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2 On June 15, 2015, Plaintiff filed an opposition, and Defendants filed a reply on June 18, 2015.
3 (ECF Nos. 40, 41.)

4 **II.**

5 **DISCUSSION**

6 **A. Motion for Summary Judgment Standard**

7 The failure to exhaust in compliance with section 1997e(a) is an affirmative defense under
8 which Defendants have the burden of raising and proving the absence of exhaustion. Jones v. Bock,
9 549 U.S. 199, 216 (2007); Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). On April 3, 2014,
10 the United States Court of Appeals for the Ninth Circuit issued a decision overruling Wyatt with
11 respect to the proper procedural device for raising the affirmative defense of exhaustion under §
12 1997e(a). Albino v. Baca, 747 F.3d 1162, 1168-69 (9th Cir. 2014) (en banc). Following the decision
13 in Albino, Defendants may raise exhaustion deficiencies as an affirmative defense under §1997e(a) in
14 either (1) a motion to dismiss pursuant to Rule 12(b)(6)² or (2) a motion for summary judgment under
15 Rule 56 if it has been pled and preserved. Id. If the Court concludes that Plaintiff has failed to
16 exhaust, the proper remedy is dismissal without prejudice. Jones, 549 U.S. at 223-24; Lira v. Herrera,
17 427 F.3d 1164, 1175-76 (9th Cir. 2005).

18 Any party may move for summary judgment. The Court shall grant summary judgment if the
19 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
20 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Washington Mutual Inc.
21 v. U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether it be that a fact is
22 disputed or undisputed, must be supported by (1) citing to particular parts of materials in the record,
23 including but not limited to depositions, documents, declarations, or discovery; or (2) showing that the
24 materials cited do not establish the presence or absence of a genuine dispute or that the opposing party
25 cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks
26

27 _____
28 ² Motions to dismiss under Rule 12(b)(6) are only appropriate "[i]n the rare event a failure to exhaust is clear on the face of the complaint." Albino, 747 F.3d at 1169.

1 omitted). The Court may consider other materials in the record not cited to by the parties, but is not
2 required to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified School Dist., 237 F.3d
3 1026, 1031 (9th Cir. 2001); accord Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1017 (9th Cir.
4 2010).

5 Unlike a motion for summary judgment on the merits of a plaintiff's claim(s) where a
6 defendant does not bear the burden of proof at trial and in moving for summary judgment, whether the
7 PLRA exhaustion standard has been met is an affirmative defense. Wyatt, 315 F.3d at 1119. Thus,
8 "defendants have the burden of raising and proving the absence of exhaustion." Id. "[T]here can be
9 no 'absence of exhaustion' unless some relief remains 'available,' a defendant must demonstrate that
10 pertinent relief remained available, whether at unexhausted levels of the grievance process or through
11 awaiting the results of the relief already granted as a result of that process." Brown v. Valoff, 422
12 F.3d 926, 937 (9th Cir. 2005). Relevant evidence includes "statutes, regulations, and other official
13 directives that explain the scope of the administrative review process; documentary or testimonial
14 evidence from prison officials who administer the review process; and information provided to the
15 prisoner concerning the operation of the grievance procedure in this case, such as in the response
16 memoranda in these cases. With regard to the latter category of evidence, information provided the
17 prisoner is pertinent because it informs [a] determination of whether relief was, as a practical matter,
18 'available.'" Id., at 937.

19 If Defendants meet this initial burden, the burden then shifts to Plaintiff "to come forward with
20 evidence showing that there is something in his particular case that made the existing and generally
21 available administrative remedies effectively unavailable to him." Albino, 747 F.3d at 1172, citing
22 Hilao v. Estate of Marcos, 103 F.3d 767, 778 (9th Cir. 1996) ("[T]he burden shifts to the plaintiff to
23 rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged,
24 inadequate, or obviously futile.") Plaintiff must meet this burden by showing ". . . more than the mere
25 existence of a scintilla of evidence." In re Oracle Corp., 627 F.3d at 387 (citing Anderson v. Liberty
26 Lobby, Inc., 477 U.S. 242, 252 (1986)). "However, as required by Jones, the ultimate burden of proof
27 remains with the defendant." Albino, 747 F.3d at 1172.
28

1 In judging the evidence at the summary judgment stage, the Court must draw all inferences in
2 the light most favorable to the nonmoving party and determine whether a genuine issue of material
3 fact precludes entry of judgment, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,
4 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted). The Court determines *only*
5 whether there is a genuine issue for trial and, in doing so, it must liberally construe Plaintiff’s filings
6 because he is a pro se prisoner. Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010) (quotation
7 marks and citations omitted).

8 **B. Exhaustion under the Prisoner Litigation Reform Act**

9 Pursuant to the Prison Litigation Reform Act of 1996, “[n]o action shall be brought with
10 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined
11 in any jail, prison, or other correctional facility until such administrative remedies as are available are
12 exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available administrative
13 remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney v. Carey, 311 F.3d
14 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required regardless of the relief sought by the prisoner
15 and regardless of the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and
16 the exhaustion requirement applies to all suits relating to prison life, Porter v. Nussle, 435 U.S. 516,
17 532 (2002).

18 The failure to exhaust in compliance with section 1997e(a) is an affirmative defense under
19 which Defendant has the burden of raising and proving the absence of exhaustion. Jones, 549 U.S. at
20 216; Albino v. Baca, 747 F.3d 1162, 1171 (9th Cir. 2014); Wyatt v. Terhune, 315 F.3d 1108, 1119
21 (9th Cir. 2003). The failure to exhaust nonjudicial administrative remedies is subject to a motion for
22 summary judgment in which the Court may look beyond the pleadings. Albino, 747 F.3d at 1170. If
23 the Court concludes that Plaintiff has failed to exhaust, the proper remedy is dismissal without
24 prejudice. Jones, 549 U.S. at 223-24; Lira v. Herrera, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

25 The California Department of Corrections and Rehabilitation (CDCR) has an administrative
26 grievance system for prisoners to appeal any departmental decision, action, condition, or policy having
27 an adverse effect on prisoners’ welfare. Cal. Code Regs. tit. 15, § 3084.1. Prior to 2011, the process
28 was initiated by submitting a CDC Form 602 describing the problem and the action requested, tit. 15,

1 § 3084.2(a), and appeal had to be submitted within fifteen working days of the event being appealed or
2 of the receipt of the unacceptable lower level decision, tit. 15, § 3084.6(c). Up to four levels of appeal
3 may be involved, including the informal level, first formal level, second formal level, and third formal
4 level, also known as the Director's Level. Tit. 15, § 3084.5. In order to satisfy section 1997e(a),
5 California state prisoners are required to use this process to exhaust their claims prior to filing suit.
6 Woodford v. Ngo, 548 U.S. 81, 85-86 (2006); McKinney, 311 F.3d at 1199-1201. On January 28,
7 2011, the inmate appeals process was modified and limited to three level of review with provisions
8 allowing the first level to be bypassed under specific circumstances. Cal. Code Regs. tit. 15, § 3084.7.

9 "[E]xhaustion is not per se inadequate simply because an individual later sued was not named
10 in the grievances." Jones v. Bock, 549 U.S. 199, 219 (2007). "The level of detail necessary in a
11 grievance to comply with the grievances procedures will vary from system to system and claim to
12 claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper
13 exhaustion." Id.

14 **C. Allegations of Complaint**

15 Plaintiff is an inmate incarcerated within the California Department of Corrections and
16 Rehabilitation. He was housed at the California Substance Abuse Treatment Facility ("SATF") from
17 April 26, 2007 to March 27, 2008, and from July 8, 2008 to December 26, 2012.

18 Plaintiff claims that prison Defendants, prison staff at SATF, retaliated against him because he
19 engaged in a civil rights lawsuit involving prison staff and because he participated in administrative
20 investigations of prison staff regarding allegations of misconduct and criminal activity.

21 Plaintiff was the subject of acts of retaliation by correctional lieutenant F.A. Rodriguez and
22 correctional officers Reyna and C. Rasey because he was deliberately placed in work assignments that
23 they knew would cause him injury and as a result Plaintiff was injured. Plaintiff was also threatened
24 with physical violence due to his litigation activities and complaints about prison staff. Defendant
25 Reyna referred to Plaintiff as a "rat."

26 Plaintiff was deliberately left on the floor and denied emergency medical treatment and
27 services for over thirty five minutes after having passed out in his cell. While Plaintiff was on the
28 floor semi-conscious, prison staff merely stated "oh it [is] just Ehtridge he likes to rat on staff." As a

1 result, Plaintiff's blood pressure became dangerously high and he was taken to the hospital an hour
2 thereafter.

3 Plaintiff was the victim of a violent assault due to the deliberate refusal and prolonged delay in
4 the documentation of critical case information and counseling staff disclosing certain information to
5 another inmate which resulted in the assault. Plaintiff was subjected to a false disciplinary report due
6 to Defendant V. Lawrence refusing to provide him counseling services to his litigation activities.

7 **D. Discussion**

8 1. Defendants' Motion for Summary Judgment

9 Defendants submit that Plaintiff filed only one Form 602 appeal, institutional log number
10 SATF-08-1186, with a subject matter of, or references to, claims of retaliation against him by prison
11 staff. This appeal was received for first level review on February 15, 2008. In this appeal Plaintiff
12 claimed he was being retained in administrative segregation status in an act of retaliation by ISU
13 officers Jiminez and Couch due to his litigation and his cooperation with the prison Office of Internal
14 Affairs ("OIA"). This appeal was withdrawn by Plaintiff before it was decided at the first level of
15 review. (Hildreth Decl. ¶ 5, Ex. B; Voong Decl. ¶ 5.)

16 However, Plaintiff did submit other appeals which Defendants submit he may argue suffice to
17 exhaust the administrative remedies. Plaintiff submitted a Form 602 appeal, institutional log number
18 SATF-09-1866. This appeal makes no references to prison staff retaliating against Plaintiff, and does
19 not identify any Defendant by name. In this appeal Plaintiff requested to be removed and reassigned
20 from a job assignment that put him in proximity to machinery, as he had a chrono stating that he
21 should not work around moving machinery or sharp objects. The response to this appeal at the
22 informal level was to place Plaintiff on a vocational waiting list, and directed him to consult with his
23 counselor for a reassignment. Dissatisfied because his counselor would not remove him from his
24 vocational shop position, Plaintiff submitted the appeal for first level review, and the response was to
25 assign him to a job in painting. Plaintiff submitted the appeal for second and third level reviews,
26 requesting to be removed from the painting shop job because he was having migraine headaches that
27 were worsened by chemicals in the shop. The appeal was denied at the second and third levels of
28 review. (Voong Decl. ¶ 6, Ex. B.)

1 Plaintiff's Form 602 appeal, institutional log number SATF-12-00275, was received at first
2 level review on December 30, 2012. This appeal makes no reference to prison staff retaliating against
3 Plaintiff. In this appeal Plaintiff requested to be removed from an educational assignment because he
4 had Multiple Sclerosis medical issues. This appeal was granted at the first level response, and Plaintiff
5 was removed from the educational assignment and assigned as a building porter with limited duties.
6 Plaintiff submitted the appeal to second level review, claiming the new assignment was not being
7 honored by prison staff. The appeal was partially granted at the second level, with Plaintiff being
8 given an explanation that he had reported for the new job assignment before the effective date.
9 Plaintiff submitted the appeal for third level review, claiming he had been injured as a result of being
10 placed in a job assignment that he was physically unable to do. This appeal was denied at third level
11 review in a decision dated August 24, 2012, and the decision states that Plaintiff had added a new
12 issue at the third level review that had not been included previously and was not address by the denial,
13 as it was inappropriate to expand the appeal beyond the original issue stated. This appeal does not
14 reference by name Defendants Rodriguez, Reyna or Lawrence. This appeal references Defendant
15 Rasey by name, but only in Plaintiff's submittal of the appeal to the third level of review. (Voong
16 Decl. ¶ 6, Ex. C.)

17 Plaintiff's Form 602 appeal, institutional log number SATF-12-02773, was received at the first
18 level on June 7, 2012. This appeal makes no reference to prison staff retaliating against Plaintiff. This
19 appeal does not reference any Defendant by name. In this appeal Plaintiff stated he had slipped and
20 fallen on a wet floor in the dining hall, and requested not to be assigned to any job that would cause
21 him injury. The appeal was partially granted at the first level, and Plaintiff was unassigned from his
22 dining hall position and was put on a waiting list for support services. Plaintiff submitted the appeal to
23 second level review, contending that his medical conditions had not been properly documented, and it
24 was denied. Plaintiff submitted the appeal to third level review, contending it had not been handled
25 properly, and it was denied. (Voong Decl. ¶ 6, Ex. E.)

26 Plaintiff submitted a Form 602 appeal, institutional log number SATF-E-12-02953, on June 6,
27 2012. This appeal makes no reference to prison staff retaliating against Plaintiff. In this appeal
28 Plaintiff contended Defendant Rasey failed to exercise professional judgment, exposing Plaintiff to

1 dangerous work conditions. This appeal was cancelled in screening at the first level review on June
2 21, 2012, because it was duplicative of Plaintiff’s appeal number SATF-12-02773. (Hildreth Decl. ¶
3 6, Ex. C.)

4 Plaintiff submitted a Form 602 appeal, institutional log number SATF-12-03230, received at
5 the first level of review on July 10, 2012. By this appeal Plaintiff appealed the decision to cancel his
6 appeal number SATF-E-12-02953 regarding staff misconduct as duplicative of his appeal number
7 SATF-12-02773. Appeal number SATF-12-03230 was denied at the third level of review in a
8 decision dated October 4, 2012. (Voong Decl. ¶ 6, Ex. D.)

9 Defendants submit that none of the appeals submitted by Plaintiff served to exhaust the
10 administrative remedies as to claims against the Defendants in this action and all Defendants are
11 entitled to summary judgment.

12 2. Plaintiff’s Opposition

13 Plaintiff argues he has exhausted the administrative remedies because the CDCR grievance
14 form directs prisoners to “describe problem and action requested.” Plaintiff contends that his inmate
15 grievances implicated each of the Defendants by way of their assignments and responsibilities even if
16 he did not specifically name each Defendant. Each Defendant was responsible for Plaintiff being
17 deliberately placed in dangerous work assignments and the PLRA does not require that Plaintiff
18 identify the legal theory upon which he proceeds against each Defendant.

19 3. Defendants’ Reply

20 Defendants argue the wording on the grievance form is consistent with the requirement under
21 the regulations that an inmate’s appeal must “describe the specific issue under appeal and the relief
22 requested.” Cal. Code Regs. tit. 15, § 3084.2(a). Plaintiff does not contend that he was ignorant of the
23 regulations or that he was somehow misled by the form’s wording. Defendants note that the Form 602
24 was in a format of blanks to be completed for sections entitled “describe problem” and “action
25 requested” only for the chronologically first two appeals submitted by Plaintiff among those identified
26 in Defendants’ motion, numbers SATF-08-1186 and SATF-09-01866. However, these two appeals
27 do not address the issues or individuals that are the subject of the instant action, and the appeals
28 submitted in 2008 and 2009 are remote in time from the events at issue. All other appeals submitted

1 by Plaintiff, are in a revised format of blanks to briefly state the subject of the appeal, to explain the
2 issue, and to state the action requested. Defendants submit that pre-printed wording on the Form 602
3 is not a basis for Plaintiff to have exhausted under the appeals he submitted.

4 Plaintiff does not dispute that he did not name Defendants in his appeals, but rather argues they
5 are “implicated” by way of their job assignments and responsibilities. However, Defendants argue the
6 regulations in effect since 2011, directly contradict Plaintiff’s argument. Defendants further argue that
7 Plaintiff does not identify any specific appeal(s) that exhausted the claims against the defendants in
8 this action. Furthermore, Defendants submit that Plaintiff concedes his appeals do not reference the
9 issue of retaliation but argues because retaliation is a legal theory it need not be stated in the
10 grievance. Defendants argue that although “retaliation” is a legal theory, the inmate appeal must
11 provide a factual scenario comprising the retaliation claim in order to properly exhaust the remedies.
12 Defendants point out that Plaintiff filed an inmate appeal relating to a claim of retaliation against
13 officers, who are not parties to the present actions, in appeal number SATF-M-08-1186, and Plaintiff’s
14 argument that he need not reference retaliation is disingenuous.

15 4. Analysis and Findings

16 The Court will address each of the inmate grievances filed by Plaintiff and referenced by
17 Defendants in their motion for summary judgment.

18 a. Appeal Number SATF-09-01866

19 Plaintiff submitted appeal log number SATF-09-01866, in which he requested to be removed
20 and reassigned from a prison job that put him in proximity to machinery, as he had a chrono³ stating
21 that he should not work around moving machinery or sharp objects. (Voong Decl. ¶ 6, Ex. B.)

22 Plaintiff specifically stated as follows:

23 Describe Problem: I have been deliberately placed in an assignment that is a threat to
24 my health and safety. See attached medical chrono and attached job assignment

25
26 ³ A medical “chrono” is a recommendation, usually related to an inmate’s medical condition or course of treatment, issued
27 by a prison physician. See, e.g., Cal. Code Regs. tit. 15, § 3043.5(d) (describing the medical chrono also known as “Form
28 128-C”); see generally Cal. Code Regs. tit. 15, § 3000 (defining “general chrono” written on CDC Form 128-B “which is
used to document information about inmates and inmate behavior.”).

1 chrono. I am a hard worker and a programming inmate your professional assistance is
2 appreciated. [Cannot] be around machinery, sharp objects.

3 Action Requested: I would like to be removed from that assignment and considered for
4 placement as 4 Block 3rd watch tier tender, yard crew or kitchen worker. I am med-A
5 and food handling cleared. Although I would appreciate placement yard crew.

6 (Voong Decl., Ex. B.)

7 This appeal makes no reference to prison staff retaliating against Plaintiff. (Id.) At the first
8 level response, Plaintiff was moved to a job in painting. Plaintiff submitted the appeal to the second
9 and third level reviews requesting reassignment from the painting job because of migraines that were
10 worsened by chemicals in the paint shop. The appeal was denied at both levels of review. (Id.)

11 Defendants correctly submit that this appeal is similar to the complaint's allegations against
12 Defendants Rodriguez, Rasey and Reyna only to the extent it concerns Plaintiff's work assignments.
13 However, the appeal does not raise or relate to Defendants' alleged misconduct of retaliation by
14 placing Plaintiff in a work assignment which they knew would injure him, that he was threatened with
15 violence, or that the placement was done with a retaliatory motive. (Id.) In 2009, at the time this
16 appeal was submitted and decided, the regulations required an appeal describe the specific issue under
17 appeal and the relief requested. (Cal. Code Regs. tit. 15, § 3084.2(a) (Oct. 15, 2009).) The regulations
18 at that time⁴ did not require the inmate to list by name the individuals against whom the grievance was
19 made. However, where a prison system's grievance procedures do not specify the requisite level of
20 detail for inmate appeals, a grievance satisfies the administrative exhaustion requirement if it "alerts
21 the prison to the nature of the wrong for which redress is sought." Griffin v. Arpaio, 557 F.3d 1117,
22 1120 (9th Cir. 2009). The Court finds that Plaintiff's appeal of his work assignment did not suffice to
23 exhaust his retaliation claim against Defendants Rodriguez, Rasey and Reyna because the appeal did
24 not place prison officials on notice that these Defendants were retaliating against Plaintiff by
25 intentionally placing him in a work assignment that would give rise to injury simply because he
26 engaged in prior activity protected by the First Amendment. Cal. Code Regs. tit. 15, § 3084.2(a);

27 _____
28 ⁴ As discussed below, the requirement to identify by name the persons against whom the grievance is made was added to
the regulations that were revised in 2011.

