

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

Dewayne Thompson v. P. Kuppinger, et al.

Thompson v. Kuppinger · No. 2:23-cv-00463-DJC-EFB (PC) · Decided September 15, 2025

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF
CALIFORNIA 10 11 DEWAYNE THOMPSON, No. 2:23-cv-00463-DJC-EFB (PC) 12 Plaintiff,
13 v. FINDINGS AND RECOMMENDATIONS 14 P. KUPPINGER, et al., 15 Defendants. 16 17
Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 18 U.S.C. §
1983.

On February 13, 2024, pursuant to 28 U.S.C. § 1915A(a), the court determined 19 that plaintiff's
first amended complaint (FAC) alleged the following potentially cognizable 20 claims: 21 Claim
1: Eighth Amendment conditions of confinement claim 22 and First Amendment retaliation claim
against Struve and Heinkel; 23 Claim 2: Eighth Amendment deliberate indifference claim against
Pohovich and Lujan; 24 Claim 4: Eighth Amendment excessive force claim against Pohovich and
Lujan; 25 Claim 5: First Amendment retaliation claim against Kuppinger; 26 Claim 6: First
Amendment retaliation claim against Haynie, Heinkel, and Struve; 27 Claim 8: First Amendment
retaliation claim against Heinkel and Pohovich; 28 Claim 9: Eighth Amendment deliberate
indifference claim against Aung; 1 Claim 10: First Amendment retaliation claim against Aung.

2 ECF No. 18. Defendant Aung is a physician, Haynie is a correctional lieutenant, Heinkel and 3
Struve are correctional sergeants, and all remaining defendants are correctional officers. ECF No.
4 12 at 2-3. Plaintiff has filed a motion for summary judgment, to which defendants have 5
responded, and plaintiff has replied. ECF Nos. 29, 38, 41. Defendants have filed a cross-motion 6
for summary judgment, to which plaintiff has responded, and defendants have replied.

ECF Nos. 7 36, 40, 42. For the following reasons, plaintiff's motion for summary judgment must
be denied, 8 and defendants' motion for summary judgment must be granted. 9 The FAC 10
Plaintiff alleges a lengthy narrative of events and interactions with defendants and other 11 prison
staff.

The allegations of the FAC are set forth here in some detail to provide context for 12 plaintiff's
claims. 13 A. Allegations Relating to the Rain Event and Cell 208 (Claims 1, 2 and 4) 14 Plaintiff
alleges he arrived at CSP-Sacramento on December 20, 2022. ECF No. 12 at 4. 15 On December
23-24, 2022, while he was housed in cell 209 of Building B-1 ("Cell 209") his cell 16 was flooded
with "substantial brown contaminated leakage" during heavy rains.

Id. at 4. He 17 brought this condition to the attention of correctional staff (none of the defendants) but his request 18 to be moved out of Cell 209 was ignored and so he “committed an indecent infraction” in order to 19 be moved to housing in administrative segregation. Id. 20 On January 7, 2023,¹ plaintiff was released from administrative segregation and housed 21 back in Building B-1 in the cell next to his previous housing (“Cell 208”).

Id. at 5. He knew 22 from his experience in Cell 209 that Cell 208 also experienced leakage and flooding. He brought 23 this to the attention of defendant Struve. Struve said he would put in a work order, but plaintiff 24 alleges this never happened. Plaintiff submitted a grievance that night. 25 Rain began at 1:00 a.m. on January 8, 2023, and Cell 208 began to leak and flood “brown 26 contaminated fluid” that burned plaintiff’s eyes, nose cavities, and throat.

Id. At 4:30 a.m., 27 ¹ The FAC states this date was “June 7, 2023,” but this is clearly an error. The narrative timeline of the FAC indicates that the actual date of plaintiff’s release from administrative 28 segregation must have been January 7, 2023. ¹ plaintiff informed staff that he was having suicidal ideations. He slipped and fell and twisted his 2 right ankle on his way to the holding cage to be evaluated, then he was admitted to a crisis bed in 3 a different building, but he was discharged from there at 9:00 a.m. the same day.

None of the 4 defendants was involved in these events. 5 Defendant Pohovich, along with another non-defendant officer, escorted plaintiff after 6 discharge from the crisis bed. Id. The escorting officers allegedly made plaintiff walk faster than 7 his normal pace. Id. at 8. Plaintiff once again fell and was evaluated by a nurse. Id. at 5, 8. 8 Pohovich “tried to cover up liability by stating Plaintiff set [sic] down[.]” Id. at 8.

Plaintiff 9 again twisted his right ankle and had pain in his ankle and back. Id. 10 Pohovich and the other officers placed plaintiff on a gurney to finish escorting him back to 11 Cell 208. Id. at 5, 9. Upon arrival, Pohovich allegedly twisted plaintiff’s handcuffs to cause pain 12 and twisted his fingers “as if she was aiming to break them.” Id. at 5, 9, 12.

Defendant Lujan 13 “began to subtly hit Plaintiff in left ribs while saying, ‘Swing on me N****r,’ in efforts to get 14 Plaintiff to swing on him.” Id. at 5, 12. Pohovich, Lujan, and the other officers pushed him “into 15 puddle of contaminated water from leakage flooding his cell. Lujan stated ‘It’s best you behave, 16 N****r,’ as cell door closed.” Id. at 5, 12.

17 On January 10, 2023, plaintiff was once again in a holding cell to be evaluated for suicidal 18 ideation because of the flooding, where he encountered Struve and asked about moving to 19 another cell. Struve said “I’m on the job,” in an allegedly sarcastic manner which “provoked” 20 plaintiff to “vent of grieving and forewarning of lawsuit.” Id. at 6. Struve answered that plaintiff 21 could find someone else to move him.

Id. 22 On January 11, plaintiff complained to defendant Heinkel about the flooding and asked to
23 be moved. Id. at 7. Heinkel told plaintiff that a damaged roof was causing flooding throughout
24 the B-1 building, and that plaintiff would have to bear with it until County Jail inmates who
were 25 housed in the B-5 building could be transferred out of there so that B-1 inmates could be
moved 26 into B-5.

27 On January 12, Heinkel “had opportunity to move Plaintiff to B8-110, which Plaintiff 28
witnessed was vacant.” Id. This was presumably a cell in another building (“B8”). Heinkel 1
refused, and plaintiff “forewarned of grieving his derelict and callous disregard to his health and 2
safety.” Id. Heinkel allegedly answered that he leads the league in grievances and the more 3
plaintiff complained, the longer it will take to move him.

Plaintiff alleges that in an act of 4 frustration he tried to shatter his cell front window “with a
fragile rock,” but the window did not 5 break. Id. 6 Also on January 12, 2023, plaintiff received
medical attention for the falls he had 7 experienced on January 8. Id. at 9. He was given an X-ray
which allegedly “showed swelling 8 from sprain that was causing pain.” Id. The doctor “applied
ice and ordered orthotic shoes, ankle 9 brace, and compression socks ... and Voltaren topical.” Id.
10 B. Allegations Relating to Property (Claim 5) 11 On January 14, 2023, all the building B-1
inmates including plaintiff were moved to 12 building B-5.

Id. at 7. Plaintiff had apparently deferred picking up his property which had been 13 transferred
from the Corcoran prison in December 2022, and he elected to pick it up after arriving 14 in his
new housing in building B-5. Id. at 13. Defendant Kuppinger was the property officer. 15
Kuppinger had allegedly witnessed plaintiff complain about conditions in his cell and what 16
plaintiff describes as “Plaintiff ranting to his co-workers and superiors of grieving and bringing 17
lawsuit against them for his living conditions.” Id. 18 On January 16, 2023, plaintiff went to claim
his property.

Kuppinger had already taken 19 plaintiff’s property out of the boxes it had been packed in, which
plaintiff claims Kuppinger 20 should not have done outside of plaintiff’s presence. Id. Plaintiff
alleges it was immediately 21 apparent that his property had been “reduced,” meaning that some
of it was missing. Id. 22 Whereas he had had nine boxes of property when he arrived at CSP-
Sacramento, including three 23 boxes of legal property, there now appeared to be only about five
total boxes of property.

Id. 24 Plaintiff asked Kuppinger about this. Kuppinger allegedly answered: “We got work to do.
You 25 want to make all this noise about your housing ... and make threats about grievances and
lawsuits 26 with all the suicidal b*****t, Ima go off property matrix and break you down.” Id.
Plaintiff 27 claims Kuppinger’s normal practice was to just give inmates their property “if it was
no serious 28 contraband,” and so Kuppinger’s strict adherence to policy in this instance was
exceptional.

1 Kuppinger began dispensing the property to plaintiff and told plaintiff to sign the property receipt. 2 Plaintiff refused because he would thereby have waived his right to grieve the loss and damage of 3 personal and legal property. 4 Plaintiff asked to see his appliances and legal property. Kuppinger then informed plaintiff 5 that his television and typewriter were damaged when they arrived from CSP-Corcoran.

Id. at 14. 6 Plaintiff had watched staff at CSP-Corcoran pack his belongings on December 19, 2022, and he 7 alleges the property was not damaged at departure. Plaintiff's refusal to sign the receipt on 8 January 16 meant he could not retrieve his property at that time. 9 On January 29, 2023, plaintiff signed the property receipt because he had decided he 10 could not wait for the grievance process to be completed and he had lost faith in it.

Plaintiff's 11 retrieved typewriter did require some repair to type capital letters, with the assistance of a 12 jailhouse handyman. Id. at 15. But plaintiff discovered that most of his law books were missing. 13 Id. at 14. He grieved Kuppinger's handling of the property transfer. 14 On April 19, 2023, a non-defendant officer (Williams) inspected, inventoried, and packed 15 plaintiff's property when plaintiff was moved to administrative segregation.

Id. at 15. Kuppinger 16 allegedly "went out of his way" to inspect plaintiff's property "like a fine tooth comb" while 17 plaintiff was in administrative segregation. Plaintiff alleges Kuppinger was the assigned property 18 officer for the B building, but not for the building where administrative segregation was housed. 19 Also, Kuppinger turned off his body camera while inspecting plaintiff's property.

Plaintiff 20 alleges Kuppinger must have searched every one of plaintiff's legal documents, because he 21 confiscated plaintiff's sewing needles that were hidden in the legal documents. Id. at 15 n.1. 22 Kuppinger confiscated plaintiff's typewriter, but plaintiff did not discover this until June 23 16, 2023 when he was released from administrative segregation and retrieved his property.

Id. at 24 15. Plaintiff alleges the confiscation was retaliatory because Kuppinger knew plaintiff used the 25 typewriter to prepare his grievance against Kuppinger. 26 //// 27 //// 28 //// 1 C. Allegations Relating to Rules Violation Report (Claim 6) 2 The FAC alleges that defendant Heinkel filed a false rules violation report (RVR) against 3 plaintiff, Struve reviewed it, and Haynie classified it as serious.2 Id. at 17.

The RVR reported 4 that plaintiff had falsified a grievance, but plaintiff alleges that defendants' roles with respect to 5 the RVR were retaliation for his grievances. Id. at 18. Plaintiff alleges he was "acquitted" of the 6 RVR on March 9, 2023. Id. at 17. 7 D. Allegations Relating To Cell Search (Claim 8) 8 The FAC alleges that Heinkel and Pohovich searched plaintiff's cell "when there was no 9 reasonable suspicion or penological interest in doing so."3 ECF No. 12 at 20.

The cell search 10 was allegedly retaliation for plaintiff's filing of grievances and this lawsuit, and also retaliation 11 for plaintiff's seeking emergency medical treatment for an anxiety attack. Id. In the course of the 12 cell search, officers acting under the supervision of Heinkel 1) destroyed some of plaintiff's legal 13 papers with a wet substance, 2) broke his headphones, and 3) took personal pictures and a storage 14 box that plaintiff used to organize his legal papers and also to wash his laundry.

Id. Plaintiff 15 alleges the search violated his First Amendment right of access to the courts. 16 E. Allegations Relating To Medical Care (Claims 9 and 10) 17 Deliberate Indifference. Plaintiff was seen by his primary care physician for ankle and 18 foot pain related to his falling on January 8, 2023. ECF No. 12 at 21.

The physician at that time 19 was Hlaing. Defendant grieved Hlaing's alleged failure to treat plaintiff's back injury, and the 20 nurse who reviewed plaintiff's grievance referred him for treatment of his back pain. Meanwhile, 21 defendant Aung succeeded Hlaing as primary care physician. Id. Aung saw plaintiff on March 22 17, 2023, and chose a conservative course of action "by merely telling plaintiff to stretch." Id. 23 Plaintiff alleges this constituted deliberate indifference (Claim 9).

Id. at 22. Plaintiff 24 "forewarned Aung that he 'will write it up' (grieve) his inadequate medical treatment by denying 25 2 According to the copy of the RVR that defendants have entered into the evidentiary 26 record, Heinkel initiated the RVR on January 31, 2023. ECF No. 36-10; id. at 28. 27 3 The FAC alleges the cell search happened on February 4, 2023, but the parties now agree that it occurred on April 4, 2023.

See ECF No. 36-7 at 3 ¶ 10 (Pohovich); ECF No. 36-10 28 at 6 ¶ 21 (Heinkel); ECF No. 40 at 24 (plaintiff); ECF No. 42 at 38. 1 him X-ray, back brace or Ace bandage." Id. at 22. Aung "invidiously responded, make sure you 2 spell my name right; though, he had no name tag." Id. 3 Retaliation. Plaintiff alleges that Aung was "bitter" because of this "forewarning" at their 4 next appointment on April 11, 2023.

Id. at 24. Plaintiff was anticipating the expiration of his 5 medical authorization for durable medical equipment (DME), consisting of orthotic shoes with 6 custom insoles, ankle brace, and compression socks.4 Id. at 24, 25.

The DME authorization was 7 scheduled to expire on July 21, 2023. Id. at 24. Plaintiff pleaded for Aung to renew the DME 8 authorization, but Aung "with joy said 'don't come to prison.'" Id. at 25. Plaintiff responded 9 with a "vent of going to 'write him up' again." Id. Aung then "instantly and ninety day 10 prematurely cancelled [plaintiff's] orthopedic shoes, ankle brace, compression socks [as] well as 11 OTC arthritis pain medicine that preceding PCPs ordered." Id. Plaintiff alleges this was 12 retaliation for plaintiff's grievance threat on March 17 (Claim 10).

When plaintiff went to 13 segregation in April 2023, he “instantly sought medical treatment” from the medical provider for 14 that building (Bharat) who restored all the DME orders. Id. 15 The Cross-Motions For Summary Judgment 16 All parties move for summary judgment on all claims.

The parties have many factual 17 disputes. The parties’ evidence and their legal arguments will be set forth as they are relevant to 18 the separate claims against the individual defendants. 19 The Evidentiary Record 20 In support of his motion for summary judgment, plaintiff submits his own declaration 21 (ECF No. 29 at 2-16), a series of statements of undisputed facts (id. at 17-48), a grievance he 22 lodged against Heinkel (id. at 63-69), a grievance he lodged against Pohovich and Lujan (id. at 23 70-78), and a grievance he lodged against Kuppinger (id. at 79-97).5 24 //// 25 4 The authorization had apparently been given by Aung’s predecessor Hlaing, on a 26 temporary but renewable basis.

ECF No. 12 at 25. 27 5 Plaintiff submits another grievance lodged against defendants who have been dismissed (Banish, UHDE, and Chavez). ECF No. 29 at 49-62. 28 1 In support of defendants’ motion for summary judgment, they submit their own 2 declarations with exhibits.6 3 In opposition to defendants’ motion for summary judgment, plaintiff submits: (1) his 4 verified account of events (ECF No. 40 at 2-30); (2) six sets of disputed facts (ECF Nos. 40-1 5 through 40-7); and (3) a “voluminous appendix A-N” containing discovery responses and 6 grievance records (ECF No. 39).7 7 In their final replies, all parties have submitted their own versions of lists of undisputed 8 facts.

ECF No. 41; ECF No. 42 at 13-42. 9 Summary Judgment Standard Under Rule 56 10 Summary judgment is appropriate when the moving party “shows that there is no genuine 11 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. 12 Civ. P. 56(a). 13 Under summary judgment practice, the moving party “initially bears the burden of 14 proving the absence of a genuine issue of material fact.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 15 376, 387 (9th Cir.

2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The moving 16 party may accomplish this by “citing to particular parts of materials in the record, including 17 depositions, documents, electronically stored information, affidavits or declarations, stipulations 18 (including those made for purposes of the motion only), admissions, interrogatory answers, or 19 other materials” or by showing that such materials “do not establish the absence or presence of a 20 genuine dispute, or that the adverse party cannot produce admissible evidence to support the 21 fact.” Fed.

R. Civ. P. 56(c)(1)(A), (B). When the non-moving party bears the burden of proof at 22 trial, “the moving party need only prove that there is an absence of evidence to support the 23 6 Aung declaration (ECF No. 36-4); Haynie declaration (ECF No. 36-5); Pohovich declaration, with video exhibit (ECF No. 36-7); Lujan declaration (ECF No. 36-7 and 36-8 24 (exhibits)); Struve

declaration (ECF No. 36-9); Heinkel declaration (ECF No. 36-10); Kuppinger declaration (ECF No. 36-11); Kuppinger's second declaration (ECF No. 42-1).

Defendants also submit the declaration of non-party A. De La Torre (ECF No. 36-6). Heinkel discovery responses (ECF No. 39 at 2-22); Struve discovery responses (id. at 23-38); Haynie discovery responses (id. at 39-48); Pohovich discovery responses (id. at 49-61); Lujan discovery responses (id. at 62-73); Aung discovery responses (id. at 74-90); Kuppinger discovery responses (id. at 91-106); and grievance records (id. at 107-226).

1 nonmoving party's case." Oracle Corp., 627 F.3d at 387 (citing Celotex, 477 U.S. at 325); see also Fed. R. Civ. P. 56(c)(1)(B). Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

See Celotex, 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, ..., is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(c)(1); Matsushita, 475 U.S. at 586 n.11.

The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir.

1987), overruled on other grounds as stated in Flood v. Miller, 35 F. App'x 701, 703 n.3 (9th Cir. 2002). In the endeavor to establish the existence of a factual dispute, the opposing party need not 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.

Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce 27 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’” 28 Matsushita, 475 U.S. at 587 (citations omitted). 1 “In evaluating the evidence to determine whether there is a genuine issue of fact,” the 2 court draws “all reasonable inferences supported by the evidence in favor of the non-moving 3 party.” Walls v. Central Costa County Transit Auth., 653 F.3d 963, 966 (9th Cir.

2011). It is the 4 opposing party’s obligation to produce a factual predicate from which the inference may be 5 drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), 6 aff’d, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing 7 party “must do more than simply show that there is some metaphysical doubt as to the material 8 facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the 9 nonmoving party, there is no ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation 10 omitted).

11 Eighth Amendment Conditions of Confinement (Claim 1) 12 A. Legal Standard - Conditions of Confinement 13 “An Eighth Amendment claim that a prison official has deprived inmates of humane 14 conditions of confinement must meet two requirements, one objective and one subjective.” Allen 15 v. Sakai, 48 F.3d 1082, 1087 (9th Cir. 1994) (citing Farmer v. Brennan, 511 U.S. 825, 834 16 (1994)).

The objective test requires the inmate to show conditions of confinement that deny the 17 minimal civilized measure of life’s necessities. Hudson v. McMillian, 503 U.S. 1, 9 (1992). 18 These are “conditions posing a substantial risk of serious harm that present an excessive risk to 19 his health or safety.” Norbert v. City and County of San Francisco, 10 F.4th 918, 927-928 (9th 20 Cir.

2021) (citation and quotation marks omitted). Because the sufficiency of a conditions-of- 21 confinement claim depends upon the particular facts of each situation, the “circumstances, nature, 22 and duration” of the challenged conditions must be carefully considered. Johnson v. Lewis, 217 23 F.3d 726, 731 (9th Cir. 2000). Conditions of confinement in combination may have a “mutually 24 enforcing effect” that deprives a single identifiable human need such as food, warmth, or 25 exercise, but “[a]morphous overall conditions cannot rise to the level of cruel and unusual 26 punishment when no specific deprivation of a single human need exists.” Brown v. Bueno, No. 27 1:17-cv-01295-LJO-SKO (PC), 2018 WL 6068513, at *3 (E.D.

Cal. Nov. 20, 2018) (citing and 28 quoting Wilson v. Seiter, 501 U.S. 294, 304-05 (1991) (internal quotation marks omitted)). 1 The subjective test requires a showing that the prison official’s state of mind was 2 deliberately indifferent -- a wanton state of mind. Norbert, 10 F.4th at 928; Wilson, 501 U.S. at 3 302.8 When considering whether a prison official acted with deliberate indifference, the court 4 must often consider the constraints facing the official, and “‘competing institutional

concerns for the safety of prison staff or other inmates.” Wilson, 501 U.S. at 303 (quoting Whitley v. Albers, 647 U.S. 312, 320 (1986)).

B. Evidentiary Record (Claim 1 – Conditions of Confinement) The allegations in plaintiff’s FAC have already been described. His motion for summary judgment restates essentially repetitive accounts of the same events. ECF No. 29 at 2-4, 20-23, 33-36. He argues that Struve and Heinkel were deliberately indifferent by keeping him in Cell 208 between January 8-14, 2023. Id. at 2.

Defendant Struve declares that the entire region around Sacramento received historic rains in January 2023. ECF Nos. 36-9 at 2 ¶ 3. Flooding at the Sacramento County Jail led to the transfer of approximately 450 Jail inmates to the state prison facility at CSP-Sacramento. Id. The Jail inmates were housed throughout the CSP-Sacramento facility. Id. The heavy rains also caused significant damage, leaks, and flooding of buildings at CSP-Sacramento.

Id. at ¶ 5. Maintenance staff were notified of the leaks in Building 1, but they could not provide a timeline for repair. Id. Many inmates, including plaintiff, were “identified for rehousing due to in-cell leaks.” Id. at ¶ 6. Some cells with severe leaks were “redlined.” Id. Some other cells may have been temporarily open due to a prisoner leaving for acute mental health or medical care, but those needed to remain available for returning prisoners.

Id. “The severe weather, failing roofs, and evacuation of County Jail inmates combined to create a situation where incarcerated persons throughout the prison had to temporarily house in leaking cells until the County Jail inmates could be safely relocated to create room to move people.” Id. at ¶ 8. The Wilson court noted the prisoner-petitioner’s acknowledgment “for instance, that if a prison boiler malfunctions accidentally during a cold winter, an inmate would have no basis for an Eighth Amendment claim, even if he suffers objectively significant harm.” 501 U.S. at 300.

Plaintiff’s motion states he was moved out of Cell 208 on January 15, but elsewhere the record establishes that the date was January 14. ECF No. 36-9 at 3 ¶ 9; ECF No. 12 at 7. Struve had no authority or control over relocating the Jail inmates. Id. at ¶ 7.

After the Jail inmates left, all Building 1 inmates including plaintiff were moved into Building 5 on January 14, 2023. Id. at 3 ¶ 9. Struve acknowledges that the roof damage in Building 1 was so extensive that the entire roof had to be replaced. Id. However, he has no knowledge that the leaking water was contaminated, unsafe, or caused burning sensations and constricted breathing.

Id. at ¶ 10. He worked in Building 1 but did not experience these symptoms. Id. Defendant Heinkel’s declaration concurs that heavy rain caused leaks throughout the prison and that there were no available cells to rehouse inmates.

As with Struve, he had no 10 control over relocating Jail inmates, he was unaware of any contamination in the rainwater, and 11 he also worked in Building 1 and did not experience symptoms. ECF No. 36-10 at 2-4. 12 Heinkel submits email correspondence with maintenance personnel. Id. at 9-15. It 13 appears that on January 5, maintenance informed that “large portions of roofing were blown off 14 last night on multiple facilities” and they were unable to provide a timeline for repair of severe 15 leaks in the B-1 control office.

Id. at 9. On January 9, non-defendant staff inquired about moving 16 some B-1 inmates to the B-5 building. Id. at 10. According to these inquiries, 14 cells in B-1 had 17 a couple of inches of water in them, and inmates in 5 cells (including plaintiff’s Cell 208) were 18 “willing to move.” Id.; id. at 13. Apparently, there was no response to the January 9 emails.

19 Heinkel adds that he does not recall having a discussion with plaintiff on January 11. Id. 20 at 3 ¶¶ 9, 10. Based on his review of records of the vacancy in Building 8, cell 110, he declares 21 that the occupant of that cell “was only temporarily moved for quarantine.” Id. at ¶ 10. It was 22 not possible to move plaintiff to that cell because there would have been no place to put the 23 quarantined occupant if he was cleared before the Jail inmates left.

Id. 24 Plaintiff disputes most of the facts asserted by Struve and Heinkel, including whether the 25 rains of January 2023 were “historic,” the number of inmates who arrived from the Jail, whether 26 they were housed throughout CSP-Sacramento or just in building B-5, whether maintenance 27 personnel were informed of leaks and whether they responded, whether the storms caused 28 significant damage throughout the prison and whether the roof was too damaged to repair, 1 whether he was one of many incarcerated persons who was identified for rehousing due to cell 2 leaks, whether there was no room to relocate inmates, and whether staff were also working in the 3 flooded facilities.

See ECF No. 41 at 7-10. Defendants counter that plaintiff fails to offer 4 evidence that refutes their factual assertions. ECF No. 42 at 14-20. 5 C. Analysis (Claim 1 – Conditions of Confinement) 6 Plaintiff fails to show any genuine issue of material fact as to either prong of his 7 conditions of confinement claim.

As for the objective prong, plaintiff has not shown a genuine 8 issue as to whether there was flooding throughout the prison in January 2023, and indeed that the 9 rain event was so severe that inmates were relocated from the County Jail.

The parties agree that 10 water leaked into plaintiff’s Cell 208, but plaintiff has not shown a genuine issue whether Cell 11 208 was affected in such an extreme manner as to have constituted a substantial risk of serious 12 harm specific to him, or an excessive risk to his health or safety during the week that he remained 13 there. See *Pauley v. California*, No. 2:18-cv-2595, 2018 WL 5920780, at *5 (E.D.

Cal. Nov. 4, 14 2019) (“[a] number of courts have concluded that poorly maintained surfaces, wet floors, or leaky 15 roofs do not pose a substantial risk of serious harm supporting a constitutional violation”). Nor is 16 there any evidence that Struve or Heinkel were responsible for the leaking roof and water in Cell 17 208 or the inability to promptly repair it.

See *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989) 18 (liability under § 1983 requires a showing of the defendant’s personal involvement or a causal 19 connection between the defendant’s wrongful conduct and the constitutional violation). 20 As for the subjective prong of the test, plaintiff also fails to show a genuine dispute as to 21 whether Struve or Heinkel acted with wanton disregard for his health and safety.

Plaintiff fails to 22 counter defendants’ declarations that neither Struve nor Heinkel had any control over the influx 23 of Jail inmates filling the facility. Neither has plaintiff countered with any evidence refuting that 24 he was identified as an inmate to be moved if cells opened, or that there were no unaffected cells 25 available to move plaintiff. Nor does plaintiff counter with evidence refuting that cell 110 in 26 Building 8 was kept open for the possible return of its occupant.10 Likewise, he presents no 27 10 Prison officials have discretion to assign housing.

Meachum v. Fano, 427 U.S. 215, 28 225-27 (1976). 1 countering evidence that building maintenance staff were unable to immediately repair the 2 leaking roof, and that plaintiff along with other inmates were moved to another building when it 3 became available. Plaintiff disagrees with these declared facts, but he offers no persuasive 4 evidence that there is any genuine dispute requiring trial.

5 Construing all reasonable inferences in plaintiff’s favor, plaintiff fails to show that either 6 Struve or Heinkel was deliberately indifferent to any threat to plaintiff’s safety, in the context of 7 the constraints created by the general conditions of flooding and damage throughout the prison 8 facility, the presence of the additional Jail inmates, and the inability of maintenance staff to make 9 immediate repairs.

Summary judgment must be entered in favor of defendants on the conditions 10 of confinement sub-issue of Claim 1. 11 Eighth Amendment Deliberate Indifference (Claims 2 and 9) 12 A. Legal Standard – Deliberate Indifference (Claim 2) 13 To establish a constitutional violation “based on a failure to prevent harm, the inmate must 14 show that he is incarcerated under conditions posing a substantial of serious harm.” *Farmer*, 511 15 U.S. at 834.

An inmate’s Eighth Amendment rights are violated by a prison official if that 16 official exposes an inmate to a “substantial risk of serious harm,” while displaying “deliberate 17 indifference” to that risk. *Id.* An official, however, is only liable if the “culpable action, or 18 inaction, is directly attributed to them” *Starr v. Baca*, 652 F.3d 1202, 1205 (9th Cir.

2011). 19 Further, a plaintiff must have suffered some type of pain or harm that is more than de minimis in 20 order to implicate the Eighth Amendment. See, e.g., *Shapley v. Nevada Bd. of State Prison* 21 Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985) (“delay of surgery, without more, is insufficient to 22 state a claim of deliberate medical indifference ... unless the denial was harmful”).

23 B. Evidentiary Record (Claim 2) 24 Plaintiff’s motion for summary judgment reiterates the allegations of his FAC. ECF No. 25 49 at 4-5, 26-27, 42-43. He argues that Pohovich and Lujan were deliberately indifferent by 26 ignoring his complaints of pain after his fall and taking him back to Cell 208 on January 8. Id. at 27 27, 43. 28 //// 1 Pohovich declares that the officers escorting plaintiff on January 8 called for medical 2 evaluation, that the medical staff who answered the call cleared plaintiff to return to his cell, and 3 that Pohovich relied on the expertise of medical staff.

ECF No. 36-7 at 2 ¶¶ 3-4. The escorting 4 officers placed plaintiff on a gurney because he refused to stand and walk. Id. ¶ 5. Pohovich 5 submits a video showing the fall, the medical staff arriving and leaving, and plaintiff being placed 6 on the gurney. See ECF No. 37 (hereinafter “Pohovich Video”). 7 The Pohovich Video shows water on the floor in the hallway where plaintiff was escorted, 8 and someone attempting to sweep away the water.

Pohovich Video, at 0:48 – 1:00. Plaintiff 9 appears to be walking at an unhurried pace. Id. at 1:00 – 1:06. Plaintiff is escorted by three 10 officers, one on each side and one behind him.11 Id. at 1:06 – 1:08. The officers at his sides hold 11 his arms and appear to be supporting him. Id. When plaintiff slips, his legs move out in front of 12 him and he first lands straight down and then rolls to his side.

Id. at 1:00 – 1:09. The officers 13 continue to hold his arms as plaintiff goes to the floor; they do not fall with him. Id. Additional 14 staff come and go as plaintiff remains on the floor. Id. at 1:55 – 4:20. A person with a clipboard 15 arrives; apparently this is Rosales arriving to conduct a medical evaluation. Id. at 4:24. 16 The Pohovich Video switches to a different camera with a closer view of Rosales.

Id. at 17 4:32. Rosales stands over plaintiff and appears to speak with him, writes something on the 18 clipboard, and leaves. Id. at 4:32 – 5:23. Other officers are seen standing about. Id. at 5:23-6:20. 19 An unidentified official in a light-colored jacket is seen arriving, appears to talk with plaintiff, 20 and then leaves. Id. at 6:00 – 7:17. A gurney is brought to the scene.

Id. at 6:20. 21 The video switches back to the original camera view. Id. at 7:20. Plaintiff is lifted onto 22 the gurney by Pohovich and three other officers. Id. at 7:45 – 8:00. Pohovich and the other 23 officers lift the gurney and proceed down the hallway out of camera view. Id. at 8:00 – 8:13. 24

Defendant Lujan declares that he arrived on scene in response to a call for assistance after 25 plaintiff fell.

ECF No. 36-8 at 2 ¶ 3. Medical staff arrived and cleared plaintiff to return to his 26 cell. Lujan did not interfere with the medical evaluation, he relied on their expertise, and plaintiff 27 11 Pohovich is understood to be the officer holding plaintiff's right arm, so identified 28 because this appears to be the only female officer. 1 was placed on a gurney because he refused to walk.

Id. at ¶¶ 3-5. Lujan apparently accompanied 2 the officers who carried the gurney back to plaintiff's cell. Id. at ¶ 5. Lujan submits a report he 3 prepared the same day (January 8, 2023) which describes the incident and which is consistent 4 with the Pohovich Video. ECF No. 36-8 at 6-7. Pohovich and Lujan submit a copy of the 5 medical report prepared by Rosales.

Id. at 9; ECF No. 36-7 at 9. 6 Plaintiff disputes some of defendant's factual assertions, such as whether medical 7 responded to his fall or to a call of a resistant inmate, and whether Pohovich and Lujan had no 8 professional training in medicine. ECF No. 41 at 11. Defendants counter that plaintiff's 9 objections are unsupported. ECF No. 42 at 23-25. 10 C. Analysis (Claim 2) 11 Plaintiff fails to show any genuine dispute over a material issue as to whether Pohovich or 12 Lujan placed him at any substantial risk of serious harm during the escort back to his cell.

The 13 floor was clearly wet, but this does not in and of itself pose an excessive risk. Pauley, 2018 WL 14 5920780, at *5; see also Brown v. Pond, No. 19-35418, 2022 WL 34134, at *2 (9th Cir. Jan. 4, 15 2022) (requiring a prisoner to traverse wet grass with shackled hands did not pose an excessive 16 risk to health and safety). Pohovich supported plaintiff as he walked and the group moved in an 17 unhurried manner.

Pohovich continued to hold and support plaintiff as he fell. The escorting 18 officers summoned medical staff and waited while plaintiff was evaluated. Lujan arrived at this 19 juncture. Pohovich and Lujan declare that a gurney was used to complete the escort because 20 plaintiff refused to walk. 21 Construing all reasonable inferences in plaintiff's favor, he has shown no genuine issue 22 whether defendants' conduct during the escort was deliberately indifferent, or whether he had 23 such obvious signs of extreme distress that non-medical officers Pohovich and Lujan should have 24 demanded further medical assessments or care instead of returning him to his cell.

Summary 25 judgment must be entered in favor of Pohovich and Lujan on Claim 2. 26 //// 27 //// 28 //// 1 D. Deliberate Indifference in Medical Care (Claim 9) 2 Deliberate indifference to a serious medical need exists if the defendant knows that the 3 inmate "face[s] a substantial risk of serious harm and disregards that risk by failing to take 4 reasonable measures to abate it." Farmer, 511 U.S. at 847.

A serious medical need exists if the 5 failure to treat a prisoner's condition could result in further significant injury or the "unnecessary 6 and wanton infliction of pain." McGuckin v. Smith, 974

F.2d 1050, 1059 (9th Cir. 1992). 7 Deliberate indifference requires a purposeful act or failure to act on the part of the defendant and 8 resulting harm. *Id.* at 1060.

9 A physician need not fail to treat an inmate altogether in order to violate that inmate's 10 Eighth Amendment rights. *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989). A 11 failure to competently treat a serious medical condition, even if some treatment is prescribed, may 12 constitute deliberate indifference in a particular case. *Id.* However, it is important to differentiate 13 common law negligence claims of malpractice from claims predicated on violations of the Eighth 14 Amendment's prohibition of cruel and unusual punishment. "Mere 'indifference,' 'negligence,' 15 or 'medical malpractice,' will not support an Eighth Amendment claim.

Broughton v. Cutter Laboratories, 622 F.2d 4548, 460 (9th Cir. 1980) (citing *Estelle*, 429 U.S. 97, 105-06 (1976)). 17 Mere disagreement among medical providers on an acceptable course of treatment is not 18 evidence of deliberate indifference. *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004). 19 "Rather, to prevail on a claim involving choices of treatment, a prisoner must show that the 20 chosen course of treatment 'was medically unacceptable under the circumstances,' and was 21 chosen 'in conscious disregard of an excessive risk to [the prisoner's] health.'" *Id.*, 391 F.3d at 22 1058 (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.

1996)). Further, a plaintiff must 23 have suffered some type of pain or harm that is more than de minimis to implicate the Eighth 24 Amendment. See, e.g., *Shapley*, 766 F.2d at 407 (delay of surgery is insufficient, unless harmful). 25 E. Evidentiary Record (Claim 9) 26 As with his other claims, plaintiff's motion for summary judgment twice reiterates the 27 allegations of the FAC.

ECF No. 29 at 13-16, 17-19. Plaintiff claims it is an "undisputed fact" 28 that he "suffered a compounded ankle injury" on January 8, 2023. *Id.* at 17. 1 Based on plaintiff's medical records, Aung declares that a nurse saw plaintiff on January 2 11, at which time plaintiff had "slight swelling" of his right ankle. ECF No. 36-4 at 2 ¶ 7. 3 Plaintiff saw physician Hlaing on January 13.

Id. at 2 ¶ 8. Imaging of plaintiff's ankle showed 4 intact bones and no evidence of fracture, dislocation, or subluxation. *Id.* at 3 ¶ 8. Hlaing had an 5 "impression" of "moderate ankle joint arthritis." *Id.* Hlaing ordered temporary orthotics, over the 6 counter pain medications, and topical gel.¹² *Id.* 7 The parties agree that plaintiff first saw Aung on March 17, 2023.

ECF No. 29 at 15; ECF 8 No. 36-4 at 3 ¶ 9. Plaintiff complained of pain from a slip and fall two months previous, but he 9 showed "no acute signs of distress, ambulated without assistance, had a normal gait, normal range 10 of motion, and no significant deformities." ECF No. 36-4 at 3 ¶ 9. Aung recommended 11 continued use of over-the-counter pain medication and continued stretching.

Id. 12 Plaintiff submitted a health care request on March 30, 2023¹³ asking to refill his topical 13 gel. Id. at 3-4 ¶ 10; id. at 10, 60. The refill was given. Id. at 4 ¶ 10. Aung declares that he had 14 not discontinued plaintiff's topical gel and it was available to plaintiff in the canteen or through a 15 health care services request (i.e., the form of request plaintiff used).

Id. at 3-4 ¶¶ 10-11. 16 The parties agree that Aung saw plaintiff a second time on April 11, 2023. Id. at 4 ¶ 11; 17 ECF No. 29 at 18. Plaintiff complained of a sprained ankle and he requested a cane and orthotics. 18 ECF No. 36-4 at 4 ¶ 11. Aung provided the cane but assessed that orthotic equipment was not 19 medically necessary. Id. 20 The parties agree that plaintiff saw a different physician (Bharat) on May 8, 2023.

Bharat 21 ordered the orthotic shoes and compression stockings that plaintiff requested. ECF No. 29 at 19; 22 12 The FAC alleges that plaintiff had irritation of his eyes, nose, and throat, but plaintiff 23 appears to have abandoned this issue. His motion for summary judgment does not mention these complaints, and his medical records indicate that plaintiff showed "no signs or symptoms relating 24 to his nose and had unlabored normal respiratory function" during his nurse visit on January 11.

ECF No. 36-4 at 2 ¶ 7. He "complained of eye irritation, but there was no sign of any redness, 25 discharge, or swelling and he was not rubbing his eyes." Id. At the visit with Hlaing on January 13, plaintiff had "no complaints regarding burning in his nose, throat, and eyes, or constricting 26 breathing" and "no new problems with vision, smell, or taste, no chest pain, and normal breathing." Id. at ¶ 8.

27 13 Aung's declaration states the date was March 20, 2023, but the request itself appears to 28 be dated March 30, 2023. See ECF No. 36-4 at 10. 1 ECF No. 36-4 at 4 ¶ 13. 2 Plaintiff disputes many of defendants' factual assertions, such as Aung's reported 3 observations of plaintiff's condition on March 17, whether plaintiff ambulated without assistance 4 on April 11, whether Aung did not order orthotics on April 11, and whether Aung discontinued 5 his topical gel.

ECF No. 41 at 19-20. Defendants counter that plaintiff fails to support his 6 contentions. ECF No. 42 at 39-42. 7 F. Analysis (Claim 9) 8 Plaintiff has failed to show a genuine issue for trial as to whether Aung was deliberately 9 indifferent in the care he provided in March and April 2023. Aung assessed plaintiff's gait and 10 presentation, and he provided a cane and advice to continue using over-the-counter pain 11 medication and to continue stretching.

Aung did not discontinue plaintiff's topical gel 12 prescription, and there is no indication that any DME was taken from plaintiff prematurely. The 13 fact that Bharat subsequently ordered orthotic shoes and compression stockings is insufficient to 14 create a genuine issue whether Aung's treatment choices were medically unacceptable and chosen 15 in conscious disregard of an excessive risk to plaintiff's health.

Toguchi, 391 F.3d at 1058. 16 Summary judgment must be entered in favor of Aung on Claim 9. 17 Excessive Force (Claim 4) 18 A. Legal Standard (Claim 4) 19 To establish a claim for the use of excessive force in violation of the Eighth Amendment, 20 a plaintiff must demonstrate that prison officials applied force maliciously and sadistically to 21 cause harm, rather than in a good faith effort to maintain or restore discipline.

Hudson, 503 U.S. 22 at 6-7. In making this determination, the court evaluates (1) the need for application of force, (2) 23 the relationship between that need and the amount of force used, (3) the threat reasonably 24 perceived by the responsible officials, and (4) any efforts made to temper the severity of a 25 forceful response. *Id.* at 7; see also *id.* at 9-10 (“The Eighth Amendment’s prohibition of cruel 26 and unusual punishment necessarily excludes from constitutional recognition de minimis uses of 27 physical force, provided that the use of force is not of a sort repugnant to the conscience of 28 mankind.” (internal quotation marks and citations omitted)).

De minimis touching, even if 1 malevolent, does not rise to the level of a constitutional violation unless repugnant to the 2 conscience of mankind. *Wilkins v. Gaddy*, 559 U.S. 34, 37-38 (2010). Also, “[f]or all claims to 3 which it applies, [the Prison Litigation Reform Act] requires a prior showing of physical injury 4 that need not be significant but must be more than de minimis.” *Oliver v. Keller*, 289 F.3d 623, 5 627 (9th Cir.

2002). 6 B. Evidentiary Record (Claim 4) 7 The FAC’s allegations that Pohovich and Lujan made plaintiff walk too fast have already 8 been described. Plaintiff’s summary judgment motion omits any further mention of this. See 9 ECF No. 29 at 4-6, 26-27, 42-43.

The court therefore proceeds from the allegations of the FAC 10 against Pohovich (twisting of plaintiff’s handcuffs and fingers, pushing plaintiff into his cell) and 11 Lujan (subtle hitting of ribs; racial slurs, pushing plaintiff into his cell) after plaintiff arrived back 12 at Cell 208 on January 8, 2023. ECF No. 12 at 5, 9, 12. 13 Pohovich and Lujan both declare that plaintiff’s handcuffs were positioned with the 14 keyhole facing inwards, making them very difficult to remove.

They also declare that plaintiff 15 began to scream and accuse the officers of assaulting him. Both deny using any force and both 16 deny witnessing any force used against plaintiff. They deny hearing or using any racial slurs. 17 ECF No. 36-7 at 2 ¶¶ 5-6; ECF No. 36-8 at 2 ¶¶ 5-6. 18 The Pohovich Video shows plaintiff arriving at his cell carried on the gurney.

