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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

JIMMY MCDONALD,

Plaintiff,

v.

J. A. YATES, et al.,

Defendants.

CASE NO. 1:09-cv-00730-LJO-SKO PC

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS, DENYING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT, AND REFERRING MATTER TO MAGISTRATE JUDGE TO SET FOR TRIAL

(Docs. 76 and 100)

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Plaintiff Jimmy McDonald is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. This action is proceeding against Defendants Cano, Clark, Rodriguez, and Roberts on Plaintiff’s claim that they acted with deliberate indifference to a substantial risk of harm to his health and/or safety, in violation of the Eighth Amendment of the United States Constitution. Plaintiff’s claim arises out of Defendants’ alleged failure to accommodate his medical need for a lower bunk.

The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. On December 13, 2012, the Magistrate Judge issued [findings and recommendations](#) recommending that Defendants’ [motion for summary judgment](#) be denied. Defendants filed [objections](#) on January 2, 2013, and Plaintiff filed a [response](#) to the objections on January 17, 2013. Local Rule 304(b), (d).

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of the case. Having carefully reviewed the entire file, the Court finds the findings and recommendations to be supported by the record and by proper analysis.

1 Defendants' objection that there is no evidence they acted with deliberate indifference lacks  
2 merit. Plaintiff's statements under penalty of perjury that he placed Defendants on notice and  
3 showed them his medical chrono are evidence, as are his witnesses' declarations. Accepting  
4 Plaintiff's version of events as true, Defendants were placed on notice that Plaintiff had a medical  
5 need for a lower bunk and having been placed on notice, they were required to take some action.  
6 *Farmer v. Brennan*, 511 U.S. 825, 844-45, 114 S.Ct. 1970 (1994). That Defendants were required  
7 to respond is true whether or not Plaintiff's medical chrono was valid at the time, as explained by  
8 the Magistrate Judge. The parties disagree whether there was a valid chrono in place at the time,  
9 and a simple phone call to verify the lack of a current, valid medical chrono might have sufficed if  
10 no chrono was in place as Defendants' claim, but there is no evidence that Defendants took any  
11 action. *Id.* As a result, there exist triable issues of fact regarding whether Defendants acted with  
12 deliberate indifference to a substantial risk of harm to Plaintiff. It is for the trier of fact, not the  
13 Court, to weigh the evidence and assess the credibility of the witnesses. *T.W. Elec. Serv., Inc. v*  
14 *Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).

15 Accordingly, it is HEREBY ORDERED that:

- 16 1. The Court adopts the findings and recommendations filed on December 13, 2012, in  
17 full;
- 18 2. Defendants' motion for summary judgment, filed on July 6, 2012, is DENIED; and
- 19 3. This matter is referred back to the Magistrate Judge to set for trial.

20  
21 IT IS SO ORDERED.

22 **Dated: January 22, 2013**

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE