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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GEORGE LEE,

Plaintiff,

vs.

A. K. SCRIBNER, et al.,

Defendants.

1: 04 CV 5587 AWI WMW PC

ORDER RE: FINDINGS &
RECOMMENDATIONS (#34)

ORDER GRANTING MOTION TO
DISMISS (#33)

_____ /

Plaintiff is a state prisoner proceeding pro se in this civil rights action. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302.

On September 10, 2008, [Findings and Recommendations](#) were entered, recommending dismissal of this action for Plaintiff's failure to exhaust available administrative remedies pursuant to 42 U.S.C. § 1997e(a). On September 26, 2008, Plaintiff filed objections to the Findings and Recommendations. Defendants filed a reply on October 14, 2008. On November 3, 2008, Plaintiff filed an opposition to Defendants' reply, and on November 17, 2008, Defendants moved to strike the November 3, 2008 filing as an improper filing.

1 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule
2 73-305, this court has conducted a de novo review of this case. Having carefully reviewed the
3 entire file, the court finds the Findings and Recommendations to be supported by the record and
4 proper analysis. Defendants have provided evidence that Plaintiff did not complete available
5 administrative remedies prior to filing suit. In the objections and opposition, Plaintiff contends
6 that he did file an inmate grievance concerning the facts at issue in this action but his appeal was
7 not processed. Plaintiff claims that at the time the appeal was made, appeals were generally not
8 processed in the time required by prison regulations. As evidence of his assertions, Plaintiff
9 provides letters sent to him by the Warden and Deputy Warden in response to letters Plaintiff
10 apparently sent to the Warden and Deputy Warden in which he appears to have complained that
11 appeals were not being timely processed. These letters, however, make no reference to any
12 specific appeal Plaintiff may have filed. Plaintiff has provided no *evidence*, such as his own
13 declaration signed under penalty of perjury, stating that he filed an administrative appeal
14 concerning the facts at issue in this action prior to filing suit. Thus, the court has no choice but
15 to grant the motion to dismiss.

16 Because the court finds Petitioner has provided no evidence to support his
17 assertion that he did file an appeal about the events at issue in this action, but it was not
18 processed, it is unnecessary to determine whether Defendants' motion should be granted on the
19 additional ground that Plaintiff did not timely oppose the motion.¹ As such, the court declines to
20 adopt those portions of the Findings and Recommendations that recommend dismissal for
21 Plaintiff's failure to oppose the motion.

22 //

25 ¹ In the objections, Plaintiff provides some evidence that
26 his medical condition prevented him from filing an opposition.

1 Accordingly, THE COURT HEREBY ORDERS that:

- 2 1. The Findings and Recommendations issued by the Magistrate Judge on
3 September 10, 2008, are adopted to the extent they find Plaintiff did not
4 exhaust his administrative remedies prior to filing suit;
- 5 2. Defendants' motion to dismiss is GRANTED;
- 6 3. This action is dismissed for Plaintiff's failure to exhaust his available
7 administrative remedies pursuant to 42 U.S.C. § 1997e(a); and
- 8 4. The Clerk of the Court is directed to close this case.

9
10 IT IS SO ORDERED.

11 **Dated: February 14, 2009**

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE