his job assignment which causes him to be on his feet almost all day long, and to lift 24 heavy boxes, without orthopedic shoes and support insoles, which causes [Plaintiff] extremely 25 severe crippling pain." (Id.). Despite informing Defendant of his condition, Plaintiff contends 26 27 4 The Complaint and record reference orthotics, orthopedic shoes, and therapeutic shoes interchangeably. The Court frequently refers to these medical accommodations as orthotics for the sake of simplicity in this 28 order. 1 that she also refused to issue a light-duty chrono, which could have mitigated his physical 2 distress. (Id.). For relief, Plaintiff requests a declaratory judgment; an award of monetary 3 damages, compensatory damages, and punitive damages in an amount determined by the court; 4 the costs of the suit; and any further relief deemed appropriate. (Id. at 8). 5 B. Undisputed Material Facts 6 In support of her MSJ, Defendant submits a Separate Statement of Undisputed Facts 7 ("SSUF"). (Doc. No. 38-1). Each listed fact in Defendant's SSUF cites to sworn declarations, 8 medical records, deposition testimony, or the Complaint. (See generally Doc. Nos. 1, 38-2, 38-3, 9 38-4, 38-5, 38-6, 38-7). In his Objection to Summary Judgment, Plaintiff includes a response to 10 Defendant's SSUF and his own statement of undisputed facts. (Doc. No. 41). 11 By his Objection to Summary Judgment, Plaintiff contests nearly all of Defendant's 12 material facts listed in her SSUF by making "objections" and providing a brief explanation to 13 support their basis. (Doc. No. 41 at 2-3). Many of these objections are based on: (1) Plaintiff's 14 lack of medical or legal expertise; 15 (2) the assertion that the "medical records relied upon [in 15 Defendant's SSUF] are self-serving documents;" and (3) Plaintiff's statement that "[he] 16 complained of foot and leg pain at all medical visits [with Defendant]." (Id.). Nearly all of 17 Plaintiff's objections and undisputed facts lack evidentiary support. (See id. at 2-4). 18 Where Plaintiff's response to Defendant's SSUF or his statement of undisputed facts are 19 based solely on conclusory statements or the Complaint, and lacks detailed facts, while Defendant 20 provides detailed facts or documentary evidence in support, the Court generally does not find 21 Plaintiff's objections or statements of fact sufficient to establish a genuine dispute of material 22 fact. See *Lopez v. Smith*, 203 F.3d 1122, 1132 n.14 (9th Cir. 2000) (en banc); see also *FTC v. 23 Publishing Clearing House*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving 24 25 5 The Court denied Plaintiff's motion to appoint counsel because he failed to satisfy the burden required for such an appointment in a civil matter under the circumstances. (See Doc. No. 15). The Court also 26 notes that Plaintiff never moved to appoint a

neutral expert, nor does this case warrant such an appointment because this action is not sufficiently complex to require one. See, e.g., *Wilkins v. Barber*, 27 562 F. Supp. 3d 943, 947 (E.D. Cal. 2021) (denying appointment of a neutral expert witness where the plaintiff’s alleged medical deliberate indifference claims included, inter alia, the discontinuation of an 28 orthopedic shoe prescription). 1 affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine 2 issue of material fact.”). Having reviewed the record, the undersigned finds the following facts to 3 be material and undisputed, unless otherwise noted. 4 • Plaintiff Steven Paul Moore is prisoner confined at the California Substance Abuse 5 Treatment Facility (“SATF”), operated by the California Department of Corrections and 6 Rehabilitation, at the time of the events giving rise to Plaintiff’s claim. (Doc. No. 1 at 1). 7 • Defendant Dr. Ndu (formerly Dr. Akabike) was a physician at SATF at the time of the 8 events giving rise to Plaintiff’s claim. (Doc. No. 1 at 3; Doc. No. 38-2 at 1–2, ¶¶ 1, 3). 9 • On or about July 11, 2018, Plaintiff was seen by specialist Dr. Zorrilla, who recommended 10 he wear orthopedic shoes and insoles. Dr. Hails, Plaintiff’s former primary care physician 11 (“PCP”), subsequently issued Plaintiff a medical authorization for orthopedic footwear 12 (“2018 Orthotics Order”). (Doc. No. 1 at 3; Doc. No. 41 at 4). 13 • Orthotics are devices used to support, align, or improve the function of body parts affected 14 by injury, deformity, or disability. (Doc. No. 38-2 at 2, ¶ 4). 15 • In his Complaint, Plaintiff alleged that Defendant told him “there was no such thing as a 16 permanent chrono” that would necessitate specific medical equipment being issued. (Doc.

17 No. 1 at 4). But, at his deposition, Plaintiff clarified that Defendant did not actually say 18 permanent chronos do not exist, but rather told Plaintiff he did not need the requested 19 shoes. (Moore Depo. Tr. at 27:24–28:11, Doc. No. 38-7).⁶ Thus, the allegation in the 20 Complaint is refuted by Plaintiff’s deposition testimony. 21 • In his Complaint, Plaintiff alleged that Defendant was ordered to reevaluate everyone who 22 requested orthotics due to state cost considerations. (Doc. No. 1 at 4). But, at his 23 deposition, Plaintiff testified that he did not recall Defendant mentioning the reevaluation 24 for medical costs. Plaintiff further noted that he believed everybody was being evaluated 25 regarding their durable medical equipment supplies. (Moore Depo. Tr. 32:20–33:14) thus, 26 the allegation in the Complaint is refuted by Plaintiff’s deposition testimony. 27 6 The Court refers throughout this Order to the complete deposition transcript lodged with the Court 28 pursuant to Local Rule 133(j). 1 • Generally, physicians are assigned based on inmate-patient placements at the facility. 2 Defendant was Plaintiff’s PCP from January 17, 2019 to March 10, 2022. (Doc. No. 38-2 3 at 1, ¶ 1). 4 • During the first evaluation on January 17, 2019, Defendant observed that Plaintiff had 5 been treated for his right foot, as Plaintiff had a ganglion cyst. Plaintiff’s prior treatment 6 included a steroid injection. (Doc. No. 38-2 at 2, ¶ 3; Doc. No. 38-3 at 2–3). 7 • A ganglion cyst is a typically benign fluid-filled lump that may cause discomfort. (Doc.

8 No. 38-2 at 2 ¶ 3).

9 • Treatment for ganglion cysts may vary from observation to surgical removal (excision). 10

(Doc. No. 38-2 at 2, ¶ 3). 11 • During the January 17, 2019 evaluation, upon inspecting Plaintiff's foot, Defendant 12 determined that no further action was medically necessary, as Plaintiff stated he had been 13 pain-free since the injection. (Doc. No. 38-2 at 2, ¶ 3; Doc. No. 38-3 at 2–3). 14 • During the initial January 17, 2019 evaluation, Plaintiff did not voice any further 15 complaints. (Doc. No. 38-2, ¶ 3; Doc. No. 38-3 at 2–3). 16 • On February 14, 2019 Defendant evaluated Plaintiff again. Plaintiff requested a referral 17 for orthotics for his right foot. Defendant examined Plaintiff's foot and did not observe 18 any evidence of pain or deformity. Plaintiff denied having ankle pain or deformity. (Doc.