Pohovich 19 Video at 9:18. There appear to be eight officers standing around the cell door, identifiably 20 including Pohovich. *Id.* at 9:20 – 9:28. The officers bring plaintiff to his feet outside the cell. *Id.* 21 at 9:44. They stand around plaintiff and he is not visible to the camera. *Id.* at 9:48 – 11:00.

The 22 group breaks up and starts moving away no more than 75 seconds after plaintiff was made to 23 stand. Id. at 10:55 – 11:00. There is no audio. The video shows no apparent indication that force 24 was used on plaintiff, or that he was forcibly pushed into his cell. 25 Plaintiff disputes aspects of defendants’ accounts, such as whether the gurney was used 26 because he refused to stand, and whether officers assisted him to his feet.

ECF No. 41 at 12-13. 27 Defendants counter that plaintiff does not support his contentions. ECF No. 42 at 25-27. 28 /// 1 C. Analysis (Claim 4) 2 Plaintiff has shown no genuine issue whether either Pohovich or Lujan applied anything 3 more than de minimis force.

The entire interaction while plaintiff stood in front of his cell took a 4 little over a minute. Plaintiff does not make any showing of physical injury from Pohovich 5 twisting his handcuffs or fingers, or due to Lujan “subtly” hitting his ribs. There is no record that 6 plaintiff complained of any such injuries during his nurse visit on January 11 or his visit with 7 Hlaing on January 13.

ECF No. 36-4 at 2-3, 21-23, 107-116. Viewing the evidence in the light 8 most favorable to plaintiff, he cannot carry his burden to prove more than de minimis touching, or 9 any physical injury that is more than de minimis. See Hudson, 503 U.S. at 9-10. 10 Lujan’s alleged racial epithets likewise are not shown to have caused any actual injury to 11 plaintiff.

Verbal harassment and abuse do not rise to the level of an Eighth Amendment 12 constitutional violation. Freeman v. Arpaio, 125 F.3d 732, 738 (9th Cir. 1997), overruled in part 13 on other grounds by Shakur v. Schriro, 514 F.3d 878, 884-885 (9th Cir. 2008); see also Keenan v. 14 Hall, 83 F.3d 1083, 1092 (9th Cir. 1996), amended 135 F.3d 1318 (9th Cir. 1998) (disrespectful 15 and assaultive comments by prison guard not enough to implicate the Eighth Amendment).

There 16 is no genuine issue of fact for trial on plaintiff's Eighth Amendment excessive force claim against 17 Pohovich or Lujan. Summary judgment must be entered in favor of defendants on Claim 4. 18 Retaliation (Claims 1, 5, 6, 8 and 10) 19 A. Legal Standard (Claims 1, 5, 6, 8 and 10) 20 An inmate’s First Amendment claim of retaliation requires the inmate to show: “(1) [a]n 21 assertion that a state actor took some adverse action against the inmate (2) because of (3) that 22 inmate’s protected conduct, and that such action (4) chilled the inmate’s First Amendment rights, 23 and (5) the action did not reasonably advance a legitimate correctional goal.” Rhodes v. 24 Robinson, 408 F.3d 559, 567-68 (9th Cir.

2005) (footnote and citation omitted). As to the last 25 factor, legitimate correctional goals include maintaining order and safety within the prison. 26 Sandin v. Conner, 515 U.S. 472, 482-83 (1995). The inmate must show evidence of retaliatory 27 motive, and a genuine issue whether legitimate correctional goals cited by defendant are merely 28 pretextual.

Long v. Sugai, 91 F.4th 1331, 1339 (9th Cir. 2024). A mere sequence of events is 1 insufficient to show retaliatory motive. Id. 2 All of plaintiff’s retaliation claims are based on alleged retaliation in

response to 3 plaintiff's grievances and/or this lawsuit, and/or his threats to file grievances and/or lawsuits. 4 Prisoner grievances and lawsuits, and threats to file grievances or lawsuits, are protected First 5 Amendment speech.

Brodheim v. Cry, 584 F.3d 1262, 1266 (9th Cir. 2009); Entler v. Gregoire, 6 872 F.3d 1031, 1036 (9th Cir. 2017). 7 B. Evidentiary Record (Retaliation Claim 1 against Struve and Heinkel) 8 Plaintiff's motion for summary judgment again "realleges and reincorporates" the 9 allegations of the FAC, and he again characterizes his allegations as "undisputed facts." ECF No. 10 29 at 2-3, 20-25, 33-38.

According to the FAC, plaintiff "vent[ed] of grieving and forewarning of 11 lawsuit" to Struve on January 10, 2023, while they discussed moving plaintiff to another cell. 12 ECF No. 12 at 6. On January 11, 2023, plaintiff "forewarned" Heinkel of a grievance when 13 Heinkel refused to move plaintiff to cell 110 in the B-8 building. Id. at 7. 14 Struve's and Heinkel's declarations about the January rain event, the full-capacity at the 15 prison due to housing Jail inmates, and the reason cell 110 in the B-8 building was held for a 16 returning prisoner, have been discussed above.

Plaintiff disputes defendants' factual assertions, 17 but he does not provide evidence to counter these facts. 18 C. Analysis (Retaliation Claim 1 against Struve and Heinkel) 19 Plaintiff cannot show the first element of a retaliation claim against Struve or Heinkel: 20 that they took an adverse action against him by not moving him to a cell that was unaffected or 21 less affected by the January 2023 rain event.

Struve and Heinkel have declared and provided 22 evidence that there were no such cells available to move plaintiff to, and plaintiff has not shown 23 any genuine issue countering their declarations. Even if the temporarily empty cell in the B-8 24 building was in better condition than plaintiff's Cell 208 in the B-1 building (which is unclear on 25 this record), that cell was unavailable because it needed to be held for the possible return of its 26 quarantined occupant.

Moreover, plaintiff has shown no genuine issue as to whether Struve or 27 Heinkel had any ability to have the leaky roofs repaired, or to remove the Jail inmates to make 28 more cells available. Struve and Heinkel's inability to obtain repair of plaintiff's Cell 208, to 1 evict the Jail inmates, or to move plaintiff, are not adverse actions because plaintiff has not shown 2 a genuine issue whether either of them had any control or discretion in these matters.

3 Second, plaintiff has not shown any genuine issue whether Struve's or Heinkel's inability 4 to obtain repairs or to move plaintiff to another cell was "because of" his forewarnings of 5 grievances and lawsuits. Finally, Struve and Heinkel have demonstrated a legitimate, non- 6 pretextual correctional goal of housing all inmates as best as possible in the circumstances and 7 constraints presented, which meant that plaintiff had to continue in Cell 208 until the Jail inmates 8 left.

Plaintiff has not shown any genuine issue of material fact for trial. Summary judgment must be entered for defendants on the retaliation sub-issue of plaintiff's Claim 1. D. Evidentiary Record (Retaliation Claim 5 against Kuppinger) Plaintiff's motion for summary judgment again "realleges and reincorporates" the allegations of the FAC regarding Kuppinger, and plaintiff again characterizes his allegations as "undisputed facts." ECF No. 29 at 6-9, 17-19.

Kuppinger declares that he inspected and inventoried plaintiff's property when plaintiff moved to CSP – Sacramento from the prison in Corcoran. ECF No. 36-11 at 2 ¶ 3. He transferred the property from boxes into bags. "The bags hold more than the boxes, so less of them were needed to hold Mr. Thompson's property." Id. Plaintiff's television had lines across the screen when turned on, and the printhead on the typewriter was not operating correctly.

Id. Kuppinger cites a provision from the California Department of Corrections and Rehabilitation (CDCR) Department Operations Manual (DOM): "... inmate personal property, including that which is altered, exceeds volume limitations, or is beyond repair, shall be disposed of[.]" Id. at 2 36-11 at 2 ¶ 6 (citing DOM § 54030.12.2(a) (copy at ECF No. 36-11 at 63)).

Kuppinger agrees that plaintiff refused to sign for receipt of his property on January 24 and so did not receive the property that day. Id. at 3 ¶ 6. Plaintiff initiated a grievance on 25 January 16 (#359313). Id. at 3 ¶ 7; id. at 33-43.

The grievance was ultimately denied on May 1, 2023. The FAC cites "section 3134(c)(3)" for plaintiff's allegation that his property should have been opened in his presence, ECF No. 12 at 13, but Cal. Code Regs. section 3134(c)(3) is a general mail regulation that applies to incoming packages, not to property transfers between prisons. See ECF No. 36-11 at 2 ¶ 3.

Id. at 3 ¶ 7; id. at 42. Plaintiff signed the receipt and received his property on January 29. Id. at 3 ¶ 8. Kuppinger allowed plaintiff to have his typewriter because plaintiff said he could fix the printhead himself. Id. at ¶ 10.

The same day, January 29, plaintiff initiated another grievance 5 (#362050) complaining that the typewriter keys were smashed and the typewriter made a rattling noise when turned on, and requesting compensation. Id. at 3-4 ¶ 10; id. at 31-34. 7 When plaintiff was moved to segregated housing on April 19, 2023, another officer 8 (Williams) inventoried and packed plaintiff's property, and Kuppinger reviewed Williams's 9 work.

Id. at 3 ¶ 9. The grievance complaining of damage to the typewriter (#362050) had not been exhausted as of plaintiff's move to segregated housing, so Kuppinger held the typewriter as confiscated, damaged property. Id. at 4 ¶ 10. 12 Kuppinger forwarded a form to plaintiff to authorize sending the typewriter for repair. Id. 13 Plaintiff declares that he twice mailed the necessary authorization to Kuppinger, on June 19 and 14 again on June 27, 2023.

ECF No. 29 at 31-32. Kuppinger declares that he never received either 15 mailing. ECF No. 36-11 at 4 ¶ 12. He continues to hold the typewriter pending authorization for 16 repair, and he submits photographs of the typewriter. Id. at 4 ¶ 12; ECF No. 42-1 at 2 ¶ 3; id. at 17 4-8. It is not apparent from these photographs whether or how the keys are damaged. 18 Kuppinger denies retaliatory motive for retaining the typewriter.

ECF No. 36-11 at 5 ¶ 19 18. He denies damaging the typewriter or the television. Id. 20 Plaintiff disputes many of Kuppinger's factual assertions, including whether Kuppinger 21 acted in accordance with policy. ECF No. 41 at 13-16. Defendants counter that plaintiff does not 22 support his contentions. ECF No. 42 at 27-34. 23 //// 24 15 Kuppinger submits four grievances from plaintiff about his property.

Grievance 25 #353143 was initiated on January 16, 2023 and complains that plaintiff's property was not damaged when it left Corcoran, that Kuppinger broke items, and that Kuppinger withheld legal 26 property. ECF No. 36-11 at 21-26. Grievance #359313 was also initiated on January 16 and complains that the property officer at Corcoran (De La Torre) had damaged plaintiff's property.

27 Id. at 35-43. Grievance #353143 appears to have been initiated January 17 and complains that Kuppinger withheld or discarded plaintiff's legal property. Id. at 27-30. Grievance #362050 was 28 initiated January 29 and complains that the typewriter was damaged. Id. at 31-34. 1 E. Analysis (Retaliation Claim 5 against Kuppinger) 2 The court notes at the outset that plaintiff appears to have abandoned the FAC's 3 allegations about "reduced" property, missing legal books, and the television.

The parties' 4 summary judgment pleadings focus on Kuppinger's actions with respect to the typewriter. 5 Also, plaintiff's retaliation claim against Kuppinger is really two separate claims based on 6 two distinct sets of events.

The first claim is based on Kuppinger's processing of plaintiff's 7 property in January 2023. The second claim is based on Kuppinger's role when plaintiff's 8 property was again processed upon his placement in administrative segregation in April 2023. 9 As to the first instance of alleged retaliation in January 2023, plaintiff cannot show that 10 Kuppinger took any retaliatory action because plaintiff did not initiate any grievance against 11 Kuppinger until after their interaction on January 16, 2023, nor does plaintiff claim he had any 12 interaction with Kuppinger before January 16.

When they first interacted on January 16, 13 Kuppinger had already processed plaintiff's property and had already determined that the 14 typewriter was damaged, and so his actions cannot have been "because of" the grievance that 15 plaintiff filed after he left Kuppinger on January 16. There is no credible showing that Kuppinger 16 knew of any grievances that plaintiff may have filed

against other prison officials prior to January 17, 2016, and such a premise is also too attenuated to satisfy the causal element of a retaliation claim.

Plaintiff cannot show that Kuppinger's assessment of damage was wrong because the property officer at Corcoran (De La Torre) declares he had not inspected the typewriter on departure. See ECF No. 36-6 at 2 ¶ 4. Nor can plaintiff show that holding the damaged appliances for repair or disposal did not reasonably advance a legitimate, non-pretextual correctional goal because CDCR policy is to repair or dispose of damaged property, and moreover Kuppinger allowed plaintiff to take the typewriter on January 29 based on plaintiff's representation that he could fix it.

Plaintiff has failed to create a genuine issue as to whether Kuppinger's actions on or before January 16 were retaliatory in violation of plaintiff's rights under the First Amendment. As to the second instance of alleged retaliation in April 2023, plaintiff again cannot show that Kuppinger took any retaliatory action. Plaintiff himself initiated a grievance (#362050) on January 29, 2023 complaining that the typewriter was damaged in that the keys were "smashed in" and there was a rattling noise, and seeking compensation.¹⁶ ECF No. 36-11 at 31-32.

Plaintiff cannot show that Kuppinger confiscated the typewriter as retaliation for plaintiff's protected First Amendment activity, because plaintiff himself had claimed that the typewriter was damaged, and CDCR policy requires repair or disposal of damaged property.

Moreover, plaintiff cannot show that repair or disposal of damaged property does not advance a legitimate correctional goal, or that Kuppinger's application of this policy was pretext for retaliation. Kuppinger had released the typewriter to plaintiff in January 2023 based on plaintiff's representation he would repair the typewriter. But plaintiff thereafter claimed the typewriter had been damaged, and he sought compensation.

By his own claims, plaintiff himself had identified the typewriter as damaged property as of its re-entry into the property office in April 2023, and so he cannot show Kuppinger's adherence to policy was pretextual. Plaintiff has failed to show a genuine issue as to whether Kuppinger's April 2023 confiscation and continued hold on plaintiff's typewriter is retaliatory in violation of plaintiff's rights under the First Amendment.

Summary judgment must be entered in favor of Kuppinger on Claim 5. F. Evidentiary Record (Retaliation Claim 6 against Haynie, Heinkel, and Struve) Plaintiff's motion for summary judgment repeats the allegations of the FAC, that Heinkel, Struve, and Haynie retaliated against plaintiff for filing a grievance, through their roles in making and reviewing a rules violation report (RVR).

ECF No. 29 at 40-41. Heinkel declares that he was assigned to investigate plaintiff's grievance #355867. ECF No. 36-10 at 4 ¶ 14. Plaintiff initiated this grievance on January 23, 2023,

complaining that non- 24 defendant officer Bennett had failed to timely release plaintiff for morning appointments on 25 January 20 and 22, 2023. Id. at ¶ 13. According to Heinkel's investigation, plaintiff had four 26 appointments scheduled the morning of January 20, beginning with an appointment at the library 27 16 The grievance (#362050) was denied, on grounds that investigation had not shown any 28 evidence of staff misconduct.

ECF No. 36-11 at 33. 1 at 8:00 a.m. Id. at ¶ 14. But plaintiff was not called for his library appointment until 9:25, and 2 he chose to attend the library appointment instead of his 9:30 mental health appointment. 3 Thereafter, he attended his two remaining appointments. Id. Heinkel did not find any record that 4 plaintiff was scheduled for medical ducats on January 22.

Id. In making these findings, Heinkel 5 relied on attendance records and decided it was unnecessary to interview plaintiff. Id. at 5 ¶ 15. 6 Grievant interviews are optional under Cal. Code Regs. tit. 15, § 3483(e) (2023). Id. 7 Heinkel believed that plaintiff's grievance #355867 was based on a knowingly false 8 account of events, because the grievance complained that officer Bennett had not timely released 9 plaintiff to attend appointments whereas the library was late in calling plaintiff for his first 10 appointment on January 20 and then plaintiff attended two more appointments that morning, but 11 he did not have any appointments scheduled for January 22.

Id. at ¶ 16. Heinkel submitted a 12 RVR (#7265611) against plaintiff for making false allegations in the grievance. Id. at ¶¶ 16, 18. 13 Heinkel denies retaliatory motive for the RVR. Id. at 7 ¶ 26. 14 Struve was the reviewing supervisor for Heinkel's RVR #7265611. ECF No. 36-9 at 3 ¶ 15 11. Struve declares that his role was to "ensur[e] that the circumstances of the rules violation 16 report coincide with the charge." Id. Struve concluded that the circumstances did coincide with 17 the charge, but he did not investigate or adjudicate the RVR.

Id. Struve also denies retaliatory 18 motive. Id. at ¶ 12. 19 Haynie is a correctional lieutenant who classified the RVR as a serious offense. ECF No. 20 36-5 at 2 ¶¶ 5-6. He denies that this classification was retaliation for plaintiff's complaints or 21 grievances. Id. at 3 ¶ 8. He declares he "take[s] no offense when an incarcerated person grieves 22 issues at SAC or names me in a grievance. [] The grievance process is part of everyday life in a 23 prison setting and incarcerated persons have a right to submit these grievances." Id. at 2-3 ¶ 7.

24 A hearing officer concluded on January 30, 2023, that there was insufficient evidence to 25 find that plaintiff knowingly falsified the information alleged in the grievance. ECF No. 36-10 at 26 5 ¶ 17. Heinkel nevertheless maintains that plaintiff's grievance was "at best, inaccurate." Id. at 27 ¶ 18. 28 //// 1 Plaintiff disputes that attendance records show he attended some of his appointments, as 2 well as defendants' declared roles, motives, and some of their actions, but he does not offer 3 evidence to support his contentions.

See ECF No. 41 at 17-18; ECF No. 42 at 34-37. 4 G. Analysis (Claim 6 against Haynie, Heinkel, and Struve) 5 It is clear that Heinkel initiated the RVR in relation to plaintiff's grievance #355867, 6 because the truth or falsity of the grievance was the very subject of the RVR.

The Department 7 Operations Manual explicitly authorizes prison officials to initiate RVRs for the precise reason 8 Heinkel did here – to discourage grievances based on false information. 9 The fact that a hearing officer found insufficient evidence to support the RVR is itself not 10 any basis to conclude that the RVR was made for retaliatory reasons.

The grievance was based 11 on a misstatement of facts by plaintiff. Whether there was enough evidence to show the 12 misrepresentations were made knowingly was a question for the hearing officer to resolve, but the 13 officer's finding did not equate with the conclusion that the RVR was brought for retaliatory 14 purposes. Discouraging falsity in grievances is a legitimate correctional goal, and allowing 15 reports of false information in grievances to be investigated is a reasonable method to accomplish 16 the goal.

Plaintiff has not adduced evidence to show that the reviews conducted by Struve and 17 Haynie were retaliatory rather than intended as a check against unmeritorious RVRs. In this case, 18 both Struve and Haynie concluded that Heinkel's RVR stated an adequate basis to proceed. 19 Plaintiff has not shown a genuine issue as to retaliatory motive on the part of Heinkel, 20 Struve, or Haynie in making their determinations.

He also has not shown that their actions failed 21 to reasonably advance a legitimate correctional goal. Summary judgment must be entered for 22 defendants on Claim 6. 23 H. Evidentiary Record (Claim 8 against Heinkel and Pohovich) 24 Plaintiff alleges that Heinkel and Pohovich searched his cell on April 4, 2023 and/or they 25 "vandalized" his property as retaliation for filing this lawsuit.

ECF No. 12 at 20. 26 Pohovich declares that she does not remember searching plaintiff's cell, but she 27 nevertheless denies that the search was retaliatory. ECF No. 36-7 at 3 ¶ 10. Plaintiff had 28 complained of chest pain and cell searches for narcotics are standard practice after a medical 1 emergency. Id. Pohovich denies vandalizing or breaking anything and declares she would have 2 confiscated or disposed of any contraband if she discovered it.

Id. 3 Heinkel declares that he was the supervising sergeant that day, but he was not present and 4 did not participate in the cell search. ECF No. 36-10 at 6 ¶ 21. "It is standard practice for 5 custody staff to search a cell following a medical emergency ... to ensure that narcotics were not 6 a contributing factor." Id. Plaintiff complained to Heinkel about staff disposing of a legal 7 container that plaintiff used for laundry, but the Department Operations Manual requires the 8 disposal of altered personal property.

Id. 9 Plaintiff disputes most of defendants' factual assertions, including whether it is standard 10 practice to search cells in response to medical emergencies. ECF No. 41 at 18-19. He argues that 11 "Defendants are exploiting safety and security to retaliate." Id. at 18; see ECF No. 42 at 38. 12 I. Analysis (Claim 8 against Heinkel and Pohovich) 13 Plaintiff has not shown a genuine issue for trial regarding his claim that the cell search on 14 April 4 was retaliatory.

Heinkel did not participate in the search. See *Taylor v. List*, 880 F.2d 15 1040, 1045 (9th Cir. 1989) (supervisors are only liable for constitutional violations if they 16 participated in or directed them, or knew of and failed to prevent them). It is also unclear whether 17 Pohovich was among the officers who searched the cell. Plaintiff has not shown any credible 18 causal link between any of his protected First Amendment activity and the search.

His claim that 19 the search was retaliation for this lawsuit is also implausible as to timing. He filed this lawsuit on 20 March 13, 2023, but his amended complaint was not screened in for service of process on 21 defendants until February 13, 2024, more than ten months after the search. 22 Plaintiff cannot show that the search was retaliation for seeking medical assistance 23 because defendants have shown that such searches are a routine response to a medical emergency, 24 to advance a legitimate, non-pretextual correctional goal of determining whether narcotics were 25 involved in the emergency.

Plaintiff has not shown a genuine issue for trial, and summary 26 judgment must be entered for defendants Heinkel and Pohovich on Claim 8. 27 //// 28 //// 1 J. Evidentiary Record (Claim 10 against Aung) 2 Plaintiff argues Aung retaliated against plaintiff's grievance and/or threat of grievance by 3 withholding approval for orthotic shoes, ankle brace, and compression socks.

ECF No. 29 at 18. 4 The treatment Aung provided to plaintiff has already been discussed. To briefly 5 summarize, Aung saw plaintiff twice, on March 17 and April 11, 2023. On March 17 Aung 6 advised continued use of over-the counter medication and stretching exercises. Aung's response 7 to plaintiff's "forewarning" of a grievance, was to tell plaintiff to spell his name correctly.

ECF 8 No. 12 at 22. Plaintiff submitted a health care services request (not a grievance) asking for refill 9 of his topical gel. ECF No. 36-4 at 3-4 ¶ 10; id. at 10, 60. This was under Hlaing's prescription, 10 and Aung had not discontinued it. 11 Aung's assessment as of April 11 was to order a cane for plaintiff's use. ECF No. 36-4 at 12 4 ¶ 11. Plaintiff filed a grievance on April 11, complaining of Aung's decision to provide only a 13 cane, but not orthotic shoes or compression stockings.

ECF No. 39 at 163-190. Another 14 physician (Bharat) provided these on May 8. 15 Aung declares that he provided plaintiff with "appropriate medical care based on my 16 professional training and experience." ECF No. 36-4 at 4 ¶ 12. Plaintiff disputes Aung's 17 declaration. ECF

No. 41 at 20; ECF No. 42 at 42. 18 K. Analysis (Claim 10 against Aung) 19 Plaintiff fails to show a genuine issue whether Aung's treatment decisions were based on 20 retaliatory motive rather than a professional assessment of plaintiff's medical needs.

Plaintiff's 21 allegation about the topical gel prescription is simply incorrect because Aung had not terminated 22 the prescription. Plaintiff has not shown a triable issue whether Aung's treatment decisions were 23 a retaliatory response to his March 17 "forewarning" that he would grieve the care Aung 24 provided. Plaintiff does not appear to have filed any grievance against Aung until after their 25 second and final visit on April 11, so that grievance could not serve as evidence for retaliatory 26 motive in denying care.

Bharat's subsequent order for orthotic shoes and compression stockings 27 does not create an issue whether Aung had denied those items for retaliatory reasons, because 28 Aung had provided a cane and advised stretching, which Aung had assessed as appropriate care 1 | for plaintiff's condition. None of plaintiff's complaints about the care Aung provided show any 2 || actual adverse actions that might be characterized as retaliatory.

Plaintiff has shown no genuine 3 || issue of material fact, and the court must grant summary judgment for defendants on Claim 10. 4 Defendants' Qualified Immunity Argument 5 Defendants also argue that they are entitled to qualified immunity.

Because the court finds 6 || that defendants are entitled to summary judgment on all claims, it is not necessary to address this 7 || additional argument with respect to plaintiff's claims. See *County of Sacramento v. Lewis*, 523 8 | U.S. 833, 841 n.5 (1998) ("[T]he better approach to resolving cases in which the defense of 9 || qualified immunity is raised is to determine first whether the plaintiff has alleged the deprivation 10 | of a constitutional right at all.").

11 RECOMMENDATION 12 For the foregoing reasons, IT IS HEREBY RECOMMENDED that: 13 1) Plaintiff's motion for summary judgment (ECF No. 29) be DENIED; and 14 2) Defendants' motion for summary judgment (ECF No. 36) be GRANTED, judgment 15 || entered for defendants, and this case closed. 16 These findings and recommendations are submitted to the United States District Judge 17 || assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

Within fourteen days 18 | after being served with these findings and recommendations, any party may file written 19 || objections with the court and serve a copy on all parties. Such a document should be captioned 20 || "Objections to Magistrate Judge's Findings and Recommendations." Any response to the 21 || objections shall be filed and served within fourteen days after service of the objections.

The 22 || parties are advised that failure to file objections within the specified time may waive the right to 23 || appeal the District Court's order. *Martinez v. Yist*, 951 F.2d 1153 (9th Cir. 1991). 24 ||

Dated: September 12, 2025 2 SS? EDMUND F. BRENNAN 96 UNITED STATES
MAGISTRATE JUDGE 27 28 31

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