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

Enrique J. Hernandez,)	No. CV 10-0432-PHX-JAT (LOA)
Plaintiff,)	ORDER
vs.)	
Arizona Department of Corrections, et al.,)	
Defendants.)	

Plaintiff Enrique J. Hernandez filed this civil rights action under 42 U.S.C. § 1983 against Arizona Department of Corrections (ADC) employees Dolezal and Wheeler (Doc. 9).¹ Before the Court is Defendants’ Motion to Dismiss and/or Motion for Summary Judgment (Doc. 24). Plaintiff did not respond to the motion.

The Court will grant the Motion to Dismiss and terminate the action.

I. Background

Plaintiff’s single claim arose during his confinement at the Arizona State Prison Complex-Central Unit in Florence, Arizona (Doc. 9 at 1). He alleged that during the last week of August 2009, he began receiving kosher diet trays with missing food items (*id.* at 5). Plaintiff further claimed that there were no substitutions for the missing food items (*id.*). Plaintiff sought monetary damages (*id.* at 12).

¹Upon screening, the Court dismissed Wall and William as Defendants (Doc. 10).

1 The Court found that Plaintiff's allegations stated a First Amendment religious-
2 exercise claim and directed Dolezal and Wheeler to respond (Doc. 10 at 3). Defendants filed
3 their Motion to Dismiss and/or Motion for Summary Judgment (Doc. 24).

4 **II. Motion to Dismiss**

5 Defendants move for dismissal on the ground that Plaintiff failed to exhaust his
6 administrative remedies as required under the Prisoner Litigation Reform Act (PLRA), 42
7 U.S.C. 1997e(a) (id.). In support, they submit the affidavit of Susan George, an Executive
8 Secretary in the Legal Services Division of the ADC (Doc. 28, George Aff. ¶ 1). George
9 explains that the ADC inmate grievance system is governed by Department Order (DO)
10 802—Inmate Grievance System (id. ¶ 2; Attach. A). George further states that under DO
11 802, inmates may grieve issues related to conditions of confinement, including food service
12 (id. ¶ 2).

13 George describes the four steps in the prison's grievance system: (1) the inmate
14 attempts to informally resolve the issue by filing an inmate letter; (2) if not satisfied with the
15 inmate-letter response, he may file a formal grievance to the grievance coordinator; (3) if not
16 satisfied with the grievance coordinator's response, the inmate may file a grievance appeal
17 to the Warden; (4) the inmate may appeal the Warden's response to the ADC Director, whose
18 response is final (id. ¶ 3). George avers that she reviewed the grievance appeal log and the
19 appeal file maintained in the ADC's Central Office; however, there was no record that
20 Plaintiff filed any appeals related to his food service issues raise in this action (id. ¶¶ 4-6).

21 Defendants submit that based on this evidence, Plaintiff failed to exhaust his
22 administrative remedies for his First Amendment claim and his First Amended Complaint
23 should therefore be dismissed (Doc. 24 at 3-7).

24 The Court issued an Order notifying Plaintiff of his obligation to respond to
25 Defendants' motion (Doc. 29). This Order informed Plaintiff that if Defendants' motion is
26 granted by the Court, it will end his case (id. at 1). The Order also cited Local Rule of Civil
27 Procedure 7.2(i) in its entirety; this rule provides that a party's failure to respond to a motion
28 may be deemed a consent to the granting of the motion (id. at 2). LRCiv 7.2(i). Plaintiff was

1 given until October 4, 2010 to respond to the Motion to Dismiss (id.).

2 To date, Plaintiff has not filed a response, and the time for responding has expired.

3 **III. Exhaustion**

4 **A. Legal Standard**

5 Under the PLRA, a prisoner must exhaust available administrative remedies before
6 bringing a federal action concerning prison conditions. See 42 U.S.C. § 1997e(a); Griffin
7 v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009). Exhaustion is required for all suits about
8 prison life, Porter v. Nussle, 534 U.S. 516, 523 (2002), regardless of the type of relief offered
9 through the administrative process, Booth v. Churner, 532 U.S. 731, 741 (2001). And a
10 prisoner must complete the administrative review process in accordance with the applicable
11 rules. See Woodford v. Ngo, 548 U.S. 81, 92 (2006).

12 Exhaustion is an affirmative defense. Jones v. Bock, 549 U.S. 199, 212 (2007). Thus,
13 the defendant bears the burden of raising and proving the absence of exhaustion. Wyatt, 315
14 F.3d at 1119. Because exhaustion is a matter of abatement in an unenumerated Rule 12(b)
15 motion, a court may look beyond the pleadings to decide disputed issues of fact. Id. at 1119-
16 20. Further, a court has broad discretion as to the method to be used in resolving the factual
17 dispute. Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 369 (9th
18 Cir. 1988) (quotation omitted).

19 **B. Analysis**

20 In his verified First Amended Complaint, Plaintiff indicates that administrative
21 remedies were available for his claim and that he fully exhausted his claim (Doc. 9 at 4). But
22 in his factual recitation, Plaintiff only describes completing the informal resolution and
23 formal grievance (id. at 5-6). Plaintiff never avers that he filed a grievance appeal or an
24 appeal to the ADC's Director.

25 Here, the Court finds that Defendants submit evidence that a grievance system was
26 available for Plaintiff's food service claim (Doc. 28, George Aff. ¶¶ 3-5). Further, the
27 allegations in Plaintiff's First Amended Complaint confirm that he did not fully exhaust the
28 grievance procedure; rather, Plaintiff only satisfied the first two steps. This does not

1 constitute proper exhaustion. See Woodford, 548 U.S. at 90 (proper exhaustion requires
2 “using all steps that the agency holds out, and doing so properly”).

3 Moreover, in failing to respond to Defendants’ motion, Plaintiff did not refute
4 evidence that a grievance system was available and he failed to avail himself of that system.
5 On this record, the Court finds that Defendants have met their burden to demonstrate
6 nonexhaustion, and the Motion to Dismiss will be granted.

7 **IV. Lack of a Response**

8 Alternately, the Court has the discretion under Local Rule of Civil Procedure 7.2(i)
9 to grant Defendants’ motion in light of Plaintiff’s failure to respond. As stated, Plaintiff was
10 specifically warned of this possibility in an Order from the Court (Doc. 29). Plaintiff was
11 also previously warned that failure to comply with any of the Court’s Orders could result in
12 dismissal (Docs. 7, 10).

13 Failure to comply with a district court’s local rule is a proper ground for dismissal.
14 Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). But before dismissal on this basis, the
15 Court must weigh “(1) the public’s interest in expeditious resolution of litigation; (2) the
16 court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public
17 policy favoring disposition of cases on their merits; and (5) the availability of less drastic
18 sanctions.” Id. at 53 (quoting Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)).
19 If the court does not consider these factors, the record may be reviewed independently on
20 appeal for abuse of discretion. Henderson, 779 F.2d at 1424.

21 Here, the first two factors favor dismissal. “[T]he public’s interest in expeditious
22 resolution of litigation always favors dismissal,” Yourish v. Cal. Amplifier, 191 F.3d 983,
23 990 (9th Cir. 1999), and the second factor favors dismissal in most cases. Wanderer v.
24 Johnston, 910 F.2d 652, 656 (9th Cir. 1990). In the instant case, the Court finds that the
25 public’s interest in expeditiously resolving this litigation and the Court’s interest in managing
26 the docket weigh in favor of dismissal. The third factor also favors dismissal. There is no
27 risk of prejudice to Defendants to grant their motion.

28 Public policy favors disposition of cases on their merits, so the fourth factor weighs

1 against dismissal. Pagtalunan v. Galaza, 291 F.3d 639, 643 (9th Cir. 2002).

2 The final factor requires the Court to consider the availability of less drastic sanctions.
3 Plaintiff was given ample time to respond to Defendants' Motion to Dismiss, which was filed
4 over two months ago. The Court explicitly warned Plaintiff that failure to respond could
5 result in the granting of the motion (Doc. 29). Plaintiff nonetheless failed to respond or move
6 for an extension. Thus, in weighing this last factor, the Court finds that dismissal without
7 prejudice is an available and less drastic sanction in this case.

8 In sum, the five-factor analysis supports dismissal for failure to respond to the Motion
9 to Dismiss. The Court's decision to grant the motion in these circumstances is further
10 supported by the fact that it is premised upon a local rule that expressly permits the Court to
11 summarily grant unopposed motions. Ghazali, 46 F.3d at 53 ("Only in rare cases will we
12 question the exercise of discretion in connection with the application of local rules"), quoting
13 United States v. Warren, 601 F.2d 471, 474 (9th Cir. 1979).

14 Defendants' Motion to Dismiss will therefore be granted based on Plaintiff's failure
15 to respond. See LRCiv 7.2(i). The Court, therefore, need not consider Defendants' Motion
16 for Summary Judgment or remaining arguments.

17 **IT IS ORDERED:**


18 (1) The reference to the Magistrate Judge is **withdrawn** as to Defendants' Motion to
19 Dismiss and/or Motion for Summary Judgment (Doc. 24).

20 (2) Defendants' Motion to Dismiss (Doc. 24) is **granted**; the First Amended
21 Complaint is dismissed without prejudice for failure to exhaust; in the alternative, it is
22 dismissed without prejudice pursuant to Local Rule of Civil Procedure 7.2(i).

23 (3) Defendants' Motion for Summary Judgment (Doc. 24) is **denied as moot**.

24 (4) The Clerk of Court must enter judgment accordingly.

25 DATED this 18th day of November, 2010.

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James A. Teilborg
United States District Judge