19 No. 38-2 at 2, ¶ 4; Doc No. 38-3 at 5–6).

20 • The referrals Plaintiff sought, whether for medical equipment like orthotics or orthopedic 21 shoes or for a specialist consultation, required a determination of medical necessity by the 22 PCP. (Doc. No. 38-2 at 2–3, ¶ 5). 23 • In Defendant's professional medical opinion, no medical necessity existed for the referrals 24 or treatment Plaintiff had requested in this case. (Doc. No. 38-2 at 2–3, ¶ 5). 25 • At Plaintiff's deposition, he recalled Defendant requesting to see his foot and determining 26 at that time that Plaintiff did not require orthotics or orthopedic shoes. (Moore Depo. Tr. 27 at 24:19–25:5). 28 • Defendant continued to see and treat Plaintiff throughout 2019 and 2020 for various issues 1 including concerns about hypertension, follow-ups related to medication, Plaintiff's 2 concerns regarding lumps on his shoulders, and COVID-19. During these visits, Plaintiff 3 voiced no further complaints about his foot. (Doc. No. 38-2 at 3, ¶7; Doc. No. 38-3 at 8– 4 13). 5 • Plaintiff's medical records indicate that he went to the Triage and Treatment Area 6 (“TTA”) on October 10, 2019, and was seen by Dr. Bass and Dr. Scharffenberg for 7 concerns regarding his right foot and to request a podiatrist who could perform aspiration 8 and injection treatment. Dr. Bass and Dr. Scharffenberg discussed the matter with Plaintiff 9 and deferred any procedures related to Plaintiff's foot. (Doc. No. 38-4 at 2, ¶ 3; Doc. No. 10 38-5 at 2). 11 • The TTA functions as an urgent care clinic at the facility, where patients can receive 12 treatment and undergo procedures and evaluations. (Doc. No. 38-2 at 4, ¶ 8). 13 • At the TTA on October 10, 2019, Plaintiff wore his personal shoes and told Dr. Bass and 14 Dr. Scharffenberg that he was satisfied with them. (Doc. No. 38-4 at 2, ¶ 3; Doc. No. 38- 15 5 at 2). 16 • Defendant saw Plaintiff on July 15, 2021, for treatment of the cyst on his right foot, at 17 which time Plaintiff requested excision of the cyst. Defendant referred Plaintiff to the 18 procedure clinic at the TTA for evaluation of his foot and ordered an x-ray to determine 19 the medical necessity of excision. (Doc. No. 38-2 at 4, ¶ 8; Doc. No. 38-3 at 15–16). 20 • During the July 15, 2021 consultation, Plaintiff's medical charts indicated that he was 21 experiencing intermittent hypertension, for which he refused to take blood pressure 22 medication. (Doc. No. 38-2 at 4, ¶ 8; Doc. No. 38-3 at 15–16). 23 • Defendant saw Plaintiff again on October 13, 2021, at which time Plaintiff continued to 24 refuse blood pressure medication and denied any other issues. Plaintiff stated that he did 25 not go to the procedure clinic for treatment of his cyst. (Doc. No. 38-2 at 4, ¶ 9; Doc. No. 26 38-3 at 18–19). 27 • Plaintiff's medical records indicate that on January 20, 2022 he saw another

medical 28 provider, Physician Assistant Mbadugha. Plaintiff informed the provider that he had 1 bilateral arch pain in his foot and had been experiencing it for five years. (Doc. No. 38-2 2 at 4, ¶ 10; Doc. No. 38-3 at 21–22). 3 • Plaintiff had not informed Defendant of his foot pain in the years prior. Defendant was 4 unaware of this pain until observing the progress note by another physician on January 20, 5 2022. (Doc. No. 38-2 at 4, ¶ 10) 6 • Defendant saw Plaintiff for the last time on March 10, 2022. Because Plaintiff refused 7 new x-rays of his foot, Defendant reviewed the x-ray taken during Plaintiff’s podiatry visit 8 in May 2018. In Defendant’s medical opinion, the x-ray was unremarkable. Nonetheless, 9 Defendant ordered therapeutic shoes for Plaintiff based on his complaints of bilateral foot 10 pain. (Doc. No. 38-2 at 4–5, ¶ 11; Doc. No. 38-3 at 24–25). 11 C. Eighth Amendment Medical Deliberate Indifference 12 The Court first must consider whether Defendant, as the moving party, has met her initial 13 burden of showing prima facie entitlement to summary judgment on the issue of Plaintiff’s 14 medical deliberate indifference claim. *Celotex Corp.*, 477 U.S. at 323. The prima facie elements 15 of medical deliberate indifference are (1) a “serious medical need[,] [where] failure to treat a 16 prisoner’s condition could result in further significant injury or the unnecessary and wanton 17 infliction of pain” and (2) the defendant’s “response to the need was deliberately indifferent.” 18 *Wilhelm*, 680 F.3d at 1122 (internal quotation marks and citation omitted). The second prong is 19 satisfied by showing “(a) a purposeful act or failure to respond to a prisoner’s pain or possible 20 medical need and (b) harm caused by the indifference.” *Jett*, 439 F.3d at 1096 (internal citations 21 omitted). 22 1. Serious Medical Need 23 Defendant argues that Plaintiff did not have a serious medical need because he never 24 raised any concerns about pain during his visits with Defendant. (Doc. No. 38 at 10). Defendant 25 further argues that “[a]t least as it relates to [Plaintiff’s] ganglion cyst, [he] did not have a serious 26 medical need.” (*Id.* at 11 (citing *Walker v. Aranas*, 2012 WL 3230561 (D. Nev. June 20, 2012), 27 and then citing *Solvey v. Zepp*, 2023 WL 5917993 (E.D. Cal. Sept. 11, 2023))). However, 28 Plaintiff’s Complaint asserts that his pain did not stem solely from a cyst. Rather, Plaintiff 1 alleges that he “suffers from severe crippling foot pain, toe pain, ganglionic cysts, 2 onychomycosis, onychocryptosis, paronychia, and edema.” (Doc. No. 1 at 4). 3 On January 17, 2019, during their first visit, when Plaintiff requested a referral for 4 orthotics, Defendant was aware that Plaintiff had received a steroid injection on July 2, 2018 for 5 treatment of his right foot. (Doc. No. 38-3 at 2). Additionally, Defendant’s progress notes from 6 January 17, 2019 and February 14, 2019 indicate that Plaintiff had “mild talonavicular joint 7 arthritis.” (Doc. No. 38-3 at 2–3, 5–6). Although Plaintiff did not report to Defendant any degree 8 of discomfort or pain on those days, the record reflects that he had ongoing issues affecting his 9 right foot. See *Washington v. Brown*, 2009 WL 160311, at *14 (E.D. Cal. Jan. 21, 2009) 10 (undisputed that “chronic arthritis constitutes a serious medical need”), report and 11 recommendation adopted, 2009 WL 532615 (E.D. Cal. Mar. 3, 2009); see also *Hollis v. Lee*, 12 2007 WL 963319, at *7 (N.D. Cal. Mar. 30, 2007) (finding triable issue of fact as to whether the 13 plaintiff’s foot pain constituted a serious medical need when the plaintiff’s doctor previously 14

prescribed orthotics), *aff'd sub nom. Hollis v. Barrie*, 321 F. App'x 677 (9th Cir. 2009); *Lopez v. 15 Scribner*, 2007 WL 184831, at *9 (E.D. Cal. Jan. 23, 2007) (finding triable issue of fact as to 16 whether the plaintiff's foot condition constituted a serious medical need where the plaintiff had 17 been prescribed orthotics dating back to 1993), report and recommendation adopted, 2007 WL 18 781432 (E.D. Cal. Mar. 13, 2007). The Court thus assumes, for purposes of this MSJ, whether 19 Plaintiff had a serious medical need during the relevant time, even if it was a chronic or semi- 20 chronic condition rather than an issue related solely to Plaintiff's ganglionic cysts, is a question of 21 fact. 22 2. Deliberate Indifference 23 Turning to the second prong, the Court examines whether Defendant acted with deliberate 24 indifference to Plaintiff's serious medical needs by denying him (1) orthotics or orthopedic shoes 25 and (2) a light-duty work chrono. The Court first examines the orthotics-related issues. 26 Plaintiff attributes liability to Defendant due her failure to order new orthotics on February 27 14, 2019, as previously authorized by Dr. Zorrilla and Dr. Hails on or around July 18, 2018 28 ("2018 Orthotics Order"). (Doc. No. 1 at 3–4; Doc. No. 41 at 4). Raised for the first time in his 1 Objection to Summary Judgment, Plaintiff argues that because he was unable to receive new 2 orthotics, he sought medical attention in July 2022 for his torn menisci in both of his knees and 3 underwent left knee surgery in July 2024. (See Doc. No. 41 at 4; see also Moore Depo. Tr. at 4 18:25–19:19). After reviewing Plaintiff's Complaint, Objection to Summary Judgment, and 5 deposition, Plaintiff's medical deliberate indifference claim can be distilled into two core 6 contentions: Defendant acted with deliberate indifference because (1) she denied Plaintiff 7 orthotics despite being aware of his constant pain, and (2) she disregarded the prior 2018 8 Orthotics Order. 9 Defendant argues that she exercised her medical judgment in treating Plaintiff, 10 determining that no further intervention was necessary based on her personal observations and 11 Plaintiff's own statements regarding his pain levels. (Doc. No. 38 at 12). Despite Plaintiff's 12 preference for orthotics, Defendant concluded that they were not medically required during the 13 relevant period. (*Id.*). While her assessment may have differed from Plaintiff's previous primary 14 care provider, she maintains that her determination remained medically acceptable given the 15 information available to her at the time. (*Id.*). For the following reasons, the Court agrees with 16 Defendant. 17 As to Plaintiff's first core contention, the Court finds that Defendant was not deliberately 18 indifferent to Plaintiff's serious medical condition because the undisputed facts and evidence in 19 the record reflect that Plaintiff did not disclose to Defendant that he was in pain until March 10, 20 2022, at which time she ordered him new orthotics. (See Doc. No. 38-3 at 24–25). During his 21 deposition, Plaintiff testified that he told Defendant his feet were in pain "every time [he was] in 22 front of her." (Moore Depo. Tr. at 13:5–17). However, in sharp contrast to his testimony, the 23 record indicates that Plaintiff did not inform Defendant that he suffered any foot pain prior to 24 March 10, 2022, 25 the date on which Defendant ordered Plaintiff new orthotics. (See Doc. No. 38-3 at 2–3 ("got steroid injection to right foot and has been pain free," "He has no complaints.");

5– 26 27 7 The dates Defendant evaluated Plaintiff prior to March 10, 2022 include January 17, 2019, February 14, 2019, July 16, 2019, January 8, 2020, March 19, 2020, July 6, 2020, December 24, 2020, July 15, 2021, 28 and October 13, 2021. (See Doc. No. 38-3 at 2–3, 5–6, 8–13, 15–16, 18–19). 1 6 (“denies ankle pain or deformity,” “has been pain free,” “He has no complaint.”); 8–13 (“no 2 joint pain or swelling,” “states he is doing well and no complaint”); 15–16 (“ganglion cyst of 3 right foot,” “referred patient to procedure clinic for evaluation”); 18–19 (“no joint pain or 4 swelling,” “patient said he has not been to procedure clinic for ganglion cyst right foot,” “follow 5 up on procedure clinic referral”); 24–25 (“bilateral foot pain,” “ordered therapeutic shoes”). 6 Additionally, on October 10, 2019, Plaintiff was seen by Dr. Bass and Dr. Scharffenberger at his 7 Triage and Treatment Area (“TTA”) appointment regarding the ganglion cyst on his right foot. 8 (Doc. No. 38-5 at 2). At this visit, the parties engaged in an “extended discussion” regarding 9 Plaintiff’s right foot and ganglion cyst history. (Id.). The progress note from that date shows that 10 Plaintiff never indicated he was in pain but instead actually expressed satisfaction with his 11 personal shoes. (Id.) (Stating Plaintiff “is wearing his personal shoes and says he is satisfied with 12 them). Dr. Bass and Dr. Scharffenberger concluded that they would defer any procedure 13 concerning his foot at that time. (Id.). 14 Indeed, the undisputed evidence demonstrates that it was not until January 20, 2022 that 15 Plaintiff first complained of foot pain to any medical provider. (See Doc. No. 38-3 at 21–22 16 (“reports history of bilateral arch pain x5years”). Specifically, Plaintiff informed Physician 17 Assistant Mbadugha of pain while walking and toe cramps at night during that visit. (Id.). On 18 March 10, 2022, Plaintiff first informed Defendant of his bilateral foot pain. (Doc. No. 38-3 at 19 24–25). Defendant reviewed his X-ray from May 2018, noting that Plaintiff refused to undergo 20 an X-ray in August 2021, and found it unremarkable. (Id. at 24). Nonetheless, Defendant 21 ordered Plaintiff therapeutic shoes that day based on his self-report of pain. (Id. at 25). 22 To the extent that Plaintiff asserts that Defendant intentionally denied or delayed an order 23 for new orthotics, Plaintiff fails to provide evidence sufficient to raise a genuine dispute of 24 material fact supporting an Eighth Amendment violation. Plaintiff’s Complaint asserts that 25 Defendant was ordered to reevaluate everyone who requested orthotics due to cost considerations 26 for the state. (Doc. No. 1 at 4). However, at his deposition, Plaintiff stated that he did not recall 27 Defendant mentioning the reevaluation for medical costs. (Moore Depo. Tr. 32:20–33:14). 28 Rather, Plaintiff now claimed that Defendant’s motivation for intentionally depriving Plaintiff of 1 his orthotics was racially motivated. (Id. at 38:9–39:3). Plaintiff describes Defendant as “cold 2 and disconnected,” that their interactions were “always negative” and that she was “[n]ever 3 helpful, never understanding, and [that she] always [] brush[ed] [him] off.” (Id. at 12:14–13:1, 4 37:17–22). As an “older Caucasian” male, Plaintiff believes that Defendant treated him this way 5 because of his race. (Id. at 38:5–23). 6 Even assuming arguendo that racial tension existed between Plaintiff and Defendant, 7 Plaintiff’s deliberate indifference claim fails because, as explained supra, the record supports that 8 as soon as Plaintiff reported that he was experiencing

