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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Riki Rashaad Muhammad,
10 Plaintiff,

No. CV 11-1890-PHX-SMM (LOA)

11 vs.

ORDER

12 Arizona Department of Corrections, et
13 al.,
14 Defendants.
15

16 Plaintiff Riki Rashaad Muhammad brought this pro se civil rights Complaint
17 under 42 U.S.C. § 1983 against Correctional Officer III Barbara Ams, a counselor with
18 the Arizona Department of Corrections (ADC) (Doc. 25 at 2, 29). In his Second
19 Amended Complaint, Muhammad set forth a threat-to-safety claim under the Eighth
20 Amendment (*id.* at 29-30).¹ Before the Court is Ams's Motion for Summary Judgment
21 (Doc. 90).

22 The Court will deny the motion without prejudice.

23 **I. Background**

24 In his Second Amended Complaint, Muhammad alleged that Ams knew of, and
25 disregarded, an excessive risk to his safety, thereby exposing him to a substantial risk of
26 harm in violation of the Eighth Amendment (Doc. 25 at 29-30). Muhammad claimed that
27 Ams provided another inmate a page from a pre-sentence report in Muhammad's criminal
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¹ All other claims and Defendants have been dismissed (Doc. 76).

1 case that contained confidential information about his involvement in the death of a two-
2 year old child (*id.*).

3 Ams moves for summary judgment on the grounds that Muhammad did not suffer
4 physical injury and he failed to exhaust administrative remedies as required under the
5 Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) (Doc. 90).²

6 **II. Summary Judgment Standard**

7 A court must grant summary judgment “if the movant shows that there is no
8 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
9 of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23
10 (1986). The movant bears the initial responsibility of presenting the basis for its motion
11 and identifying those portions of the record, together with affidavits, that it believes
12 demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

13 If the movant fails to carry its initial burden of production, the nonmovant need
14 not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d
15 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the
16 burden then shifts to the nonmovant to demonstrate the existence of a factual dispute and
17 that the fact in contention is material, i.e., a fact that might affect the outcome of the suit
18 under the governing law, and that the dispute is genuine, i.e., the evidence is such that a
19 reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby,*
20 *Inc.*, 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d
21 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact
22 conclusively in its favor, *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-
23 89 (1968); however, it must “come forward with specific facts showing that there is a
24 genuine issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475
25 U.S. 574, 587 (1986) (internal citation omitted); *see Fed. R. Civ. P. 56(c)(1).*

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27 ² The Court issued an Order with the Notice required under *Rand v. Rowland*, 154
28 F.3d 952, 962 (9th Cir. 1998) (en banc), which informed Muhammad of his obligation to
respond to the motion and the requirements under Federal Rule of Civil Procedure 56
(Doc. 94).

1 At summary judgment, the judge’s function is not to weigh the evidence and
2 determine the truth but to determine whether there is a genuine issue for trial. *Anderson*,
3 477 U.S. at 249. In its analysis, the court must believe the nonmovant’s evidence, and
4 draw all inferences in the nonmovant’s favor. *Id.* at 255. The court need consider only
5 the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P.
6 56(c)(3).

7 **III. Physical Injury**

8 Ams argues that Muhammad’s claim is barred by the PLRA’s requirement that a
9 prisoner make “a prior showing of physical injury” (Doc. 90 at 4). Section 1997e(e)
10 provides that “[n]o Federal civil action may be brought by a prisoner confined in a jail,
11 prison, or other correctional facility, for mental or emotional injury suffered while in
12 custody without a prior showing of physical injury.” 42 U.S.C. § 1997e(e). In *Oliver v.*
13 *Keller*, the Ninth Circuit specified that “§ 1997e(e) applies only to claims for mental and
14 emotional injury.” 289 F.3d 623, 629 (9th Cir. 2002). The appellate court therefore
15 concluded that where an inmate has actionable claims for compensatory, nominal or
16 punitive damages premised on constitutional violations and not on any alleged mental or
17 emotional injuries, the claims are not barred by § 1997e(e). *Id.* at 630.

18 Muhammad does not seek recovery for “mental or emotional injury”; rather, he
19 seeks damages for an alleged violation of his Eighth Amendment rights (Doc. 25 at 29,
20 31). Accordingly, his claim against Ams is not barred by § 1997e(e). *See Greening v.*
21 *Miller-Stout*, 739 F.3d 1235, 1238 (9th Cir. 2014) (rejecting argument that the plaintiff’s
22 claim was barred by § 1997e(e)’s “physical injury” requirement and finding that because
23 he did not seek recovery for mental and emotional injury but instead sought declaratory
24 judgment and injunctive relief for alleged Eighth and Fourteenth Amendment violations,
25 the claim was not barred).

26 Ams’s request for summary judgment on this ground will be denied.

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1 **IV. Exhaustion**

2 **A. Legal Standard**

3 Under the PLRA, a prisoner must exhaust “available” administrative remedies
4 before filing an action in federal court. *See* 42 U.S.C. § 1997e(a); *Vaden v. Summerhill*,
5 449 F.3d 1047, 1050 (9th Cir. 2006); *Brown v. Valoff*, 422 F.3d 926, 934-35 (9th Cir.
6 2005). The prisoner must complete the administrative review process in accordance with
7 the applicable rules. *See Woodford v. Ngo*, 548 U.S. 81, 92 (2006). Exhaustion is
8 required for all suits about prison life, *Porter v. Nussle*, 534 U.S. 516, 523 (2002),
9 regardless of the type of relief offered through the administrative process, *Booth v.*
10 *Churner*, 532 U.S. 731, 741 (2001).

