

1 excessive (id. at 5). And in Count IV, Plaintiff alleged that meals were non-nutritious and
2 contained moldy and spoiled food (id. at 5a). Plaintiff requested monetary damages and
3 injunctive relief (id. at 6).

4 The Court screened the First Amended Complaint, dismissed Counts II and V, and
5 directed Defendant to file an answer (Doc. #7). Defendant then filed a Motion to Dismiss
6 (Doc. #9).

7 **II. Motion to Dismiss**

8 **A. Defendant's Contentions**

9 In his motion, Defendant contends that Plaintiff failed to exhaust his administrative
10 remedies as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a)
11 (id.). In support, Defendant submits the affidavit of Susan Fisher, a Sergeant assigned to
12 the Inmate Hearing Unit (id., Ex. 1, Fisher Aff. ¶ 1). Fisher describes the jail's grievance
13 procedures, which are set out in Policy DJ-3 (id. ¶¶ 3, 5). The three-tiered grievance
14 system includes an initial grievance and appeal to the Bureau Hearing Officer, the
15 Institutional appeal, and the External Appeal (id. ¶ 5). Fisher attests that inmates are
16 informed of the grievance procedures when they receive a copy of the "MCSO Rules and
17 Regulations for Inmates" (id.). According to the sheriff's office grievance records, during
18 his confinement Plaintiff filed five grievances regarding various conditions of
19 incarceration (id. ¶ 8). Fisher avers that all five grievances were resolved and there were
20 no appeals submitted (id.). In addition to the affidavit, Defendant submits a copy of the
21 Inmate Grievance Procedure, Policy DJ-3 (id., Ex. A); excerpts from the "MCSO Rules
22 and Regulations for Inmates" (id., Ex. B); and a "Grievance Listing" chart that lists
23 Plaintiff's five grievances (id., Ex. D).

24 Defendant further argues that Plaintiff failed to show that he suffered actual
25 physical injury and, therefore, his suit must be dismissed (id. at 5).

26 **B. Plaintiff's Response**

27 The Court informed Plaintiff of his obligation to respond and the evidence
28

1 necessary to successfully rebut Defendant’s contentions (Doc. #10).² Plaintiff opposes
2 Defendant’s motion (Doc. #11). He reiterates many of the factual allegations supporting
3 his First Amended Complaint (id.). As to exhaustion, he argues that despite the grievance
4 procedures set out in the “Rules and Regulations for Inmates,” in reality, it is difficult to
5 grieve issues because officers discourage or intimidate inmates from filing grievances,
6 refuse to accept grievance forms, fail to sign and date grievance forms, and/or retaliate
7 against inmates who file grievances (id. at 1-3). Plaintiff notes that Defendant’s evidence
8 suggests that Plaintiff filed only five grievances, but Plaintiff submits that he filed two
9 grievances on Inmate Request forms and seven grievances on the Inmate Grievance forms
10 (id. at 9). He proffered copies of these forms along with two Inmate Institutional Appeal
11 forms (id., Exs.).

12 Plaintiff stated that jail staff only responded to some of his grievances about
13 inadequate food (Count IV); however, given those staff responses, he assumed that the
14 meal problems were corrected (Doc. #11 at 10). Nonetheless, he explains that although
15 staff replaced the meals that gave rise to the grievances, the problems with spoiled food
16 continued (id. at 10-11). With respect to the no-physical-injury argument presented by
17 Defendant, Plaintiff submits that during his jail confinement, he went from 189 pounds to
18 139 pounds and experienced digestive and sleeping problems (id. at 11).

19 As to his excessive noise claim (Count III), Plaintiff argues that he made one effort
20 to file a grievance but was told that if he did so, he would be transferred to 23-hour
21 lockdown protective custody (id. at 5). Plaintiff states that in relation to his threat-to-
22 safety claim in Count I, his efforts to grieve were met with staff refusals to accept
23 grievance forms and more threats to move him to protective custody (id. at 7).

24 In addition to his the grievances about food, Plaintiff submitted grievance forms
25 regarding lockdown for punitive means against the entire housing pod (id., Attachs.); the
26 declaration of Jason Long, a fellow inmate (id., Long Decl.); and his own declaration (id.,
27

28 ²Notice required under Wyatt v. Terhune, 315 F.3d 1108, 1120 n. 14 (9th Cir. 2003).

1 Pl. Decl.). These declarations support the factual allegations in Plaintiff’s First Amended
2 Complaint (id., Long Decl. & Pl. Decl.).

3 **C. Defendant’s Reply**

4 Defendant contends that Plaintiff’s assertions that he could not grieve his claims
5 due misconduct of jail staff are too general to excuse nonexhaustion (Doc. #14). He also
6 argues that Plaintiff’s food grievances were all promptly resolved, and Plaintiff offers no
7 explanation why staff would be willing to resolve these grievances but not others (id. at
8 2). Defendant maintains that Plaintiff’s evidence, including appeals he filed after
9 initiating this action, fail to prove that he fully exhausted all administrative remedies (id.).
10

11 **III. Exhaustion**

12 The PLRA provides that a prisoner may not bring a lawsuit with respect to prison
13 conditions under § 1983 unless all available administrative remedies have been
14 exhausted. See 42 U.S.C. § 1997e(a); Vaden v. Summerhill, 449 F.3d 1047, 1050 (9th
15 Cir. 2006); Brown v. Valoff, 422 F.3d 926, 934-35 (9th Cir. 2005). He must complete the
16 administrative review process in accordance with the applicable rules. See Woodford v.
17 Ngo, 548 U.S. 81, 92 (2006). Exhaustion is required for all suits about prison life, Porter
18 v. Nussle, 534 U.S. 516, 523 (2002), regardless of the type of relief offered through the
19 administrative process, Booth v. Churner, 532 U.S. 731, 741 (2001).

20 Exhaustion is an affirmative defense. Jones v. Bock, 549 U.S. 199, 216 (2007).
21 Defendant bears the burden of raising and proving the absence of exhaustion. Wyatt, 315
22 F.3d at 1119. Because exhaustion is a matter of abatement in an unenumerated Rule
23 12(b) motion, a court may look beyond the pleadings to decide disputed issues of fact. Id.
24 at 1119-20. Further, a court has broad discretion as to the method to be used in resolving
25 the factual dispute. Ritza v. Int’l Longshoremen’s & Warehousemen’s Union, 837 F.2d
26 365, 369 (9th Cir. 1988) (quotation omitted).

27 **IV. Analysis**

28 **A. Count I - Threat to Safety**

1 Defendant submits evidence that there exists a grievance system at the jail (Doc.
2 #9, Ex. 1, Fisher Aff. ¶¶ 3,5). With regard to Count I, Plaintiff claims that jail staff
3 refused to accept his grievances and threatened to place him in protective custody; thus,
4 he was denied access to administrative remedies (Doc. #11). But Plaintiff provides only
5 this general allegation that he attempted to grieve to no avail. He has not alleged exactly
6 what transpired when he attempted to grieve his claim, nor has he specified who refused
7 to accept grievance forms, who threatened him, or when he made these attempts to grieve.
8 Without more specific allegations, Plaintiff cannot overcome Defendant's evidence
9 showing that a grievance system was available at the jail for the claim in Count I.

10 To the extent that Plaintiff implies that his attached grievances may relate to Count
11 I, the Court notes that outside of the grievances related to inadequate food, three
12 grievances and two appeals concern lockdowns at the jail (*id.*, Attachs.). Plaintiff
13 submitted these grievances in June and August 2008 (*id.*) The appeals were submitted on
14 June 11, 2008, and November 6, 2007 (*id.*). The PLRA requires exhaustion *before* an
15 action is filed. McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002); see Vaden, 449
16 F.3d at 1051. Plaintiff's First Amended Complaint was filed in April 2008; therefore, the
17 Court will consider only the appeal filed in November 2007.

18 A review of this appeal reflects that Plaintiff grieved an incident that occurred on
19 November 5, 2007, when the first shift officer instituted a 24-hour lockdown at the lower
20 tier where Plaintiff was housed. During this lockdown period, video visits and church
21 services were restricted (Doc. #11, Attach., Inmate Institutional Disciplinary Appeal
22 dated Nov. 6, 2007). In his appeal, Plaintiff complained that the lockdown was a "blanket
23 punishment" applied to all inmates, even though it was in response to an "issue"
24 involving just some inmates (*id.*). Plaintiff grieved that this action punished pretrial
25 detainees and their visitors, none of whom were responsible for the "issue," and that the
26 lockdown deprived inmates of religious services and phone privileges (*id.*). This
27 grievance is not related to the allegations in Count I, which Plaintiff specifically identified
28 as a threat-to-safety claim and which includes specific claims about exposure to sentenced

1 inmates in overcrowded pods and personal threats made against him by other inmates.
2 (Doc. #6 at 3). Consequently, this November 7, 2007 appeal does not demonstrate an
3 attempt to exhaust the claim in Count I.

4 On this record, Plaintiff failed to exhaust available administrative remedies for
5 Count I, and it will be dismissed without prejudice.

6 **B. Count III - Excessive Noise**

7 Plaintiff states that he made one attempt to file a formal grievance about the
8 excessive noise caused by detention officers but when he did so, he was threatened (Doc.
9 #11 at 5). Plaintiff fails to allege when he made this attempt to file a grievance or who
10 threatened him. Again, without more specific allegations going to his attempt to grieve,
11 he cannot rebut Defendant's evidence that a grievance system was in place for this
12 complaint. And although Plaintiff makes general assertions that inmates are discouraged
13 by officers from filing grievances and officers retaliate by various means against inmates
14 who grieve issues (id. at 2-3), there is no explanation why he was still able to submit nine
15 grievances about meals but not a single grievance concerning the noise (see id. #11, Exs.
16 (referring to grievances filed 7/11/07, 7/17/97, 7/21/07, 11/08/07, 12/09/07, 12/09/07,
17 1/11/08, 1/12/08, and 2/09/08)). The Court finds that Plaintiff's general claims that he
18 tried but was unable to grieve the claim in Count III are insufficient to survive
19 Defendant's motion to dismiss Count III for nonexhaustion.

20 **C. Count IV - Inadequate Food**

21 Plaintiff specifically alleges that on June 1, 2007, he attempted to grieve his
22 complaint about food; he states that the floor officers on three different shifts all refused
23 to accept the grievance form (Doc. #11 at 9). Plaintiff submits copies of grievances he
24 was able to submit that complain about spoiled food, missing food, or reduced servings of
25 food (id., Exs.). He explains that when jail staff responded to these grievances, he
26 assumed that the basis for each grievance was corrected (id. at 10). Plaintiff states that on
27 some occasions, officers replaced his lunch bag; another time, one officer confirmed that
28 Plaintiff's food was spoiled; and once a dietician met with Plaintiff and described the

1 jail's food policies with regard to cooking turkey (id.). The written responses from staff
2 evidence that Plaintiff's concerns were responded to by shift supervisors who confirmed
3 receipt of spoiled food, replaced the food, and even advised Plaintiff "we will see to it
4 that the spoiled turkey is put to a stop . . . fresh turkey was served today thus showing this
5 issue is being taken care of" (id., Exs. (grievances dated 1/17/07, 7/21/07, and 12/09/07)).

6 In his reply, Defendant confirms that five grievances related to food were promptly
7 resolved (Doc. #14 at 2).

8 The question on Count IV is whether Plaintiff was required to proceed with the
9 appeal process after he received a resolution of the problem at a lower level in grievance
10 procedure. Defendant offers no argument going to this question. In Brown, the Ninth
11 Circuit held that if an inmate receives all the available remedies at an intermediate level
12 of review, he need not proceed to further levels of review. See Brown, 422 F.3d at 935.
13 This appears to be the case with Plaintiff. And without any suggestion or argument
14 otherwise, Defendant has failed to meet his burden to demonstrate that Plaintiff was
15 required to appeal his food grievances after jail staff provided remedies at the inmate
16 grievance level. On this record, Defendant cannot show that Plaintiff failed to exhaust
17 available administrative remedies.

18 **D. Physical Injury**

19 Defendant's remaining argument is that Plaintiff's claim must be dismissed
20 because he makes no credible allegation that he suffered actual injury as required under
21 § 1997e(e) of the PLRA (Doc. #9 at 5). In Oliver v. Keller, the Ninth Circuit determined
22 that even absent physical injury, the prisoner-plaintiff was entitled to seek compensatory,
23 nominal, and punitive damages premised on violations of his Fourteenth Amendment
24 rights. 289 F.3d 263, 629-30 (9th Cir. 2002). The Court held that § 1997e(e) applied
25 only to claims for mental and emotional injury and not to claims for relief for the
26 underlying constitutional violations. Id.; see Shaheed-Muhammad v. Dipaolo, 393
27 F. Supp. 2d 80, 107 (D. Mass. 2005) ("the violation of a constitutional right is an
28 independent injury that is immediately cognizable and outside the purview of

1 § 1997e(e)").

2 Here, Plaintiff did not bring a claim for mental and emotional injury; he brought a
3 claim for the violation of his Fourteenth and Eighth Amendment rights (Doc. #6 at 3, 5,
4 5a (alleging violations of his due process rights and his right against cruel and unusual
5 punishment)). Under Oliver, these claims are not barred by § 1997e(e).

6 In sum, Defendant has failed to demonstrate nonexhaustion or any other ground
7 for dismissal of Plaintiff's claim regarding inadequate food. The Motion to Dismiss will
8 be denied as to Count IV.

9 **IT IS ORDERED:**

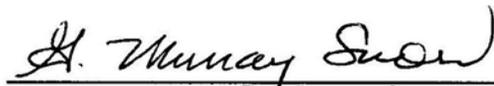
10 (1) The reference to the Magistrate Judge is withdrawn as to Defendant's Motion
11 to Dismiss (Doc. #9).

12 (2) Defendant's Motion to Dismiss (Doc. #9) is **granted in part and denied in**
13 **part** as follows:

14 (a) the motion is **granted** to Counts I (threat-to-safety) and III (excessive
15 noise); Counts I and III are dismissed without prejudice; and

16 (b) the motion is **denied** as to Count IV (inadequate food).

17 DATED this 28th day of January, 2009.

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20 G. Murray Snow
21 United States District Judge
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