1 Sapp, 623 F.3d at 824. Although Plaintiff mentions being deliberately placed in a work assignment
2 that is a threat to his health and safety, there is no reference to any individual placing Plaintiff in a
3 work assignment which that person knew would injure Plaintiff, or that any prison staff threatened
4 Plaintiff with violence. (Voong Decl. Ex. B.) Nor is there any mention of any retaliatory conduct. It
5 is not the placement or retention of Plaintiff in alleged dangerous job/educational assignments which
6 gave rise to a cognizable constitutional violation in this action. Rather, it was Plaintiff's allegations
7 that he was subjected to adverse action, i.e. placement/retention in dangerous work conditions which
8 resulted in physical injury, in *retaliation* for filing prior complaints and/or grievances against
9 Defendants. Furthermore, Plaintiff's request for relief was limited to reassignment to a new work
10 placement, there is no mention whatsoever as to any action to be taken against staff for alleged
11 retaliatory action. Even under the prior regulations, which required only a description of the problem
12 and constituted a "low floor," Griffin v. Arpaio, 557 F.3d at 1120, Plaintiff's appeal would not have
13 sufficed to alert prison officials to the nature of the wrong for which redress is now sought, Sapp, 623
14 F.3d at 824 (quotation marks omitted); accord Akhtar v. Mesa, 698 F.3d 1202, 1211 (9th Cir. 2012).
15 Accordingly, this grievance does not serve to exhaust the administrative remedies for Plaintiff's
16 retaliation claims.

17 **b. Appeal Number SATF-12-00275**

18 On December 30, 2011, Plaintiff submitted appeal number SATF-12-00275 to the first level of
19 review. In this appeal, Plaintiff requested to be removed from an educational assignment because of
20 medical issues. (Voong Decl. ¶ 6, Ex. C.) This appeal makes no reference to prison staff retaliating
21 against Plaintiff. (Id.) In this first level response, Plaintiff was removed and assigned to a position as
22 building porter with limited duties. Plaintiff submitted the appeal to the second level of review,
23 claiming the new assignment was not being honored by prison staff. (Id.)

24 Plaintiff subsequently submitted the appeal for third level of review, claiming he had been
25 injured as a result of being placed in a job assignment that he was physically unable to do. (Id.) The
26 appeal was denied on August 24, 2012, and the decision specifically states that Plaintiff added a new
27 issue (claim of injury) to his third level submittal that had not been included previously, such that it
28 was improper and not addressed by the denial decision.

1 When the appeal was initially submitted to first level review, the appeal did not list any
2 Defendant or describe any Defendant as involved in the issue presented. (Voong Decl. at Ex. C.)
3 However, in submitting the appeal for third level review and explaining his dissatisfaction with the
4 second level review, Plaintiff complained that he “was injured in the E-dining as a result of being
5 placed in a job assigned I was physically incapable of doing I suffered a concussion and sprain neck.
6 [D]ining hall c/o Rasey and correctional cook V. Manchaca left me in those dangerous work
7 conditions [and] ... porter only contributed to my being subsequently injured.” (Id.) No Defendant
8 other than Rasey is listed or identified by name in any of Plaintiff’s submissions of this appeal.

9 In 2011, the regulations were revised to specifically state:

10 The inmate or parolee shall list all staff member(s) involved and shall describe their
11 involvement in the issue. To assist in the identification of staff members, the inmate or
12 parolee shall include the staff member’s last name, first initial, title or position, if
13 known, and the dates of the staff member’s involvement in the issue under appeal.

14 Cal. Code. Regs. tit. 15, § 3084.2(a)(3) (July 28, 2011). Further, the inmate must “state all facts
15 known and available to him/her regarding the issue being appealed at the time,” and he or she must
16 “describe the specific issue under appeal and the relief requested.” Cal. Code Regs. tit. 15, §
17 3084.2(a)(4).

18 Plaintiff failed to list or name any Defendant other than Rasey, and therefore failed to comply
19 with the applicable regulations and did not exhaust the administrative remedies. With regard to
20 Defendant Rasey, because he was not listed or named in the original grievance, and was only added at
21 the third level for review, Plaintiff did not exhaust any claim as to Defendant Rasey. Indeed, the third
22 level response noted that Plaintiff added a new issue at the third level review which was not addressed
23 because it is not appropriate to expand the appeal beyond the original stated issue and requested
24 action. (Voong Decl. at Ex. C.) Administrative remedies are not exhausted as to any new issue,
25 information or person later named by the appellant prisoner that was not included in the originally
26 submitted CDCR Form 602 and addressed through all required levels of administrative review up to
27 and including the third level. (Cal. Code Regs. tit. 15, § 3084.1(b) (2012).) Accordingly, this appeal
28 did not serve to exhaust any claims against any Defendants in this action even though it was denied at
the third level of review.