11 The defendant bears the initial burden to show that there was an available
12 administrative remedy and that the prisoner did not exhaust it. *Albino v. Baca*, 747 F.3d
13 1162, 1169, 1172 (9th Cir. 2014); *see Brown*, 422 F.3d at 936-37 (a defendant must
14 demonstrate that applicable relief remained available in the grievance process). Once
15 that showing is made, the burden shifts to the prisoner, who must either demonstrate that
16 he, in fact, exhausted administrative remedies or “come forward with evidence showing
17 that there is something in his particular case that made the existing and generally
18 available administrative remedies effectively unavailable to him.” *Albino*, 747 F.3d at
19 1172. The ultimate burden, however, rests with the defendant. *Id.* Summary judgment is
20 appropriate if the undisputed evidence, viewed in the light most favorable to the prisoner,
21 shows a failure to exhaust. *Id.* at 1166, 1168; *see Fed. R. Civ. P. 56(a)*.

22 If summary judgment is denied, disputed factual questions relevant to exhaustion
23 should be decided by the judge; a plaintiff is not entitled to a jury trial on the issue of
24 exhaustion. *Albino*, 747 F.3d at 1170-71. But if a court finds that the prisoner exhausted
25 administrative remedies, that administrative remedies were not available, or that the
26 failure to exhaust administrative remedies should be excused, the case proceeds to the
27 merits. *Id.* at 1171.

1 **B. Discussion**

2 Ams previously moved to dismiss Muhammad’s claim on the ground that he failed
3 to exhaust administrative remedies (Doc. 67). In her Motion for Judgment on the
4 Pleadings, Ams argued that Muhammad admitted in his amended pleading that he did not
5 exhaust remedies and that his reason for failing to exhaust—that he feared retaliation—
6 was meritless (*id.* at 4). The Court construed Ams’s motion as one under Federal Rule of
7 Civil Procedure 12(b)(6) and found that when taking the allegations in Muhammad’s
8 Second Amended Complaint as true—specifically, that he feared retaliation if he
9 attempted to grieve his claim against Ams—it could not conclude that he failed to
10 exhaust because it is possible that remedies were rendered unavailable (Doc. 77 at 4).
11 *See Sapp v. Kimbrell*, 623 F.3d 813, 822 (9th Cir. 2010) (exhaustion not required when
12 circumstances render administrative remedies “effectively unavailable”). The Court
13 therefore denied the motion.

14 Ams raises the same argument for nonexhaustion in her pending Motion for
15 Summary Judgment (Doc. 90). She asserts that in his deposition, Muhammad testified
16 that his fear of retaliation was not based on any specific facts tied to Ams or any other
17 prison official (*id.* at 5-6). According to Ams, Muhammad’s generalized fear is
18 insufficient to show that remedies were not available and summary judgment should
19 therefore be granted (*id.* at 6-7).

20 As set forth above, Ams bears the initial burden to show that there was an
21 available administrative remedy for Muhammad to pursue his complaint. *Albino*, 747
22 F.3d at 1169, 1172. Nowhere in her motion or separate Statement of Facts does Ams
23 describe the grievance procedure available to Muhammad at the time his claim arose, and
24 the only evidence she proffers is an excerpt from Muhammad’s deposition (*see* Docs. 90-
25 91; Doc. 91, Ex. 1). Ams also failed to present any evidence of the available grievance
26 procedure in her prior motion to dismiss on the same ground (*see* Doc. 67).

27 In *Wyatt v. Terhune*, the Ninth Circuit found that the defendants’ documents were
28 insufficient because, although their proffered affidavit described the inmate appeals

1 process, it failed to present specific information regarding the plaintiff's appeals. 315
2 F.3d 1108, 1120 (9th Cir. 2003), *overruled on other grounds by Albino*, 747 F.3d 1162.
3 In other words, the defendants' evidence showed only that there was a grievance process.
4 *See id.* Here, Ams fails to make that initial showing. She does not present an affidavit or
5 any evidence of the inmate grievance process available at the prison. *See Brown*, 422
6 F.3d at 937 (evidence demonstrating available relief in the grievance process includes
7 "official directives that explain the scope of the administrative review process; [and]
8 documentary or testimonial evidence from prison officials who administer the review
9 process . . ."). As such, there is no evidence that there was a grievance process
10 available, what it was, or whether it addressed situations where inmates feared retaliation
11 at the initial grievance level.

12 As a result, the Court does not reach the parties' arguments regarding
13 Muhammad's retaliation fears if he attempted to grieve a claim against Ams. Because
14 Ams fails to meet her initial burden to show that there was an available administrative
15 remedy, the request for summary judgment for failure to exhaust will be denied without
16 prejudice.

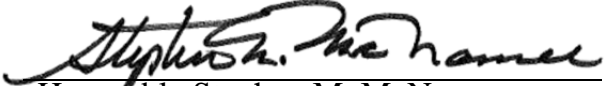
17 **IT IS ORDERED:**

18 (1) The reference to the Magistrate Judge is withdrawn as to Defendant Ams's
19 Motion for Summary Judgment (Doc. 90).

20 (2) Defendant Ams's Motion for Summary Judgment (Doc. 90) is **denied**
21 without prejudice.

22 (3) Within **10 days** from the date of this Order, Defendant Ams may file a new
23 motion for summary judgment limited to the exhaustion issue.

24 DATED this 23rd day of April, 2015.

25
26 
27 Honorable Stephen M. McNamee
28 Senior United States District Judge