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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CARMON WARREN,

Plaintiff,

v.

S. SHAWNEGO,

Defendant.

CASE NO. 1:03-cv-06336-AWI-SKO PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DEFENDANT’S MOTION
TO DISMISS BE GRANTED

(Doc. 44)

THIRTY-DAY OBJECTION PERIOD

Findings and Recommendations Addressing Motion to Dismiss

I. Procedural History

Plaintiff Carmon Warren, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on September 29, 2003. This action is proceeding against Defendant Shawnego on Plaintiff’s due process claim, which arises from Plaintiff’s allegation that Defendant intentionally issued a rules violation report falsely accusing him of indecent exposure and stalking.¹ Nonnette v. Small, 316 F.3d 872, 878-79 (9th Cir. 2002); Burnsworth v. Gunderson, 179 F.3d 771, 774-75 (9th Cir. 1999).

On June 9, 2011, Defendant filed a motion to dismiss the action based on Plaintiff’s failure to exhaust his claim. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b). Plaintiff did not file an opposition or a statement of non-opposition and the motion is deemed submitted.² Local Rule 230(l).

¹ The action was dismissed on February 23, 2005, and reopened on November 23, 2010. Fed. R. Civ. P. 60(b)(6).

² Plaintiff was provided with notice of the requirements for opposing a motion to dismiss for failure to exhaust in an order filed on February 11, 2011. Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003). (Doc. 37-1.)

1 **II. Legal Standard**

2 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with
3 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
4 confined in any jail, prison, or other correctional facility until such administrative remedies as are
5 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available
6 administrative remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211, 127 S.Ct. 910, 918-19
7 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required
8 regardless of the relief sought by the prisoner and regardless of the relief offered by the process,
9 Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct. 1819, 1825 (2001), and the exhaustion requirement
10 applies to all suits relating to prison life, Porter v. Nussle, 435 U.S. 516, 532, 122 S.Ct. 983, 992
11 (2002).

12 The failure to exhaust in compliance with section 1997e(a) is an affirmative defense under
13 which the defendants have the burden of raising and proving the absence of exhaustion. Jones, 549
14 U.S. at 216; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). The failure to exhaust is
15 subject to an unenumerated Rule 12(b) motion, and in resolving the motion, the Court may look
16 beyond the pleadings and decide disputed issues of fact. Morton v. Hall, 599 F.3d 942, 945 (9th Cir.
17 2010); Wyatt, 315 F.3d at 1119-20. If the Court concludes that the prisoner has failed to exhaust,
18 the proper remedy is dismissal without prejudice. Jones, 549 U.S. at 223-24; Lira v. Herrera, 427
19 F.3d 1164, 1175-76 (9th Cir. 2005).

20 **III. Discussion**

21 The California Department of Corrections and Rehabilitation has an administrative grievance
22 system for prisoner complaints, and the process is initiated by submitting a CDCR Form 602. Cal.
23 Code Regs., tit. 15 §§ 3084.1, 3084.2(a). During the relevant time period, four levels of appeal were
24 involved, including the informal level, first formal level, second formal level, and third formal level,
25 also known as the “Director’s Level,” and appeals had to be submitted within fifteen working days
26 of the event being appealed.³ Id. at §§ 3084.5, 3084.6(c).

27
28 ³ Emergency changes to the regulations became effective on January 28, 2011. The changes occurred after
the events at issue here and are therefore irrelevant to the resolution of Defendant’s motion.

1 Defendant contends that there is no evidence Plaintiff exhausted his claim that she falsely
2 accused him of indecent exposure and stalking. In support of her motion, Defendant submits
3 evidence that the appeal Plaintiff initiated against her for falsely accusing him of indecent exposure
4 and stalking was screened out because it was untimely, and there is no record of any other relevant
5 appeal accepted for formal review at the institutional level or at the final level of appeal in
6 Sacramento.⁴ (Doc. 44, Motion, Foston Dec., ¶¶3, 4 & Campbell Dec., ¶¶4, 5, 7.)

7 Plaintiff is required to comply with the procedural rules governing the inmate appeals process
8 and the exhaustion requirement may not be satisfied by filing an untimely appeal. Woodford v. Ngo,
9 548 U.S. 81, 83-84, 126 S.Ct. 2378 (2006). The incident which generated the issuance of the
10 allegedly false rules violation report occurred on June 17, 2002, and Plaintiff was found guilty of the
11 rules violation on August 21, 2002.⁵ Although Plaintiff submitted an inmate appeal concerning the
12 accusation of indecent exposure and stalking, it was dated November 7, 2002. (Campbell Dec., Ex.
13 E.) The appeal appears to have been received by the appeals office on November 19, 2002, and it
14 was screened out in December 2002. (Id.) Plaintiff only had fifteen working days to file an appeal
15 grieving the issuance of the false rules violation report, and the preparation and submission of the
16 appeal on November 7, 2002, occurred well after these events and clearly violated the fifteen-day
17 time constraint. Plaintiff has submitted no evidence bringing into question the propriety of the
18 screening decision rejecting his appeal as untimely, and therefore, Defendant is entitled to dismissal
19 of this action. Sapp v. Kimbrell, 623 F.3d 813, 823-24 (9th Cir. 2010).

20 **IV. Recommendation**

21 Based on the foregoing, the Court HEREBY RECOMMENDS that Defendant's motion to
22 dismiss, filed June 9, 2011, be GRANTED and this action be dismissed, without prejudice, for
23 failure to exhaust. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b).

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26 ⁴ It is proper to consider documentary evidence in resolving an unenumerated Rule 12(b) motion and
27 judicial notice of the documents related to Plaintiff's appeal attempts is not required. Morton, 599 F.3d at 945;
28 Wyatt, 315 F.3d at 1119-20. Therefore, Defendant's request for judicial notice is disregarded.

⁵ The rules violation report was apparently issued on July 4, 2002. (Campbell Dec., Ex. E.)

1 These Findings and Recommendations will be submitted to the United States District Judge
2 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**
3 **days** after being served with these Findings and Recommendations, the parties may file written
4 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
5 Findings and Recommendations.” The parties are advised that failure to file objections within the
6 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d
7 1153 (9th Cir. 1991).

8
9
10 IT IS SO ORDERED.

11 **Dated:** August 11, 2011

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE