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

John Wayne Farmer,
Plaintiff,
vs.
Dana Youhas, et al.,
Defendants.

No. CV 09-2543-PHX-RCB (MEA)

ORDER

Plaintiff John Wayne Farmer brought this civil rights action under 42 U.S.C. § 1983 against Probation Officer Dana Youhas, Phoenix Police Officer #2381, Maricopa County Sheriff Joseph Arpaio, and Maricopa County (Doc. # 10). Defendants Arpaio and Maricopa County move to dismiss the claims against them for failure to exhaust administrative remedies as required by the Prison Litigation Reform Act (PLRA) (Doc. ## 20, 22). Plaintiff failed to respond, although he was informed of his right and obligation to do so (Doc. ## 21, 23). The Court will grant the motions to dismiss.

I. Exhaustion

Under the Prison Litigation Reform Act (PLRA), 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, 90-1, 92 (2006). Exhaustion is required for all suits about prison life,

1 Porter v. Nussle, 534 U.S. 516, 523 (2002), regardless of the type of relief offered through
2 the administrative process, Booth v. Churner, 532 U.S. 731, 741 (2001).

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

10 **II. Analysis**

11 Plaintiff's claims stem from the events surrounding his probation violation and
12 subsequent incarceration at the Fourth Avenue Jail in Phoenix, Arizona (Doc. # 10 at 1). In
13 Count I of his Complaint, Plaintiff alleged that Youhas violated Plaintiff's Fifth Amendment
14 right against self-incrimination when she stated that his probation would be revoked if he
15 refused to answer questions during a polygraph test (Doc. # 10 at 6-7). In Count II, Plaintiff
16 alleged that Youhas and Officer #2381 knew Plaintiff needed to walk with his knee brace and
17 crutches because of recent knee surgery, but took his crutches and forced him to walk
18 unassisted, causing his knee to swell severely (id. at 8-11). Plaintiff further alleged that
19 Arpaio and Maricopa County promulgated a policy requiring pretrial detainees to wait two
20 weeks before receiving a mobility device (id.). And in Count III, Plaintiff claimed that
21 Arpaio and Maricopa County have a policy of forcing pretrial detainees to wait two weeks
22 before seeing a medical provider (id. at 12-15).¹ The Court ordered Youhas, Officer #2381,
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26 ¹ Upon screening, the Court dismissed the State of Arizona, Maricopa County Board
27 of Supervisors, Broderick, Harris, Jane Does #1-10, and John Does #2-10 as Defendants.
28 The Court also dismissed Plaintiff's failure-to-train and failure-to-supervise claims against
Broderick in Count II, Arpaio in Counts II and III, and Adams in Counts II and III, along
with the entirety of Count IV (Doc. # 13 at 12-13).

1 Arpaio, and Maricopa County to answer Counts I, II, and III. Arpaio and Maricopa County
2 have now filed motions to dismiss (Doc. ## 20, 22).²

3 Arpaio and Maricopa County moved to dismiss for lack of exhaustion, arguing that
4 Plaintiff filed numerous grievances while in Maricopa County custody, but never filed a
5 single grievance as to his claims that policies of either Arpaio or Maricopa County required
6 that Plaintiff wait two weeks to see a medical provider or receive a mobility device (Doc.
7 # 20 at 3-4). Arpaio also submitted the affidavit of Inmate Hearing Unit Sergeant Susan
8 Fisher, who attested that inmates are notified of the grievance procedure upon arrival at their
9 housing unit (Doc. # 20, Ex. B, Fisher Aff. ¶ 5). Fisher explains that exhausting the
10 grievance procedure involves compliance with a three-tiered system, which includes (1) an
11 initial grievance and decision by the Bureau Hearing Officer, (2) the Institutional Appeal,
12 and (3) the External appeal (id., Attach. 2). Fisher also attests that inmate grievance forms
13 contain the standard language that explains the sequential steps in the grievance process (id.
14 ¶ 6). Consequently, Arpaio and Maricopa County maintain that Plaintiff had an available
15 remedy but failed to utilize it, rendering his claims against them unexhausted (Doc. ## 20,
16 22).

17 Plaintiff was issued an Order containing the customary warnings regarding his
18 obligation to respond and the potential consequences for failing to do so (Doc. ## 21, 23).
19 He was specifically informed that if Arpaio and Maricopa County showed that he failed to
20 exhaust, his claims against them would be dismissed unless he produced controverting
21 evidence (id. at 2).

22 Plaintiff still failed to respond. Thus, Plaintiff has not rebutted Defendants' evidence
23 that he did not file any grievance as to the claims presented against Arpaio and Maricopa
24 County in his Second Amended Complaint. Indeed, Plaintiff acknowledges in his Second
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27 ² Officer #2381 has not yet been served. The Court also determined that Plaintiff
28 Plaintiff that he should move to amend his Second Amended Complaint to provide the
identity of that defendant (Doc. # 13 at 11).

1 Amended Complaint that he did not exhaust his deliberate indifference claims, despite the
2 availability of a grievance procedure (Doc. # 10 at 12).

3 In short, Arpaio and Maricopa County have presented specific evidence that a
4 grievance procedure existed at the jail for Plaintiff's claim and that inmates are apprised of
5 the grievance procedure upon their arrival at their housing units. Plaintiff has not disputed
6 that evidence in any way. Consequently, the Court concludes that Arpaio and Maricopa
7 County have demonstrated that Plaintiff failed to exhaust available remedies and their motion
8 will be granted as to the deliberate indifference claims against them in Counts II and III. See
9 Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009).

10 **III. Lack of a Response**

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

22 The first three factors do not favor Plaintiff, particularly in light of the fact that
23 Plaintiff has ostensibly lost interest in prosecuting his action. There is no risk of prejudice
24 to Arpaio or Maricopa County to resolve the motions in their favor, and judicial efficiency
25 also favors resolution of the motions. The fourth factor of favoring disposition of cases on
26 their merits weighs in favor of Plaintiff, and for the fifth factor, granting the motion is the
27 least drastic sanction. In light of the overall five-factor analysis weighing in Arpaio's and
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1 Maricopa County's favor, the Court will deem Plaintiff's lack of a response as a consent and
2 grant the motions to dismiss.

3 **IT IS ORDERED:**

4 (1) The reference to the Magistrate Judge is **withdrawn** as to Arpaio's Motion to
5 Dismiss (Doc. # 20) and Maricopa County's Motion to Dismiss (Doc. # 22).

6 (2) Arpaio's Motion to Dismiss (Doc. # 20) is **granted**.

7 (3) Maricopa County's Motion to Dismiss (Doc. # 22) is **granted**.

8 (4) The deliberate indifference claims against Arpaio and Maricopa County in
9 Count II and Count III are dismissed.

10 (5) The remaining claims are Plaintiff's Fifth Amendment claim against Youhas
11 in Count I and the deliberate indifference claim against Youhas and Officer #2381 in Count
12 II.

13 DATED this 1st day of July, 2 010.

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16 Robert C. Broomfield
17 Senior United States District Judge

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