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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROBERT LIONEL SANFORD,	)	No. EDCV 09-1155-DMG(CW) <sup>1</sup>
	)	
Plaintiff,	)	MEMORANDUM AND ORDER
	)	DISMISSING COMPLAINT
v.	)	WITH LEAVE TO AMEND
	)	
M. CRISPIN,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff's First Amended Complaint is dismissed, with leave to amend, for failure to exhaust administrative remedies.

**BACKGROUND AND PROCEEDINGS**

The pro se plaintiff is a prisoner in state custody, proceeding in forma pauperis, on a civil rights complaint naming governmental defendants and addressing prison conditions. His initial Complaint [docket no. 3], dated May 26, 2009, was received on June 16, 2009, and filed on June 29, 2009, pursuant to the court's Order re Leave to File Action Without Prepayment of Full Filing Fee. [Docket no. 2.] The

<sup>1</sup> Plaintiff has another pending action: No. EDCV 10-733-DMG(CW). This Memorandum and Order concerns only No. EDCV 09-1155.

1 Complaint was dismissed with leave to amend in a first Memorandum and  
2 Order filed August 14, 2009. [Docket no. 6.]

3 Plaintiff's First Amended Complaint ("FAC") was filed on  
4 September 29, 2009. [Docket no. 13.] Plaintiff was granted leave to  
5 proceed in forma pauperis in an order filed December 7, 2009. [Docket  
6 no. 15.] In a motion filed June 3, 2010, Defendant M. Crispin (the  
7 only remaining defendant) moved to dismiss for failure to exhaust  
8 administrative remedies. [Docket no. 27.]<sup>2</sup> Plaintiff's opposition  
9 was filed on July 13, 2010. [Docket no. 38 (docketed out of order).]  
10 Defendant's reply was filed on July 22, 2010. [Docket no. 32.]  
11 Plaintiff's supplemental opposition was filed on August 9, 2010.  
12 [Docket no. 33.]

#### 13 STANDARD OF REVIEW

14 Defendants have moved to dismiss this action for failure to  
15 exhaust administrative remedies as required under the Prison  
16 Litigation Reform Act of 1995 ("PLRA"), as codified at 42 U.S.C.  
17 § 1997e(a). Before filing a civil rights action about prison  
18 conditions, a prisoner plaintiff must first exhaust available  
19 administrative remedies. See Jones v. Bock, 549 U.S. 199, 204, 127 S.  
20 Ct. 910, 166 L. Ed. 2d 798 (2007)(unanimous decision); Porter v.  
21 Nussle, 534 U.S. 516, 524, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002);  
22 Booth v. Churner, 532 U.S. 731, 736, 121 S. Ct. 1819, 149 L. Ed. 2d  
23 958 (2001). Administrative exhaustion is required even if a plaintiff  
24 seeks only money damages and the available administrative process  
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26 <sup>2</sup> Defendant also moved to dismiss for failure to state a claim  
27 and on grounds of qualified immunity. Insofar as the issue of  
28 administrative exhaustion appears to be dispositive, the court need  
not reach Defendant's other arguments for dismissal at this time.

1 cannot provide payment. See Booth, 532 U.S. at 740-41. Furthermore,  
2 an action must be dismissed unless administrative remedies were  
3 exhausted before the action was filed, even if administrative remedies  
4 were exhausted later while the action was pending. See McKinney v.  
5 Carey, 311 F.3d 1198, 1199 (9th Cir. 2002)(per curiam). Here,  
6 administrative exhaustion must have been completed on the date a pro  
7 se prisoner plaintiff first submitted a complaint to a federal court,  
8 rather than on the date on which the court allowed the complaint to be  
9 filed, if the filing date was delayed. Vaden v. Summerhill, 449 F.3d  
10 1047, 1051 (9th Cir. 2006).

11 This exhaustion of administrative remedies is not a pleading  
12 requirement a plaintiff must satisfy; instead, failure to exhaust  
13 administrative remedies is an affirmative defense a defendant must  
14 plead and prove. Jones, 549 U.S. at 212-16; Wyatt v. Terhune, 315  
15 F.3d 1108, 1119 (9th Cir. 2003). The defense should be raised in an  
16 unenumerated Rule 12(b) motion rather than in a motion for summary  
17 judgment. Wyatt, 315 F.3d at 1119. In deciding such a motion -- a  
18 motion to dismiss for failure to exhaust nonjudicial remedies -- the  
19 court may look beyond the pleadings and decide disputed issues of  
20 fact. Id. at 1119-20. When the court looks to a factual record  
21 beyond the pleadings, it must ensure that a plaintiff is given fair  
22 notice of the opportunity to develop a record. Wyatt, 315 F.3d at  
23 1120 n.14. If the court concludes that a prisoner plaintiff has not  
24 exhausted nonjudicial remedies, the proper remedy is dismissal without  
25 prejudice. Id. at 1120.

26 Leave to amend should be granted if it appears possible that the  
27 defects in the complaint can be corrected, especially if the plaintiff  
28 is pro se. See Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000)

1 (en banc); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995).  
2 However, if, after careful consideration, it is clear that a complaint  
3 cannot be cured by amendment, the court may dismiss without leave to  
4 amend. Cato, 70 F.3d at 1107-11.

#### 5 DISCUSSION

6 Before bringing suit in federal court, a prisoner must have fully  
7 and properly exhausted administrative remedies, by completing "the  
8 administrative review process in accordance with the applicable  
9 procedural rules," as defined "by the prison grievance process  
10 itself." Jones, 549 U.S. at 218. In Woodford v. Ngo, the Supreme  
11 Court described California's grievance system for prisoners  
12 challenging conditions of confinement:

13 To initiate the process, an inmate must fill out a simple form,  
14 Dept. of Corrections, Inmate/Parolee Appeal Form, CDC 602  
15 (12/87)(hereinafter Form 602), that is made "readily available to all  
16 inmates." Cal. Code Regs., tit. 15, § 3084.1(c)(2004). The inmate  
17 must fill out two parts of the form: part A, which is labeled  
18 "Describe Problem," and part B, which is labeled "Action Requested."  
19 Then, as explained on Form 602 itself, the prisoner "must first  
20 informally seek relief through discussion with the appropriate staff  
21 member." App. 40-41. The staff member fills in part C of Form 602  
22 under the heading "Staff Response" and then returns the form to the  
23 inmate.

24 If the prisoner is dissatisfied with the result of the  
25 informal review, or if informal review is waived by the  
26 State, the inmate may pursue a three-step review process.  
27 See §§ 3084.5(b)-(d). Although California labels this  
28 "formal" review (apparently to distinguish this process from

1 the prior step), the three-step process is relatively  
2 simple. At the first level, the prisoner must fill in part  
3 D of Form 602, which states: "If you are dissatisfied,  
4 explain below." Id., at 40. The inmate then must submit  
5 the form, together with a few other documents, to the  
6 Appeals Coordinator within 15 working days -- three weeks --  
7 of the action taken. § 3084.6(c). This level may be  
8 bypassed by the Appeals Coordinator in certain  
9 circumstances. § 3084.5(b). Within 15 working days after  
10 an inmate submits an appeal, the reviewer must inform the  
11 inmate of the outcome by completing part E of Form 602 and  
12 returning the form to the inmate.

13 If the prisoner receives an adverse determination at  
14 this first level, or if this level is bypassed, the inmate  
15 may proceed to the second level of review conducted by the  
16 warden. §§ 3084.5(c), (e)(1). The inmate does this by  
17 filling in part F of Form 602 and submitting the form within  
18 15 working days of the prior decision. Within 10 working  
19 days thereafter, the reviewer provides a decision on a  
20 letter that is attached to the form. If the prisoner's  
21 claim is again denied or the prisoner otherwise is  
22 dissatisfied with the result, the prisoner must explain the  
23 basis for his or her dissatisfaction on part H of the form  
24 and mail the form to the Director of the California  
25 Department of Corrections and Rehabilitation within 15  
26 working days. § 3084.5(e)(2). An inmate's appeal may be  
27 rejected where "[t]ime limits for submitting the appeal are  
28 exceeded and the appellant had the opportunity to file

1 within the prescribed time constraints." § 3084.3(c)(6).

2 Woodford, 126 S. Ct. at 2383.

3 In the present case, Plaintiff apparently pursued administrative  
4 remedies with respect to two similar incidents, one on April 29, 2008;  
5 the other on October 23, 2008. Plaintiff's present claims concern the  
6 October 23, 2008 incident. [FAC.] Plaintiff's exhibits indicate that  
7 he received a Director's Level Appeal Decision with respect to the  
8 April 29, 2008 incident, but only a Second Level Response (dated  
9 December 8, 2008) with respect to the October 23, 2008 incident (which  
10 directed Plaintiff to request a Director's Level Response if  
11 dissatisfied). [Exhibits to Plaintiff's opposition and supplemental  
12 opposition.]

13 Accordingly, from the present record, it appears that Plaintiff  
14 has not exhausted administrative remedies by pursuing the final step  
15 in the California process described above. However, in light of the  
16 liberal policies governing amendment of pro se pleadings, Plaintiff  
17 will be given an opportunity to amend his complaint by showing that he  
18 did in fact complete the process of administrative exhaustion before  
19 filing the present action.

20 **ORDERS:**

21 It is therefore **ORDERED** as follows:

- 22 1. The First Amended Complaint is dismissed with leave to  
23 amend.
- 24 2. Defendant's motion to dismiss (docket no. 27, filed June 3,  
25 2010) is **MOOT** in light of the above.
- 26 3. If Plaintiff can amend by showing that he has completed the  
27 administrative exhaustion requirement, he shall do so in writing, on  
28 or before February 23, 2011, attaching any supporting evidence.