foot pain to Defendant on March 10, 2022, 9 she ordered him new orthotics. Dr. Bass and Dr. Scharffenberger also deferred making further 10 treatment recommendations regarding Plaintiff's foot condition during this same time. Without 11 more, Plaintiff fails to provide factual support disputing that Defendant was unaware of any 12 substantial serious risk of harm during the relevant period. See Sandoval, 985 F.3d at 668 ("a 13 prison official who should have been aware of a medically related risk to an inmate, but in fact 14 was not, has not violated the Eighth Amendment." (emphasis in original)). See Shapley, 766 F.2d 15 at 407 (a delay in treatment, without more, is insufficient to state a deliberate indifference claim). 16 Plaintiff's newly raised argument that the delay in ordering his new orthotics eventually 17 led to the tearing of his menisci fails for the same reasons. During his deposition, Plaintiff stated 18 that his torn menisci occurred at some point "during the four-year timeframe." (Moore Depo. Tr. 19 at 19:20–20:8). He further testified that he never brought up his knee pain with Defendant and 20 that his knee-related pain and subsequent treatment occurred after he had received his orthotics 21 and was under the care of his new PCP, Dr. Galvez. (Id. at 23:3–24:4). Moreover, Plaintiff 22 admitted that Defendant "didn't have anything to do with [his] knees. [He] didn't even know they 23 were torn." (Id. at 23:3–7). Plaintiff fails to put forth evidence showing that Defendant, or even 24 Plaintiff himself, was aware of any issues related to his knees during Defendant's treatment of 25 Plaintiff. See Sandoval, 985 F.3d at 668; see also Shapley, 766 F.2d at 407. 26 As to Plaintiff's second core contention, the Court finds that Defendant was not 27 deliberately indifferent to Plaintiff's serious medical condition because the undisputed facts 28 reflect that her treatment was medically acceptable under the circumstances when conducting her 1 own independent evaluation of Plaintiff rather than following the prior 2018 Orthotics Order. 2 Plaintiff testified that Defendant "blatant[ly] disregard" the 2018 Orthotics Order as 3 instructed in his permanent chrono8 located in his medical file. (Moore Depo. Tr. at 27:18– 4 28:11). Plaintiff took issue with Defendant for conducting an independent evaluation, rather than 5 just replacing his worn-out orthotics based on the 2018 Orthotics Order. During his visit with 6 Defendant, Plaintiff testified that he "wonder[ed] why she wanted to see [his] foot because [he] 7 was there asking her. . . [for] another pair of shoes" [] [as] permitted by [his] DME." (Id. at 8 24:19–25:2). Defendant then "looked at [his foot] with [his] sock off and determined right then 9 and there that [he] didn't need any [new orthotics]." (Id. at 25:3–5). Plaintiff's own testimony 10 supports that he was merely unsatisfied with Defendant's independent evaluation, which 11 determined that Plaintiff did not meet the criteria for a new orthotics referral. See Toguchi, 391 12 F.3d at 1058 ("a mere difference of medical opinion is insufficient . . . to establish deliberate 13 indifference" (cleaned up)). Defendant asserts that the 2018 Orthotics Order "is an undisputed 14 fact for which [he] [has] documentation to support it." (Doc. No. 41 at 2). However, Plaintiff 15 failed to provide any documentation to support its existence other than his own self-reported 16 claims. Even assuming the existence of the 2018 Orthotics Order, Plaintiff fails to provide any 17 evidence to support that a prior medical treatment cannot be rescinded or changed. See, e.g., 18 Washington v. Rouch, 2018 WL 3770203,

