

EASTERN DISTRICT OF CALIFORNIA

CASE NO. 1:06-cv-01817-LJO-SKO PC

ORDER DENYING DEFENDANTS' MOTION
TO DISMISS FOR FAILURE TO EXHAUST
AND REQUIRING DEFENDANTS TO FILE
A RESPONSE TO THE AMENDED
COMPLAINT WITHIN THIRTY DAYS

COMPLAINT WITHIN THIRTY DAYS

(Docs. 22 and 38)

[Dockets.Justia.com](https://www.dockets.justia.com)

1 issued a [findings and recommendations](#) recommending Defendants' motion to dismiss be granted.
2 Plaintiff was granted numerous extensions of time to file an objection, and on April 27, 2011, the
3 Magistrate Judge issued an [order](#) granting Plaintiff a final forty-five day extension of time. More
4 than forty-five days have passed and Plaintiff has not filed an objection.

5 **II. Exhaustion Requirement**

6 Before filing suit in federal court, prisoners are required to exhaust the available
7 administrative remedies. 42 U.S.C. § 1997e(a); Jones v. Bock, 549 U.S. 199, 211, 127 S.Ct. 910
8 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). The failure to exhaust is
9 an affirmative defense, Jones, 549 U.S. at 216, and it must be raised in an unenumerated Rule 12(b)
10 motion, Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003). In resolving the motion, the
11 Court may look beyond the pleadings and decide disputed issues of fact, Morton v. Hall, 599 F.3d
12 942, 945 (9th Cir. 2010); Wyatt, 315 F.3d at 1119-20, but it may not assess the credibility of
13 witnesses on a motion to dismiss submitted upon the record, e.g., Ortega v. Giamalvo, No. C-07-
14 04436 EDL, 2011 WL 2445315, at *5 (N.D.Cal. Jun. 16, 2011); Jones v. Felker, No. CIV S-08-0096
15 KJM EFB PC, 2011 WL 533755, at *2 (E.D.Cal. Feb. 1, 2011), findings and recommendations
16 adopted in full, 2011 WL 1299454 (E.D.Cal. Mar. 29, 2011); Sanchez v. Stancliff, No. 1:07-cv-
17 00128-LJO-SMS PC, 2009 WL 2498257, at *4 (E.D.Cal. Aug. 14, 2009), findings and
18 recommendations adopted in full, (E.D.Cal. Sept. 14, 2009); Roberts v. Salano, No. 1:08-00162-
19 LJO-GSA PC, 2009 WL 1514440, at *2 (E.D.Cal. May 27, 2009), findings and recommendations
20 adopted in full, 2009 WL 2136890 (E.D.Cal. Jul. 16, 2009).

21 Defendants met their initial burden as the moving parties by submitting evidence showing
22 the absence of any record of an appeal filed by Plaintiff at the institutional level or the Director's
23 level in Sacramento. Wyatt, 315 F.3d at 1119. However, Plaintiff opposed the motion on the ground
24 that he filed three appeals at the prison which were never responded to and never returned to him.
25 Plaintiff also contended that he contacted the appeals office to inquire about the status of his appeals,
26 but he never received any response.

27 In reply, Defendants argued that Plaintiff's assertion in his opposition that he received no
28 response from the appeals office to his inquiries regarding his appeals contradicts the allegation in

1 his amended complaint that he was told by the appeals office that there was no record of the appeals.
2 The Magistrate Judge found that this contradiction called into question Plaintiff's "veracity or
3 memory," and in the absence of reliable evidence to the contrary, Defendants' evidence that Plaintiff
4 failed to follow the proper procedure entitled them to dismissal of the action. (Doc. 38, Findings and
5 Recommendations, 6:15-7:3.)

6 In this Circuit, the failure to exhaust *may* be excused where the administrative remedies are
7 rendered effectively unavailable. Sapp v. Kimbrell, 623 F.3d 813, 822-23 (9th Cir. 2010); Nunez
8 v. Duncan, 591 F.3d 1217, 1224 (9th Cir. 2010). While the absence of evidence that an appeal was
9 filed may indicate that Plaintiff never submitted the appeal, it may also indicate that the appeal was
10 discarded or ignored by staff, as Plaintiff suggests. Spence v. Director of Corr., No. CIV S-05-0690
11 GEB KFM PC, 2007 WL 61006, at *3 (E.D.Cal. Jan. 8, 2007) (If prison officials "are interfering
12 with inmates' ability to properly file their 602s, then there will be no official record of the 602s
13 having been 'accepted.'"), findings and recommendations adopted in full, 2007 WL 738528
14 (E.D.Cal. Mar. 6, 2007). The regulations governing the inmate appeals process apply with equal
15 force to inmates and prison officials. If a prisoner complies with the procedural rules but staff
16 members fail to respond to the appeal in compliance with applicable procedural rules or they
17 otherwise thwart the process, it becomes unavailable. Sapp, 623 F.3d at 822-23; Nunez, 591 F.3d
18 at 1224.

19 Under either version of events, Plaintiff consistently maintains that he made numerous
20 attempts to exhaust the grievance process by filing appeals but he was unable to do so because he
21 did not receive any responses to the appeals.² While Plaintiff contradicts himself on the issue of
22 whether the appeals office responded to his inquiries on the status of his appeals, the Court cannot
23 find that because of this contradiction, his attestation that he attempted to file appeals but was

24
25 ² Plaintiff's amended complaint and opposition are verified and the opposition is supported by Plaintiff's
26 declaration. Although Defendants attempt to dismiss Plaintiff's evidence as limited to his self-serving declaration,
27 declarations are generally self-serving by nature. Plaintiff's declaration has evidentiary value to the extent that it is
28 based on his personal knowledge and sets forth facts admissible in evidence and to which he is competent to testify.
See McElyea v. Babbitt, 833 F.2d 196, 197-98 (9th Cir. 1987) (per curium); Lew v. Kona Hosp., 754 F.2d 1420,
1423 (9th Cir. 1985).

1 unsuccessful is not entitled to any weight. E.g., Ortega, 2011 WL 2445315, at *5; Jones, 2011 WL
2 533755, at *2; Sanchez, 2009 WL 2498257, at *4; Roberts, 2009 WL 1514440, at *2.

3 “In a situation such as this in which the parties offer differing versions of events based on
4 competing declarations, the issue is one of witness credibility and the Court cannot make that
5 requisite assessment on a motion to dismiss.” Roberts, 2009 WL 1514440, at *2. At this juncture,
6 Plaintiff’s evidence that he attempted to file appeals but was thwarted from exhausting through the
7 failure of prison officials to respond to his appeals is sufficient to defeat Defendants’ motion to
8 dismiss.³ Sapp, 623 F.3d at 822-23; Nunez, 591 F.3d at 1224.

9 **III. Order**

10 Accordingly, for the reasons set forth herein, it is HEREBY ORDERED that:

- 11 1. The Court declines to adopt the findings and recommendations filed on February 4,
12 2010;
- 13 2. Defendants’ motion to dismiss, filed on August 17, 2009, is DENIED, without
14 prejudice; and
- 15 3. Defendants shall file a response to Plaintiff’s amended complaint within **thirty (30)**
16 **days** from the date of service of this order.

17
18
19 IT IS SO ORDERED.

20 **Dated: June 29, 2011**

21 /s/ Lawrence J. O'Neill
22 UNITED STATES DISTRICT JUDGE
23
24
25
26

27 ³ The Court does not find that exhaustion occurred because the process was rendered unavailable. Rather,
28 the Court finds only that Defendants are not entitled to dismissal at this juncture.