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

JEFF AIDNIK

Plaintiff,

No. 2:09-cv-2271 WBS KJN (TEMP) P

vs.

SHAWN O'CONNER, et al.

Defendants.

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner, proceeding without counsel and in forma pauperis, with an action under 42 U.S.C. § 1983 and state law. He alleges that defendants O'Conner and Russell were deliberately indifferent to his safety by exposing him to asbestos and lead during a demolition work project at the California Medical Facility, in violation of the Eighth Amendment.

Russell was served with process¹ and has filed a motion to dismiss, alleging: (1) plaintiff failed to exhaust the prison grievance process before filing this lawsuit; (2) workers'

¹ The summons directed to O'Conner was returned unexecuted, with a notation indicating that he could not be located in the California Department of Corrections and Rehabilitation's ("CDCR") database. The court advised plaintiff that he must provide additional information to serve defendant O'Conner, see Dkt. # 17, but to date plaintiff has not provided any additional information to complete service. Accordingly, the undersigned recommends that defendant O'Conner be dismissed from this action.

1 compensation is plaintiff's exclusive remedy; (3) plaintiff's tort claim was untimely, barring any
2 negligence claim; and (4) plaintiff's request for injunctive relief is moot.

3 I. Plaintiff's Allegations

4 Plaintiff alleges that in March 2006, he was instructed to assist in the demolition
5 of the photo lab at the California Medical Facility ("CMF") in Vacaville, California. See
6 Complaint at 9 (Dkt. # 1). About one week into the project, a supervisor told the workers onsite,
7 including plaintiff, to stop. Id. Plaintiff never resumed work at the demolition site. Instead, "an
8 outside company" specializing in asbestos removal took over the project. Id.

9 Plaintiff alleges that, despite the work stoppage, he did not learn of the presence
10 of asbestos and lead at the demolition site until he received an occupational injury or illness
11 report on May 26, 2006. Id. at 7. He also states that on August 16, 2006, the California
12 Compensation Insurance Fund sent him a notice that "liability for this injury had been accepted."
13 Id.

14 Plaintiff alleges that defendant Russell, a secondary supervisor in plant operations
15 with the CDCR, knew about the presence of asbestos throughout CMF. See Complaint at 7. He
16 avers that Russell was aware that the same "outside company" had removed asbestos from the
17 gym restroom at CMF only a week before the demolition of the photo lab began. Id. Plaintiff
18 alleges Russell acted with deliberate indifference to a serious risk to plaintiff's health when he
19 allowed plaintiff "to work and remove these deadly contaminants with no proper training or
20 safety gear." Id.

21 The complaint states that as a direct result of plaintiff's handling asbestos and
22 lead, he suffers respiratory distress and requires respiratory treatment four times a day. Id. at 9.
23 Plaintiff seeks injunctive and declaratory relief and compensatory and punitive damages.

24 II. Procedural Background

25 Plaintiff brought these same allegations against defendant Russell in this court, in
26 Civil Action No. 2:07-cv-1273 MCE EFB. In that case, the court dismissed without prejudice

1 plaintiff's claim that Russell was deliberately indifferent to the safety risks posed by asbestos at
2 the demolition work site where plaintiff was assigned. The court found that plaintiff had failed
3 to exhaust administrative remedies with regard to allegations of asbestos exposure in March
4 2006. See Civil Action No. 2:07-cv-1273 MCE EFB, Dkt. # 62 (recommending dismissal) and
5 Dkt. # 65 (adopting the recommendation and dismissing the case). The magistrate judge's
6 recommendation also stated that "[d]ismissal without prejudice may permit plaintiff to file a new
7 action upon exhaustion of the prison grievance process." Civil Action No. 2:07-cv-1273 MCE
8 EFB, Dkt. # 62 at 4.² Indeed plaintiff filed an inmate grievance after his first lawsuit was
9 dismissed, and he states in the instant complaint that the grievance process is now complete. See
10 Complaint at 3. However, defendant Russell again moves to dismiss on the ground that plaintiff
11 did not fully exhaust the grievance process.

12 III. Failure to Exhaust Administrative Remedies

13 A motion to dismiss for failure to exhaust administrative remedies prior to filing
14 suit arises under Rule 12(b) of the Federal Rules of Civil Procedure. Wyatt v. Terhune, 315 F.3d
15 1108, 1119 (9th Cir. 2003). In deciding a motion to dismiss for failure to exhaust non-judicial
16 remedies, the court may look beyond the pleadings and decide disputed issues of fact. Id. at
17 1120. If the district court concludes that the prisoner has not exhausted non-judicial remedies,
18 the proper remedy is dismissal of the claim without prejudice. Id.

19 The exhaustion requirement is rooted in the Prison Litigation Reform Act
20 ("PLRA"), which provides that "[n]o action shall be brought with respect to prison conditions
21 under section 1983 of this title, . . . until such administrative remedies as are available are
22 exhausted." 42 U.S.C. § 1997e(a). CDCR regulations provide administrative procedures in the
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24 ² In that first action, plaintiff conceded that he had not even initiated the grievance
25 process in seeking redress for his exposure to asbestos or lead. He appears to have argued that he
26 exhausted his state remedies when the state employer (presumably, CDCR) accepted liability for
the work-related injury. As the court explained, that fact "has no bearing on whether plaintiff
satisfied the exhaustion requirement." Id.

1 form of one informal and three formal levels of review to address plaintiff's claims. See Cal.
2 Code Regs. tit. 15, §§ 3084.1-3084.7. Administrative procedures generally are exhausted once a
3 prisoner has received a "Director's Level Decision," or third level review, with respect to his
4 issues or claims. Cal. Code Regs. tit. 15, § 3084.5.