at *7 (E.D. Cal. Aug. 7, 2018) (“The undisputed evidence is that even accommodations designated as ‘permanent’ are subject to review and possible modification or rescission.”), *aff’d*, 771 F. App’x 832 (9th Cir. 2019). Nonetheless, the pivotal question of this case is whether Defendant’s “chosen course of treatment was medically unacceptable under the circumstances, and was chosen in conscious disregard of an excessive risk to the prisoner’s health.” See *Toguchi*, 391 F.3d at 1058 (cleaned up). Here, Plaintiff fails to put forth any evidence raising an issue of material fact regarding Defendant’s denial of new orthotics and whether it was medically unacceptable under the circumstances. Rather, the undisputed facts support the opposite conclusion. Notably, during Plaintiff refers to his permanent chrono, permanent durable medical equipment, permanent disability medical equipment, and DME interchangeably throughout his deposition. 1 their separate evaluation, Dr. Bass and Dr. Scharffenberger noted that Plaintiff was satisfied with 2 his personal shoes and concluded that they would defer any further treatment concerning his foot 3 at the time. This evaluation, which apparently occurred without Defendant’s input, along with 4 various other medical documentation in the record, allows the Court to draw a reasonable 5 inference that Defendant’s denial of orthotics did not rise to the level of an Eighth Amendment 6 violation during the relevant period. Therefore, the Court finds no evidence to support a triable 7 issue as to whether Defendant was deliberately indifferent to Plaintiff’s medical needs when she 8 did not order reorder orthotics for Plaintiff. See *Washington*, 2018 WL 3770203, at *8 (granting 9 summary judgment in favor of the defendants who rescinded and denied the plaintiff’s permanent 10 chrono for orthopedic shoes). 11 Finally, the Court examines whether Defendant acted with deliberate indifference to 12 Plaintiff’s serious medical needs by denying a light-duty work chrono. The Court notes that 13 neither party addressed this issue in their moving papers. (See generally Doc. Nos. 38, 41, 42). 14 Plaintiff’s Complaint asserts that he “is forced to perform his job assignment which causes him to 15 be on his feet almost all day long, and to lift heavy boxes, without orthopedic shoes and support 16 insoles, which causes [him] extremely severe crippling pain.” (Doc. No. 1 at 4). Despite 17 informing Defendant of his condition, Plaintiff contends that she refused to issue a light-duty 18 chrono, which could have mitigated his pain. (*Id.*). In Plaintiff’s deposition, he stated that his 19 request for a light-duty chrono was denied but was unable to recall any specifics regarding the 20 denial. (Moore Depo. Tr. at 36:14–37:6). Here, the record contains no request for a light-duty 21 chrono. Instead, the record reveals that Plaintiff requested “orthotics for ankle support” because 22 “he works in the kitchen and picks up heavy objects.” (See Progress Note dated January 17, 23 2019, Doc. NO. 38-3 at 6). Upon examining Plaintiff, Defendant noted “Right ankle and foot are 24 not tender nor swollen, ROM is normal. He has normal arches, no deformity, normal gait.” (*Id.*). 25 Thus, Defendant opined that “Patient does not meet criteria for orthotic referral.” (*Id.*). As noted, 26 there is no evidence in the record that Plaintiff requested a light-duty chrono but instead requested 27 orthotics. Consequently, there is no evidence that Defendant knew of and disregarded an 28 excessive risk to Plaintiff’s health and safety during the relevant time, as explained *supra*.

