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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Leo Charles Hillyer,
Plaintiff,
vs.
Joseph Arpaio,
Defendant.

No. CV 09-0963-PHX-DGC (LOA)

ORDER

In this civil rights action brought by a county jail inmate, Arpaio moved to dismiss for lack of exhaustion (Doc. # 7). Plaintiff failed to respond, although he was informed of his right and obligation to do so (Doc. # 9). The Court will grant the motion to dismiss.

I. Exhaustion

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

Exhaustion is an affirmative defense. Jones v. Bock, 549 U.S. 199, 216 (2007). Defendant bears the burden of raising and proving the absence of exhaustion. Wyatt, 315

1 F.3d at 1119. Because exhaustion is a matter of abatement in an unenumerated Rule 12(b)
2 motion, a court may look beyond the pleadings to decide disputed issues of fact. Id. at 1119-
3 20. Further, a court has broad discretion as to the method to be used in resolving the factual
4 dispute. Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 369 (9th
5 Cir. 1988) (quotation omitted).

6 **II. Analysis**

7 In his Complaint, Plaintiff presented three claims for relief. In Count I, Plaintiff
8 claimed that Arpaio instituted a policy and directed his staff to overcrowd the
9 "intake/booking facility" in the Fourth Avenue Jail (Doc. # 1 at 3). In Count II, Plaintiff
10 alleged that Arpaio deliberately instructs his staff to feed pretrial detainees only two meals
11 per day (id. at 4)). Plaintiff further alleged that the meals are insufficient, spoiled, and
12 provide insufficient nutrition. Finally, in Count III, Plaintiff alleged that Arpaio has
13 deliberately set policies to require inmates going to court to wake up at midnight and be
14 placed in a holding cell where they are forced to sleep without a mat or blanket for 8 hours
15 on an unsanitary floor (id. at 5). Further, Plaintiff claimed that inmates are fed at 1:00 AM
16 and are not fed again until their return from court, which can be as late as early evening.
17 Plaintiff also alleged that the issues in Counts I, II, and III were "non-grievable" (id. at 3-5).
18 The Court required Arpaio to answer the Complaint (Doc. # 5 at 4).

19 Arpaio moved to dismiss for lack of exhaustion, arguing that Plaintiff failed to file any
20 grievances as to the claims he presented in his Complaint (Doc. # 7 at 3-5). Arpaio also
21 submitted the affidavit of External Grievance Coordinator Sergeant Susan Fisher, who
22 attested that Plaintiff's claims were grievable under the grievance procedure and, in fact,
23 Plaintiff had previously utilized the grievance procedure (Doc. # 8, Ex. 1, Fisher Aff. ¶¶ 10,
24 12). Further, Fisher attested that other inmates filed grievances as to the issues of
25 overcrowding and unsanitary holding cells and spoiled and insufficient meals (id. ¶ 12).
26 Consequently, Arpaio maintains that Plaintiff had an available remedy, but failed to utilize
27 it, rendering his claims unexhausted (id.).

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1 Plaintiff was issued an Order containing the customary warnings regarding his
2 obligation to respond and the potential consequences for failing to do so (Doc. # 9). He was
3 specifically informed that if Arpaio showed that he failed to exhaust, his action would be
4 dismissed unless he produced controverting evidence (id. at 2).

5 Plaintiff still failed to respond. Thus, Plaintiff has not rebutted Arpaio's evidence that
6 Plaintiff did not file any grievance as to the claims presented in his Complaint. Further,
7 Plaintiff's contention that he was told his claims were not grievable is not supported by any
8 degree of specificity (such as dates, times, or other identifying circumstances) to inform the
9 Court what transpired that prevent him from fully exhausting his claims. Indeed, it is directly
10 contradicted by Arpaio's evidence that Plaintiff's claims are grievable issues (Doc. # 8, Ex.
11 1, Fisher Aff. ¶ 12).

12 Arpaio has presented specific evidence that a grievance procedure existed at the jail
13 for any issue and that Plaintiff has previously used the grievance procedure for another issue.
14 Plaintiff has not disputed that evidence in any way. Consequently, the Court concludes that
15 Arpaio has demonstrated that Plaintiff failed to exhaust available remedies and his motion
16 will be granted.

17 **III. Lack of a Response**

18 Alternately, the Court has the discretion under Rule 7.2(i) of the Local Rules of Civil
19 Procedure to deem Plaintiff's lack of response as consent to Arpaio's motion to dismiss.
20 Plaintiff was warned of this possibility (Doc. # 9). The Ninth Circuit Court of Appeals has
21 upheld a dismissal based on a failure to comply with a similar local rule in the District of
22 Nevada. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995). Before dismissal on this
23 basis, the court must weigh (1) the public's interest in expeditious resolution of litigation,
24 (2) the court's need to manage its docket, (3) the risk of prejudice to the defendants, (4) the
25 public policy favoring disposition of cases on their merits, and (5) the availability of less
26 drastic sanctions. Id. at 53 (quoting Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir.
27 1986)). If the court does not consider these factors, the record may be reviewed
28 independently on appeal for abuse of discretion. Henderson, 779 F.2d at 1424.

1 The first three factors do not favor Plaintiff, particularly in light of the fact that
2 Plaintiff has ostensibly lost interest in prosecuting his action. There is no risk of prejudice
3 to Arpaio to resolve the motion in his favor, and judicial efficiency also favors resolution of
4 this action. The fourth factor of favoring disposition of cases on their merits weighs in favor
5 of Plaintiff, and for the fifth factor, dismissal without prejudice is the least drastic sanction.
6 In light of the overall five-factor analysis weighing in Arpaio's favor, the Court will deem
7 Plaintiff's lack of a response as a consent and dismiss the action without prejudice.


8 **IT IS ORDERED:**

9 (1) The reference to the Magistrate Judge is **withdrawn** as to Arpaio's Motion to
10 Dismiss (Doc. # 7).

11 (2) Arpaio's Motion to Dismiss (Doc. # 7) is **granted**.

12 (3) This action is dismissed without prejudice for lack of exhaustion or alternately,
13 for failure to respond. The Clerk of Court shall enter a judgment of dismissal accordingly.

14 DATED this 9th day of November, 2009.

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19 David G. Campbell
20 United States District Judge
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