5 Under CDCR regulations, an inmate must file his prisoner grievance within
6 fifteen days of the events grieved.³ If a plaintiff failed to exhaust available administrative
7 remedies by filing a late grievance, his case must be dismissed. Woodford v. Ngo, 548 U.S. 81
8 (2006). Exhaustion during the pendency of the litigation will not save an action from dismissal.
9 McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir. 2002). Exhaustion "means using all steps
10 that the agency holds out, and doing so properly...." Woodford, 548 U.S. at 90 (citation
11 omitted). Therefore, an inmate must pursue a grievance through every stage of the prison's
12 administrative process before a civil rights action is filed, unless a he can demonstrate a step was
13 not "available "to him.

14 Defendant bears the burden of proving plaintiff's failure to exhaust. Wyatt, 315
15 F.3d at 1119. The court resolves all ambiguities in favor of the non-moving party. Estelle v.
16 Gamble, 429 U.S. 97, 106 (1976).

17 A. Analysis

18 Defendant Russell submits a sworn declaration of D. Foston, who is Chief of the
19 Inmate Appeals Branch ("IAB") of the CDCR. The IAB receives inmates' appeals at the "Third
20 Level," which is the final stage of the grievance process. Foston states that "Plaintiff Aidnik
21 submitted a work incentive appeal on July 20, 2009, related to the [asbestos] incident. (Log No.
22 IAB # 0900912.) This appeal was screened out on August 17, 2009, because it concerned a 2006
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24 ³ California regulations do not require an inmate to specifically identify a prison official
25 in a grievance. Therefore, an inmate need not name a particular individual during the grievance
26 process in order to name that person as a defendant and meet the PLRA's exhaustion requirement
when he files suit. See Jones v. Bock, 549 U.S. 199, 218-19 (2007); Butler v. Adams, 397 F.3d
1181, 1183 (9th Cir. 2005).

1 incident, and the appeal had been screened out at the institutional level.” Declaration of D.
2 Foston at ¶ 11 (Dkt. # 27-2). However, the August 17, 2009 screening letter from the IAB is not
3 entirely consistent with Foston’s suggestion that plaintiff’s appeal failed because it was
4 submitted too late. Instead, the letter states, rather cryptically, that plaintiff’s appeal was “being
5 screened out and returned to you” by the IAB because “[y]our appeal was rejected, withdrawn or
6 cancelled at the institution level.” Id. at 9. The IAB letter simply gives the conclusory
7 explanation that plaintiff’s appeal was rejected at the Third Level of appeal because it was
8 rejected at the previous, institutional level. But, for whatever reason, defendant Russell submits
9 no document stating why the appeal was rejected at the institutional level, nor is there any
10 statement from any stage of the grievance process confirming that the appeal was rejected for
11 being filed too late.

12 Were this inconclusive collection of evidence all that the court had to decide the
13 exhaustion question, the ambiguities left by the defendant’s inexplicable failure to submit easily
14 obtainable, written proof of the substantive reason for the IAB’s decision would require the court
15 to find that defendant has not carried his burden of proving non-exhaustion. See Estelle, supra.
16 Defendant, however, has the good fortune of plaintiff’s own submission regarding the reason his
17 appeal failed: well before defendant filed the motion to dismiss, plaintiff filed a notice with the
18 court that he had exhausted all administrative remedies, explaining that “on August 17, 2009, he
19 received a letter back from N. Grannis, Chief of Inmate Appeals, rejecting his appeal do [sic] to
20 time.” Plaintiff’s Notice of Exhaustion (Dkt. No. 10). Again, the letter from the IAB does not
21 mention untimeliness as a reason for the appeal’s rejection. Nevertheless, plaintiff effectively
22 concedes that he was screened out of the appeals process for filing a grievance too late. The
23 three years that passed between his exposure to asbestos and his initiation of the grievance
24 process supports his concession.

25 As stated above, if a plaintiff failed to exhaust available administrative remedies
26 by filing a late grievance, his case must be dismissed. Woodford, supra. Moreover, “concession

1 to nonexhaustion is a valid ground for dismissal, so long as no exception to exhaustion applies.”
2 Wyatt, 315 F.3d at 1120. The court sees no exception applicable here.⁴

3 In light of plaintiff’s concession that his appeal was rejected as untimely, the court
4 finds that his case must be dismissed. Having so found, the court need not address defendant’s
5 other arguments for dismissal.

6 Accordingly, IT IS RECOMMENDED that:

- 7 1. Defendant Russell’s motion to dismiss (Dkt. # 27) be granted.
8 2. Defendant O’Conner be dismissed from this case
9 3. This case be closed.

10 These findings and recommendations are submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
12 one days after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
15 shall be served and filed within fourteen days after service of the objections. The parties are
16 advised that failure to file objections within the specified time may waive the right to appeal the
17 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: July 14, 2011

19 
KENDALL J. NEWMAN
20 UNITED STATES MAGISTRATE JUDGE

21 aidn2271.57

22 ⁴ In his opposition, plaintiff appears to be under the mistaken belief that when this court
23 dismissed his first action, it gave him a fresh start within the CDCR’s grievance process. To the
24 contrary, the existence of certain exceptions to the exhaustion requirement does not confer on the
25 court authority to waive the timeliness requirements that the CDCR has set for its own
26 administrative remedies. Rather, the court said only that dismissal of the first case without
prejudice “may permit plaintiff to file a new action upon exhaustion of the grievance process.”
Civil Action No. 2:07-cv-1273 MCE EFB, Dkt. # 62 at 4 n.3 (emphasis added). In finding now
that plaintiff filed an untimely grievance, the court necessarily finds that he has not exhausted the
grievance process.