See 1 *Toguchi*, 391 F.3d at 1058. Because Plaintiff fails to make a sufficient showing to establish the 2 existence of the essential element regarding the second prong of a medical deliberate indifference 3 claim under the Eighth Amendment, summary judgment should be granted for Defendant. See 4 *Celotex*, 477 U.S. at 323. 5 D. Qualified Immunity 6 In the alternative, Defendant asserts that she is entitled to qualified immunity in this case 7 because no official in her position would believe her conduct in denying orthotics for a ganglion 8 cyst violated Plaintiff's constitutional rights. (Doc. No. 38 at 13). In support, Defendant cites to 9 *Harden v. High Desert State Prison*, No. 2:15-cv-01168, 2018 U.C. Dist. LEXIS 111809, at *10 10 (D. Nev. July 5, 2018), where the court noted that qualified immunity would be appropriate in 11 that case because there exists no clearly established right to elective surgical procedures for 12 benign cysts. (Id.). 13 A government official is entitled to qualified immunity under Section 1983 unless (1) the 14 official "violated a federal statutory or constitutional right, and (2) the unlawfulness of his 15 conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 16 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)); *Harlow v. Fitzgerald*, 457 U.S. 17 800, 817 (1982). To demonstrate that a right was "clearly established" requires a showing that 18 the statutory or constitutional question was "beyond debate," such that every reasonable official 19 would understand that what he is doing is unlawful. *Wesby*, 138 S. Ct. at 589; *Vos v. City of 20 Newport Beach*, 892 F.3d 1024, 1035 (9th Cir. 2018). This standard is "demanding" and protects 21 "all but the plainly incompetent or those who knowingly violate the law." *Wesby*, 138 S. Ct. at 22 589 (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "[A] court typically should identify a 23 case where an officer acting under similar circumstances as [the defendant] was held to have 24 violated the constitutional right at issue." *S.B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th 25 Cir. 2017)). "Even when no case is 'directly on point,' courts may compare relevant factors to 26 determine whether every reasonable officer should have known the conduct in question was 27 unlawful." *Anderson v. Virga*, 2018 WL 1556806, *2 (E.D. Cal. Mar. 30, 2018) (citing *Isayeva v. 28 Sacramento Sheriff's Dep't*, 872 F.3d 938, 946–47 (9th Cir. 2017)). The plaintiff bears the burden 1 | of establishing that the right alleged was clearly established. *Moran v. Washington*, 47 F.3d 839, 2 | 844 (9th Cir. 1998). 3 As discussed supra, the Court finds the undisputed facts show that Defendant was not 4 || deliberately indifferent to Plaintiff's serious medical needs. Thus, because the Court finds no 5 | constitutional violation, the Court need not address the second prong. 6 Accordingly, it is RECOMMENDED: 7 1. The district court GRANT Defendant's Motion for Summary Judgment (Doc. No. 38). 8 2. Judgment be entered in Defendant's favor and the case closed.

9 NOTICE TO PARTIES

10 These Findings and Recommendations will be submitted to the United States District 11 | Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(). Within 14 days 12 | after being served with a copy of these Findings and Recommendations, a party may file written 13 | objections with the Court. /d.; Local Rule 304(b). The document should be captioned, 14 |

“Objections to Magistrate Judge’s Findings and Recommendations” and shall not exceed fifteen
15 | (15) pages. The Court will not consider exhibits attached to the Objections. To the extent a
party 16 | wishes to refer to any exhibit(s), the party should reference the exhibit in the record by
its 17 | CM/ECF document and page number, when possible, or otherwise reference the exhibit
with 18 || specificity. Any pages filed in excess of the fifteen (15) page limitation may be
disregarded by 19 | the District Judge when reviewing these Findings and Recommendations under
28 U.S.C. § 20 | 636(b)(C). A party’s failure to file any objections within the specified time may
result in the 21 | waiver of certain rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th
Cir. 2014). 22 23 | Dated: _ April 23, 2025 Mihaw. Wh. foareh fackte

HELENA M. BARCH-KUCHTA

24 UNITED STATES MAGISTRATE JUDGE

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