1 **c. Appeal Number SATF-12-02773**

2 On June 7, 2012, Plaintiff submitted appeal number SATF-12-02773 to the first level review.
3 In this appeal, Plaintiff stated that he had slipped and fallen on a wet floor in the dining hall, and
4 requested not to be assigned to any job that would cause him injury. (Voong Decl. ¶ 6, Ex. E.) The
5 only similarity between this appeal and the complaint’s allegations is that it references to prison work
6 assignments and a resulting injury. However, this appeal makes no reference to prison staff retaliating
7 against Plaintiff.

8 The appeal was partially granted at the first level, and Plaintiff was unassigned from his dining
9 hall position and was put on a waiting list for support services. Plaintiff submitted the appeal to the
10 second level of review, contending that his medical conditions had not been properly documented.
11 Plaintiff’s second level appeal was denied. Plaintiff submitted the appeal to the third level of review,
12 contending it had not been handled properly, and the appeal was denied. (Voong Decl., ¶ 6, Ex. E.)
13 Based on the content of this appeal, it could not and did not serve to exhaust the administrative
14 remedies for the claims of retaliation alleged in this action.

15 **d. Appeal Number SATF-E-12-02953**

16 On June 6, 2012, Plaintiff submitted appeal number SATF-E-12-02953. In this appeal,
17 Plaintiff contended that Defendant Rasey failed to exercise professional judgment, exposing Plaintiff
18 to dangerous work conditions. This appeal makes no references to prison staff retaliating against
19 Plaintiff. This appeal was cancelled in screening at the first level review on June 21, 2012, because it
20 was duplicative of Plaintiff’s appeal number SATF-12-02773. (Hildreth Decl. ¶ 6, Ex. C.)

21 **e. Appeal Number SATF-12-03230**

22 Plaintiff submitted a Form 602 appeal, institutional log number SATF-12-03230, received at
23 the first level of review on July 10, 2012. By this appeal, Plaintiff appealed the decision to cancel his
24 appeal number SATF-12-02953 regarding staff misconduct as duplicative of his appeal number SATF-
25 12-02773. Appeal number SATF-12-03230 was denied at the third level of review in a decision dated
26 October 4, 2012. (Voong Decl. ¶ 6, Ex. D.)

27 For the reasons set forth herein, the Court finds that Plaintiff failed to exhaust the available
28 administrative remedies as to his claims in this action. None of the above referenced appeals grieved

1 Plaintiff's claim of retaliation and did not suffice to exhaust the claims. Defendants have met their
2 burden of demonstrating that Plaintiff failed to exhaust the administrative remedies with respect to the
3 retaliation claims in this action. While Plaintiff is correct that "retaliation" is a legal theory, in order to
4 exhaust the administrative remedies there must be a factual scenario comprising the retaliation claim.
5 Plaintiff has failed to refute Defendants' evidence and although Plaintiff contends that he exhausted
6 the administrative remedies, the pertinent appeals submitted by Defendants contradict such argument.
7 Accordingly, Plaintiff did not provide prison officials sufficient notice of the problem and ability to
8 correct such issue prior to litigation in this Court, and Defendants' motion for summary judgment
9 should be granted.

10 **III.**

11 **RECOMMENDATIONS**

12 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 13 1. Defendants' motion for summary judgment be GRANTED; and
- 14 2. Judgment be entered in favor of Defendants.

15 These Findings and Recommendations will be submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after
17 being served with these Findings and Recommendations, the parties may file written objections with
18 the Court. The document should be captioned "Objections to Magistrate Judge's Findings and
19 Recommendations." The parties are advised that failure to file objections within the specified time
20 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.
21 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22
23 IT IS SO ORDERED.

24 Dated: November 13, 2015



25 UNITED STATES MAGISTRATE JUDGE