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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KAVIN M. RHODES,

 Plaintiff,

 v.

M. ROBINSON, et al.,

 Defendants.

Case No. 1:02-cv-05018 LJO DLB PC

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND GRANTING
DEFENDANTS’ MOTION TO DISMISS
CERTAIN CLAIMS

(Document 288)

Plaintiff Kavin M. Rhodes (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on Plaintiff’s Third Amended Complaint, filed on June 9, 2011, against (1) Defendants Wenneker, Pazo, Tidwell, Chapman, Lopez, K. Todd, Metzen, and Garza for retaliation in violation of the First Amendment; and (2) Defendants Garza and Jones for excessive force in violation of the Eighth Amendment.

On October 9, 2013, Defendants filed a Motion to Dismiss pursuant to the unenumerated portion of Rule 12(b) of the Federal Rules of Civil Procedure, for Plaintiff’s failure to exhaust administrative remedies as to Count 13. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

1 On May 20, 2013, the Magistrate Judge issued [Findings and Recommendations](#) to grant
2 Defendants' Motion to Dismiss Count 13 and Defendant Jones.¹ The Findings and
3 Recommendations were served on the parties and contained notice to the parties that any objections
4 to the Findings and Recommendations were to be filed within fourteen days. After receiving
5 extensions of time, Plaintiff filed [objections](#) on July 22, 2013. Defendants did not file a reply.

6 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a de
7 novo review of this case. Having carefully reviewed the entire file, including Plaintiff's objections,
8 the Court finds that the Findings and Recommendations are supported by the record and proper
9 analysis.

10 Throughout Plaintiff's objections, he continues to suggest that Magistrate Judge Beck is
11 biased against him. As proof, he cites a reference to "2013," rather than the correct date of "2003."
12 Contrary to Plaintiff's theory that Judge Beck's intent was to make his appeal seem "untimely by
13 years," it is simply a typographical error.

14 Plaintiff also continues to argue that appeals coordinators conspired to screen out his
15 "timely" June 17, 2003, appeal. However, the fact remains that Plaintiff could have, but did not,
16 submit a timely appeal regarding the events in Count 13, to the first level of review. As the
17 Magistrate Judge found, "Plaintiff was capable of filing an inmate appeal, but did not comply with
18 the prison appeals procedure." ECF No. 288 at 5. "If a prisoner had full opportunity and ability to
19 file a grievance timely, but failed to do so, he has not properly exhausted his administrative
20 remedies." Marella v. Terhune, 568 F.3d 1024, 1028 (9th Cir. 2009).

21 Insofar as Plaintiff contends that the April 2003 appeal put prison officials on notice of the
22 events on June 17, 2003, he is incorrect. While the April 2003 appeal may have referenced the
23 threats, it could not have discussed the actual transfer, including a cell extraction and use of pepper
24 spray, that occurred in June 2003. Although Plaintiff may disagree with the exhaustion procedure
25 and/or requirements, it does not change the ultimate conclusion.

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¹ Count 13 is the only count against Defendant Jones.

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Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations, filed May 20, 2013, are ADOPTED in full;
2. Defendants' Motion to Dismiss (Document 276) is GRANTED;
3. Count 13 is DISMISSED for Plaintiff's failure to exhaust administrative remedies;
and
4. Defendant Jones is DISMISSED.

IT IS SO ORDERED.

Dated: August 8, 2013

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE