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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAIME L. ZEPEDA,

1:06-cv-01391-LJO-GSA-PC

Plaintiff,

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT DEFENDANTS’
MOTION TO DISMISS FOR FAILURE TO
EXHAUST BE GRANTED, DISMISSING THIS
ACTION
(Doc. 37.)

v.

W. J. SULLIVAN, et al.,

Defendants.

OBJECTIONS, IF ANY, DUE IN THIRTY
DAYS

I. BACKGROUND

Jaime L. Zepeda (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on October 10, 2006. (Doc. 1.) This case now proceeds on Plaintiff’s Third Amended Complaint, filed on November 19, 2010, against defendants Matthew Cate, W. J. Sullivan, M. Carrasco, L. L. Schulties, and John Doe Deputy Director, on Plaintiff’s claims for inadequate outdoor exercise and winter clothing.¹ (Doc. 28.) On August 12, 2011, defendants Cate, Sullivan, Carrasco, and Schulties (“Defendants”) filed a motion to dismiss this action based on Plaintiff’s failure to exhaust administrative remedies before bringing this action, and because Defendants are

¹On April 7, 2011, the Court dismissed all remaining claims and defendants from this action, based on Plaintiff’s failure to state a claim. (Doc. 31.)

1 entitled to qualified immunity.² (Doc. 37.) On August 31, 2011, Plaintiff filed an opposition to the
2 motion. (Doc. 42.) On September 28, 2011, Defendants filed a reply to Plaintiff's opposition. (Doc.
3 46.) Defendants' motion to dismiss is now before the Court.

4 **II. STATUTORY EXHAUSTION REQUIREMENT**

5 Section 1997e(a) of the Prison Litigation Reform Act of 1995 provides that “[n]o action shall
6 be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by
7 a prisoner confined in any jail, prison, or other correctional facility until such administrative
8 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust
9 the available administrative remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211, 127
10 S.Ct. 910, 918-19 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002).
11 Exhaustion is required regardless of the relief sought by the prisoner and regardless of the relief
12 offered by the process, Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct. 1819 (2001), and the
13 exhaustion requirement applies to all prisoner suits relating to prison life, Porter v. Nussle, 435 U.S.
14 516, 532, 122 S.Ct. 983 (2002).

15 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative
16 defense under which Defendant has the burden of raising and proving the absence of exhaustion.
17 Jones, 549 U.S. at 216; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). The failure to
18 exhaust nonjudicial administrative remedies that are not jurisdictional is subject to an unenumerated
19 Rule 12(b) motion, rather than a summary judgment motion. Wyatt, 315 F.3d at 1119 (citing Ritza
20 v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 368 (9th Cir. 1998) (per curium)).
21 In deciding a motion to dismiss for failure to exhaust administrative remedies, the Court may look
22 beyond the pleadings and decide disputed issues of fact. Wyatt, 315 F.3d at 1119-20. If the Court
23 concludes that the prisoner has failed to exhaust administrative remedies, the proper remedy is
24 dismissal without prejudice. Id.

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28 ²The Doe Defendant has not been served with process in this action. Plaintiff has not sufficiently identified the Doe Defendant to enable the Marshal to locate and serve this defendant.

1 **III. SUMMARY OF PLAINTIFF’S ALLEGATIONS AND CLAIMS UPON WHICH THIS**
2 **ACTION PROCEEDS**

3 Plaintiff is a state prisoner presently incarcerated at California Correctional Institution
4 (“CCI”) in Tehachapi, California, where the events at issue allegedly occurred. This action now
5 proceeds with Plaintiff’s Third Amended Complaint against defendants Cate, Sullivan, Carrasco,
6 Schulties, and John Doe Deputy Director, on Plaintiff’s claims for inadequate outdoor exercise and
7 winter clothing.

8 Plaintiff alleges that Defendants violated his rights under the Eighth Amendment by
9 providing him with inadequate outdoor exercise and winter clothing. Plaintiff alleges that
10 during a nine-month period, from late December 2005 until October 10, 2006, he did not receive
11 more than 2.5 to 3.0 hours per week of outside exercise time, for no legitimate reason such as prison
12 lockdown or medical issues. As a result of limited exercise, Plaintiff gained 35 pounds and suffered
13 from stress, depression, anxiety, and tissue atrophy. Plaintiff alleges that under modifications to
14 Article 43 which occurred in March 2005, he is not provided sufficient clothing to stay warm during
15 the winter months. Although Plaintiff was issued thermal tops and bottoms, he maintains that he
16 needs additional warm clothing and a beanie, which he does not have the means to purchase himself.
17 Plaintiff asserts that he is exposed to temperatures below freezing, wind, rain, and occasional snow
18 when he goes outdoors for exercise. Plaintiff alleges that prisoners in the general population at CCI
19 are provided heavy coats and beanies during the winter months, but he is not. Because of loss of
20 body heat resulting from inadequate winter clothing, Plaintiff suffers pain in his ears, nose, face and
21 hands, exposure to frostbite, and pulmonary problems.

22 Plaintiff requests monetary damages, declaratory and injunctive relief, attorneys fees, and
23 costs of suit.

24 **IV. MOTION TO DISMISS FOR FAILURE TO EXHAUST**

25 The Court takes judicial notice of the fact that the California Department of Corrections and
26 Rehabilitation (“CDCR”) has an administrative grievance system for prisoner complaints. Cal.Code
27 Regs., tit. 15 § 3084.1 (2007). The process is initiated by submitting a CDC Form 602. Id. at §
28 3084.2(a). Appeals must be submitted within fifteen working days of the event being appealed, and
the process is initiated by submission of the appeal to the informal level, or in some circumstances,

1 the first formal level. Id. at §§ 3084.5, 3084.6(c). Four levels of appeal are involved, including the
2 informal level, first formal level, second formal level, and third formal level, also known as the
3 “Director’s Level.” Id. at § 3084.5. In order to satisfy § 1997e(a), California state prisoners are
4 required to use this process to exhaust their claims prior to filing suit. Woodford v. Ngo, 548 U.S.
5 81, 85 (2006); McKinney, 311 F.3d. at 1199-1201.

6 **Defendants’ Motion**

7 Defendants argue that this action should be dismissed because Plaintiff failed to exhaust the
8 CDCR’s administrative appeals process regarding his claims against Defendants. Defendants submit
9 evidence that between January 1, 2005 and December 31, 2006, the Office of Appeals (“OOA”) for
10 the CDCR, which receives and maintains inmate appeals accepted for Director’s Level review,
11 accepted and rendered a decision on only three of Plaintiff’s appeals, none which addressed the
12 wrongful acts alleged against Defendants in this action. (Declaration of D. Foston (“Foston Decl.”),
13 Doc. 37-2, ¶¶2 3.)

14 **Plaintiff’s Opposition**

15 In opposition, Plaintiff argues that under Jones, 549 U.S. at 214-15, Defendants’ motion is
16 improper, because a motion to dismiss for failure to exhaust cannot be granted unless non-exhaustion
17 is clear from the fact of the complaint, and Plaintiff pleads exhaustion in the body of the complaint.
18 Plaintiff also argues that Defendants have not established that none of the appeals filed by Plaintiff
19 concerned grievances about inadequate exercise or clothing. Plaintiff asserts that he participated in
20 group appeals which Defendants may not have discovered using a search of his name. Plaintiff
21 discusses and provides evidence of two group appeals which he asserts he participated in, Log
22 Numbers CCI-07-01474 and CCI-08-00663, which were denied at the Director’s Level of review.
23 (Exh. A to Plt’f Opp’n, Doc. 42 at 29, 35.) Plaintiff also provides evidence of another group appeal,
24 Log Number CCI-08-00110, which was signed by nine inmates including Plaintiff. Id. at 48, 53.

25 **Defendants’ Reply**

26 Defendants reply that neither of the two group appeals discussed by Plaintiff exhausted his
27 remedies with regard to the allegations and claims in this action. The first group appeal grieved the
28 Security Housing Unit’s (“SHU”) inmates’ request to order lotion, deodorant, hair conditioner, Q-

1 tips/cotton swabs and wash cloths, which do not pertain to the two claims in this action. While the
2 second group appeal grieved inadequate outdoor exercise, the Director's Level decision was not
3 rendered until August 23, 2008, after the present lawsuit was filed. In response to Plaintiff's
4 argument that Defendants' motion is improper under Jones, Defendants argue that the Supreme
5 Court, in Booth, 532 U.S. 731, 741 (2001), has consistently held that inmates must exhaust their
6 administrative remedies regardless of the relief sought, and regardless of the relief offered by the
7 process.

8 Discussion

9 Defendants' evidence is sufficient to demonstrate that Plaintiff failed to exhaust his remedies
10 at the Director's Level with respect to the allegations and claims upon which this action proceeds.
11 Defendants provide evidence that OOA records show that only three of Plaintiff's appeals, Log
12 Numbers CCI-05-3569, CCI-05-3715, and CCI-05-3998, were accepted for review and decided at
13 the Director's Level between January 1, 2005 and December 31, 2006.³ (Foston Decl. at 2 ¶3.)
14 Appeal #CCI-05-3569 concerned Plaintiff's requests for more stationary materials, stamps and
15 envelopes. (Exh. A to Foston Decl., Doc. 37-2 at 15.) Appeal #CCI-05-3715 concerned Plaintiff's
16 request for double cell status. Id. at 16. Appeal #CCI-05-3998 concerned Plaintiff's grievances
17 about how a disciplinary hearing was conducted. Id. at 20. Thus, none of these three appeals
18 concerned any allegation or claim that Plaintiff was denied adequate exercise or winter clothing.

19 The Court finds that Defendants have met their burden as the party moving for dismissal on
20 exhaustion grounds. The burden now shifts to Plaintiff to demonstrate that exhaustion occurred or
21 that an exception exists. Wyatt, 315 F.3d at 1119

22 Plaintiff's argument that Defendants' motion is improper under Jones is without merit. As
23 discussed above, the failure to exhaust nonjudicial administrative remedies that are not jurisdictional
24 is subject to an unenumerated Rule 12(b) motion, and in deciding a motion to dismiss for failure to
25 exhaust administrative remedies, the Court may look beyond the pleadings and decide disputed
26

27 ³Plaintiff alleges in the Third Amended Complaint that he was subjected to unconstitutional conditions
28 beginning in March 2005, and Plaintiff's Complaint commencing this action was filed on October 10, 2006. Thus,
Plaintiff must have exhausted his remedies for the claims in this action between March 2005 and October 10, 2006.
Therefore, Defendants have searched the records applicable to the relevant time period.

1 issues of fact. Wyatt, 315 F.3d at 1119-20. While Plaintiff has submitted evidence of three group
2 appeals he claims he participated in, Log Numbers CCI-07-01474, CCI-08-00663, and CCI-08-
3 00110, none of those appeals was exhausted at the Director's Level of review before Plaintiff filed
4 the present lawsuit on October 10, 2006. Appeal #07-01474, which concerned SHU inmates' request
5 to order canteen items, was denied at the Director's Level on August 21, 2007. (Exh. A. to Pltf's
6 Opp'n, Doc. 42 at 29.) Appeal #CCI-08-00663, which concerned inadequate outdoor exercise, was
7 denied at the Director's Level on October 23, 2008. Id. at 35. Appeal #CCI-08-00110, which
8 concerned a request that tortillas and cheese be allowed in the SHU, was partially granted at the
9 Second Level of review on February 5, 2008. Id. at 48. Thus, none of these three appeals was
10 decided at the Third Level of review before Plaintiff filed suit on October 10, 2006.

11 Based on the foregoing, the Court finds that Plaintiff failed to comply with the CDCR's
12 procedural rules to complete the appeals process before filing suit, and he did not otherwise satisfy
13 the exhaustion requirement under § 1997e(a) before filing this lawsuit. Therefore, the Court finds
14 that Defendants are entitled to dismissal of the claims against them and dismissal of this action.

15 **V. QUALIFIED IMMUNITY**

16 Defendants claim they are entitled to qualified immunity. In light of the fact that the Court
17 recommends dismissal of Plaintiff's action in its entirety due to failure to exhaust remedies, the Court
18 shall not address the qualified immunity issue.

19 **VI. CONCLUSION AND RECOMMENDATION**

20 Defendants have met their burden of demonstrating that Plaintiff failed to exhaust his
21 administrative remedies prior to filing suit, in compliance with § 1997e(a). Defendants have shown
22 an absence in the official records of any evidence that Plaintiff exhausted his remedies by an inmate
23 appeal pursuant to Title 15 of the California Code of Regulations § 3084.1, et seq., concerning
24 Plaintiff's allegations in the complaint against Defendants in this action. Therefore, the Court
25 HEREBY RECOMMENDS that Defendants' motion to dismiss, filed on August 12, 2011, be
26 GRANTED, dismissing this action.

27 These Findings and Recommendations will be submitted to the United States District Court
28 Judge assigned to this action pursuant to the provisions of 28 U.S.C. § 636 (b)(1). Within thirty (30)

1 days after being served with a copy of these Findings and Recommendations, any party may file
2 written objections with the Court and serve a copy on all parties. Such a document should be
3 captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are
4 advised that failure to file objections within the specified time may waive the right to appeal the
5 order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6
7 IT IS SO ORDERED.

8 **Dated: January 12, 2012**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE