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

KEVIN BARTHOLOMEW,

Plaintiff,

No. 2:12-cv-1116 LKK CKD P

vs.

A.V. SOLORZANO,

Defendant.

FINDINGS & RECOMMENDATIONS

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Plaintiff, an inmate of the California Department of Corrections and Rehabilitation (“CDCR”), proceeds pro se with a civil rights complaint filed pursuant to 42 U.S.C. § 1983. (Dkt. No. 1.) Plaintiff asserts claims under the First and Eighth Amendments against defendant Solorzano, the sole named defendant. Defendant has moved to dismiss the complaint on the ground that plaintiff failed to exhaust administrative remedies before filing suit. (Dkt. No. 18.) Plaintiff opposes the motion (Dkt. Nos. 19, 22) and defendant has filed a reply (Dkt. No. 20).

I. Allegations of the Complaint

The events giving rise to this lawsuit occurred at California State Prison- Solano (CSP-Solano), where plaintiff was incarcerated and defendant was employed as a correctional officer at all times relevant. On September 1, 2011, while processing plaintiff’s outgoing mail,

1 defendant made comments about inmates' rectums and stated to plaintiff: "Bartholomew have  
2 you ever put anything up your ass, you know what they say about prison[.]" (Dkt. No. 1 at 5,  
3 10.<sup>1</sup>) On September 2, 2011, plaintiff filed an inmate grievance reporting this incident and  
4 alleging that defendant had sexually harassed him. (Id.)

5 On September 8, 2011, defendant asked plaintiff to withdraw the grievance but  
6 plaintiff refused to do so. (Dkt. No. 1 at 5.) About an hour later, plaintiff asked defendant for  
7 permission to take a shower. (Id.) Although defendant was letting other inmates into the shower,  
8 defendant refused to allow plaintiff to shower, stating, "you write me up and expect a shower  
9 lock it up[.]" (Id.) Defendant denied plaintiff showers on three more occasions that month. (Id.)

10 On March 19, 2012, defendant entered plaintiff's cell and broke plaintiff's  
11 dentures and clock, stating "maybe next time you will think twice about filing a 602[.]" (Dkt.  
12 No. 1 at 17.) Without his dentures, plaintiff was injured and suffered pain when eating. (Id.)

13 Plaintiff commenced this federal action on April 26, 2012. (See Dkt. No. 1.) In a  
14 screening order dated June 8, 2012, this court found that plaintiff had sufficiently stated claims as  
15 follows: (1) "that Solorzano violated his rights under the First Amendment by restricting  
16 plaintiff's shower access in retaliation for plaintiff's sexual harassment grievance against  
17 Solorzano[;]" and (2) "that Solorzano violated his rights under the Eighth Amendment by  
18 destroying his dentures and therefore subjecting him to the unnecessary infliction of pain." (Dkt.  
19 No. 8 at 3.)

## 20 II. Exhaustion of Administrative Remedies

### 21 A. Legal Standard

22 Pursuant to the Prison Litigation Reform Act ("PLRA"):

23 No action shall be brought with respect to prison conditions under  
24 section 1983 of this title, or any other Federal law, by a prisoner  
confined in a jail, prison, or other correctional facility until such

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26 <sup>1</sup> The page numbers referenced are those assigned by the court's CM/ECF system, where applicable.

1 administrative remedies as are available are exhausted.

2 42 U.S.C. § 1997e(a). Compliance with the exhaustion requirement is mandatory. Booth v.  
3 Churner, 532 U.S. 731, 739, 741 (2001) (holding that prisoners must exhaust their administrative  
4 remedies regardless of the relief they seek, i.e., whether injunctive relief or money damages, even  
5 though the latter is unavailable pursuant to the administrative grievance process).

6 The State of California’s prison regulations provide administrative procedures in  
7 the form of one informal and three formal levels of review to address plaintiff’s claims. See 15  
8 Cal. Code Regs. §§ 3084.1-3084.7. Administrative procedures generally are exhausted once a  
9 prisoner has received a “Director’s Level Decision,” or third level review, with respect to his  
10 issues or claims. Cal. Code Regs. tit. 15, § 3084.5. All steps must be completed before a civil  
11 rights action is filed, unless there is an exception; exhaustion during the pendency of the  
12 litigation will not save an action from dismissal. McKinney v. Carey, 311 F.3d 1198, 1200 (9th  
13 Cir. 2002). In order to properly exhaust in compliance with the exhaustion requirement of  
14 section 1997e(a), a prisoner must comply with applicable procedural rules and time  
15 requirements. Woodford v. Ngo, 548 U.S. 81, 90-91 (2006).

16 “The level of detail in an administrative grievance necessary to properly exhaust a  
17 claim is determined by the prison’s applicable grievance procedures.” Jones v. Bock, 549 U.S.  
18 199, 218 (2007); see also McCullum v. CDCR, 647 F.3d 870, 876 (2011) (“Whether an inmate’s  
19 claim has been exhausted is determined by reference to the prison’s own grievance requirements,  
20 which necessitate that the inmate “describe the problem and the action requested.” (internal  
21 quotations and citations omitted). In California,

22 A grievance need not include legal terminology or legal theories  
23 unless they are in some way needed to provide notice of the harm  
24 being grieved. A grievance also need not contain every fact  
25 necessary to prove each element of an eventual legal claim. The  
primary purpose of a grievance is to alert the prison to a problem  
and facilitate its resolution, not to lay groundwork for litigation.

26 Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009); see also McCullum, 647 F.3d at 876

1 (“While an inmate need not articulate a precise legal theory, a grievance must alert the prison to  
2 the nature of the wrong for which redress is sought.”); see also *Jones*, 549 U.S. at 219  
3 (“[E]xhaustion is not per se inadequate simply because an individual later sued was not named in  
4 the grievances.”).

5           The exhaustion requirement is not jurisdictional, but rather is an affirmative  
6 defense that may be raised by a defendant in a motion to dismiss pursuant to Federal Rule of  
7 Civil Procedure 12(b). See *Jones v. Bock*, 549 U.S. 199, 216 (2007) (“inmates are not required  
8 to specially plead or demonstrate exhaustion in their complaints”); *Wyatt v. Terhune*, 315 F.3d  
9 1108, 1117–19 (9th Cir. 2003) (failure to exhaust is an affirmative defense). The defendant bears  
10 the burden of raising and proving the absence of exhaustion. *Id.* at 1119. If the district court  
11 concludes that the prisoner has not exhausted administrative remedies on a claim, “the proper  
12 remedy is dismissal of the claim without prejudice.” *Wyatt*, 315 F.3d at 1120; see also *Lira v.*  
13 *Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005) (“mixed” complaints may proceed on exhausted  
14 claims).

15           “In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the  
16 court may look beyond the pleadings and decide disputed issues of fact.” *Wyatt*, 315 F.3d at  
17 1119. “[I]f the district court looks beyond the pleadings to a factual record in deciding the  
18 motion to dismiss for failure to exhaust – a procedure closely analogous to summary judgment –  
19 then the court must assure that [the prisoner] has fair notice of his opportunity to develop a  
20 record.” *Id.* at 1120 n.14. In this case, plaintiff was advised of the requirements to oppose an  
21 unenumerated Rule 12(b) motion to dismiss on August 21, 2012, contemporaneously with  
22 service of defendant’s motion, and again by order of the court on September 4, 2012. (Dkt. Nos.  
23 18-1, 21.)

#### 24           B. Discussion

25           As discussed, the events alleged in the complaint found to state cognizable claims  
26 began on September 8, 2011, when defendant asked plaintiff to withdraw his appeal and first

1 denied plaintiff a shower. Plaintiff then commenced this federal action on April 26, 2012.  
2 Thus, to satisfy exhaustion requirements, plaintiff must have submitted a grievance or grievances  
3 concerning defendant's alleged conduct at issue in the complaint sometime after September 8,  
4 2011 and the process must have been completed by April 26, 2012.

5           According to the sworn declaration of J.D. Lozano, Chief of The Office of  
6 Appeals ("OOA"), during the relevant time frame, OOA received and maintained inmate appeals  
7 accepted for the third and final level of review in CDCR's inmate appeals process for all issues  
8 except medical issues. (Dkt. No. 18-6, Declaration of J.D. Lozano ("Lozano Decl.") at ¶ 2.)  
9 During the time period from September 1, 2011 through April 26, 2012, plaintiff submitted three  
10 inmate appeals, two of which were decided by OOA on or before April 26, 2012. (Id. at ¶ 3.)

11           Copies of the appeals decided on or before April 26, 2012 are attached as exhibits;  
12 neither submitted during the relevant time frame addresses shower access, broken dentures, or  
13 any alleged retaliatory conduct by defendant. (Dkt. Nos. 18-3, 18-4.) Plaintiff alleged in Inmate  
14 Appeal CSP-S-11-00969 that defendant sexually harassed him by making inappropriate  
15 comments about men's rectums, as alleged in the complaint. (Dkt. No. 18-3.) Inmate Appeal  
16 CSP-S-11-01056 concerns contraband (a \$100 bill) confiscated during a search of plaintiff's cell  
17 and contains no reference to any allegations in plaintiff's complaint. (Dkt. No. 18-4.)

18           S. Cervantes, Appeals Coordinator for the Institutional Appeals Office at CSP-  
19 Solano, is responsible for screening inmate appeals at the second level of review, coordinating  
20 appeals processing, and maintaining inmate appeals records including a database of appeals that  
21 are screened out for non-compliance with proper procedures. (Dkt. No. 18-7, Declaration of S.  
22 Cervantes at ¶ 1-2.) S. Cervantes declares in a sworn statement that plaintiff submitted Inmate  
23 Appeal CSP-S-12-00619 concerning a property issue to the second level of review. (Id. at ¶ 4.)  
24 In Appeal CSP-S-12-00619, plaintiff alleged that defendant damaged his dentures and clock in  
25 an act of retaliation. (Dkt. No. 18-5.) Plaintiff signed Inmate Appeal CSP-S-12-00619 on March  
26 19, 2012, and it was received by S. Cervantes on April 2, 2012. (Id.) As set forth, however,

1 plaintiff did not submit this appeal or any others concerning shower access, dentures, or  
2 retaliatory acts by defendant to the third level of review during the relevant time frame. (Lozano  
3 Decl. at ¶ 3.) This appeal does not, therefore, satisfy the exhaustion requirement for either of  
4 plaintiff's claims.

5           Several points presented in plaintiff's first and second oppositions will now be  
6 addressed. To begin, plaintiff objects to defendant's assertion that the events at issue first  
7 occurred September 8, 2011.<sup>2</sup> (Dkt. No. 19 at 1.) While it is true that the events described in  
8 plaintiff's complaint began on September 1, 2011 when defendant allegedly sexually harassed  
9 plaintiff, plaintiff's allegation of sexual harassment does not state a cognizable claim for a  
10 constitutional violation. In other words, defendant's actionable conduct did not first occur until  
11 September 8, 2011 making that the first date on which plaintiff could have begun the exhaustion  
12 process for the conduct underlying his First and Eighth Amendment claims.

13           Plaintiff asserts that his presentation of Inmate Appeal CSP-S-11-00969 did in  
14 fact exhaust his First and Eighth Amendment claims. He argues:

15           [I]n his grievance [CSP-S-11-00969] Plaintiff complained to  
16 prison officials that in reprisal to reporting the incident he was  
17 being harassed in the related conditions. As the 602 progressed  
18 through the various levels of review, plaintiff complained that he  
19 was not being allowed to shower.... [¶] Plaintiff complained to  
20 prison officials that defendant Solorzano was being deliberate  
21 indifferent [*sic*] to his hygiene needs by refusing to provide access  
22 to shower, to "chill" his appeal for reporting the sexual harassment.  
23 Prison officials, including defendant Solorzano who reviewed the  
24 second level appeal, clearly understood what Plaintiff was  
25 complaining about and what relief he was seeking. In each  
26 response, prison officials acknowledged plaintiff's complaints  
regarding that no reprisal be taken against him for filing his appeal.  
e.g. trash searches, Harassment, transfer out of building #8, bogus  
CDC-115.

It is the nature of plaintiff's claim, not whether he mentioned a  
shower or broken denture in his grievance, that is the paramount

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<sup>2</sup>Actually, plaintiff describes the date as "September 8, 2012," but the court concludes that this is a typographical error as the plaintiff's federal complaint was filed in April, 2012. Dkt. No. 1.

1 consideration in the exhaustion analysis.

2 Here, prison officials would not have been anymore aware of the  
3 ongoing problems about which plaintiff was complaining had he  
4 re-started the grievance process each time he was being “harassed”  
5 by defendant Solorzano when depriving him showers and trash  
6 searching plaintiff’s cell breaking his dentures.

6 (Dkt. No. 19 at 6-7.)

7 As set forth, to properly exhaust administrative remedies, a prisoner must comply  
8 with the prison’s policies and procedures governing its administrative process. Woodford, 548  
9 U.S. at 90-91. “All steps [in the inmate grievance process] must be completed before a civil  
10 rights action is filed....” McKinney, 311 F.3d at 1200.

11 Under CDCR’s regulations it is “[t]he third level of review [that] exhausts  
12 administrative remedies” 15 Cal. Code Regs. § 3084.7(d)(3). However, department regulations  
13 specifically provide:

14 Administrative remedies shall not be considered exhausted relative  
15 to any new issue, information, or person later named by the  
16 appellate that was not included in the originally submitted CDCR  
17 Form 602 (Rev. 08/09), Inmate/Parolee Appeal, which is  
18 incorporated by reference, and addressed through all required  
19 levels of administrative review up to and including the third level.

18 15 Cal. Code Regs. § 3084.1(b).<sup>3</sup> The referenced “CDCR Form 602 (Rev. 08/09),  
19 Inmate/Parolee Appeal” is the form submitted to the appeals coordinator of the institution at the  
20 first level of review. See 15 Cal. Code Regs. §§ 3084.2(a)-(c). Accordingly, for any inmate  
21 appeal on which plaintiff received a director’s decision at the third level of review, only the  
22 issues he set forth in his original submission are properly exhausted.

23 Applying this rule, Inmate Appeal CSP-S-11-00969 did not exhaust either of  
24 plaintiff’s claims brought under the First and Eighth Amendments. Plaintiff’s original

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25 <sup>3</sup> Review of the administrative history confirms that the quoted language was in effect  
26 when plaintiff initiated the inmate appeal at issue. See 15 Cal. Code Regs. § 3084.1 (2011).

1 submission of CDCR Form 602 (Rev.08/09) on September 2, 2011 grieved only the incident that  
2 occurred the day prior, on September 1, 2011. (Dkt. No. 18-3 at 4-6.) Contrary to plaintiff's  
3 argument in his second opposition (Dkt. No. 22 at 2), his request therein that "no reprisal be  
4 taken against plaintiff for filing the grievance" cannot be said to have exhausted conduct that had  
5 not yet occurred. It was not until plaintiff's submission at the third level of review that he wrote,  
6 in the section designated for him to express dissatisfaction with the second level decision, that  
7 defendant had denied his request for a shower in retaliation for filing the grievance. (Dkt. No.  
8 18-3 at 5.)

9 Under these circumstances, defendant has met his burden of raising and proving  
10 the absence of exhaustion. Both of plaintiff's claims must be dismissed without prejudice. See  
11 Wyatt, 315 F.3d at 1120.

12 In accordance with the above, IT IS HEREBY RECOMMENDED THAT:

- 13 1. Defendant's motion to dismiss (Dkt. No. 18) be GRANTED;
- 14 2. Plaintiff's claims brought under the First and Eighth Amendment be  
15 dismissed without prejudice; and
- 16 3. The clerk be directed to close this case.

17 These findings and recommendations are submitted to the United States District  
18 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
19 days after being served with these findings and recommendations, any party may file written  
20 objections with the court and serve a copy on all parties. Such a document should be captioned  
21 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
22 shall be served and filed within fourteen days after service of the objections. The parties are

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1 advised that failure to file objections within the specified time may waive the right to appeal the  
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: December 14, 2012

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5 CAROLYN K. DELANEY  
6 UNITED STATES MAGISTRATE JUDGE

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8 <sup>8</sup>  
9 bart1116.mtd

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