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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

QUINCY LOWMAN,

Plaintiff,

v.

D. G. ADAMS, et al.,

Defendants.

CASE NO. 1:07-cv-00546 DLB PC

ORDER GRANTING MOTION TO DISMISS,  
AND DISMISSING ACTION WITHOUT  
PREJUDICE

(Doc. 22)

**Order on Defendants’ Motion to Dismiss**

**I. Background**

Plaintiff Quincy Lowman (“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 this action on April 9, 2007, and filed a first amended complaint on March 3, 2008. This action is proceeding against defendants Loadholt, McGuinness and Dwevedi (“Defendants”). Pending before the Court is Defendants’ motion to dismiss, filed March 9, 2009. Plaintiff filed an opposition on July 27, 2009, and Defendants filed a reply on August 19, 2009.<sup>1</sup> The motion is deemed submitted.

**II. Dismissal for Failure to Exhaust**

**A. Exhaustion Requirement**

Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with

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<sup>1</sup> Plaintiff was provided with notice of the requirements for opposing an unenumerated Rule 12(b) motion on November 14, 2008. Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003). (Doc. 15.)

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

9 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative  
10 defense under which Defendants have the burden of raising and proving the absence of exhaustion.  
11 Jones, 127 S.Ct. at 921; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). The failure to  
12 exhaust nonjudicial administrative remedies that are not jurisdictional is subject to an unenumerated  
13 Rule 12(b) motion, rather than a summary judgment motion. Wyatt, 315 F.3d at 1119 (citing Ritza  
14 v. Int’l Longshoremen’s & Warehousemen’s Union, 837 F.2d 365, 368 (9th Cir. 1998) (per curium)).  
15 In deciding a motion to dismiss for failure to exhaust administrative remedies, the Court may look  
16 beyond the pleadings and decide disputed issues of fact. Wyatt, 315 F.3d at 1119-20. If the Court  
17 concludes that the prisoner has failed to exhaust administrative remedies, the proper remedy is  
18 dismissal without prejudice. Id.

19 The California Department of Corrections and Rehabilitation has an administrative grievance  
20 system for prisoner complaints. Cal. Code Regs., tit. 15 § 3084.1 (2008). The process is initiated  
21 by submitting a CDC Form 602. Id. at § 3084.2(a). Four levels of appeal are involved, including  
22 the informal level, first formal level, second formal level, and third formal level, also known as the  
23 “Director’s Level.” Id. at § 3084.5. Appeals must be submitted within fifteen working days of the  
24 event being appealed, and the process is initiated by submission of the appeal to the informal level,  
25 or in some circumstances, the first formal level. Id. at §§ 3084.5, 3084.6(c). In order to satisfy  
26 section 1997e(a), California state prisoners are required to use the available process to exhaust their  
27 claims prior to filing suit. Woodford v. Ngo, 548 U.S. 81, 126 S.Ct. 2378, 2383 (2006); McKinney,  
28 311 F.3d at 1199-1201.

1           **B. Summary of Plaintiff's Allegations**

2           This action is proceeding against Defendants for violation of the Eighth Amendment of the  
3 United States Constitution. The events giving rise to this action occurred at California State Prison -  
4 Corcoran, where Plaintiff was transferred on January 10, 2007. In his amended complaint, Plaintiff  
5 alleges that on February 20, 2007, Plaintiff complained to defendant Loadholt that he was  
6 experiencing severe pain in his left testicle. (Doc. 11, Comp. ¶¶11, 12.) Plaintiff alleges that  
7 defendant Loadholt was aware that Plaintiff's pain medication had been depleted and that he was not  
8 receiving any treatment. (Id., ¶13.) Plaintiff alleges that defendant Loadholt confirmed a lump in  
9 Plaintiff's left testicle, knew of Plaintiff's complaints of severe pain, and refused to provide any  
10 treatment, instead referring Plaintiff to a urologist, and causing Plaintiff to suffer. (Id., ¶¶15-17.)

11           Plaintiff alleges that on March 13, 2007, he was seen by urologist Dr. Dwevedi. (Id., ¶18.)  
12 Plaintiff alleges that defendant Dwevedi failed to provide adequate treatment and caused Plaintiff  
13 to continue to suffer. (Id., ¶¶23-26.) Defendant Dwevedi recommended surgery and tissue testing.  
14 (Id., ¶22.) Plaintiff underwent a penal culture examination on April 11, 2007. (Id., ¶29, 32.)  
15 Plaintiff alleges that defendant Loadholt did not provide plaintiff with antibiotics for five to six days  
16 after the test results showed an infection. (Id., ¶38.) On May 10, 2007, Plaintiff underwent surgery  
17 by defendant Dwevedi to remove the cyst in his left testicle. (Id., ¶40.)

18           Plaintiff alleges that because of a policy implemented by defendant McGuinness, Plaintiff  
19 suffered unreasonable delay in receiving treatment. (Id., ¶44.) Plaintiff alleges that he suffered  
20 prolonged and severe pain, and depression as a result. (Id., ¶45.)

21           **C. Defendants' Motion**

22           Defendants argue that Plaintiff did not exhaust his claims against them prior to filing this  
23 instant lawsuit on April 9, 2007. In support of their motion to dismiss, Defendants submit evidence  
24 that between December 2006 through April 2007, Plaintiff filed four grievances alleging that he had  
25 received improper medical care or a delay in receiving medical treatment and surgery. (Doc. 22,  
26 Jones Decl. ¶¶7,8.)

27           **i. Grievance / Appeal Log No. COR-2-07-00693 ("07-693")**

28           In this grievance, Plaintiff complains of inadequate medical care / treatment and requests that

1 he be seen by a physician immediately. The grievance is dated January 18, 2007 and was received  
2 on February 8, 2007. (Id.¶9; Jones Decl. Attachment A.) Defendants submit evidence that the  
3 Director’s level decision was completed on April 1, 2008, after Plaintiff filed suit.

4 In opposition, Plaintiff attests that on February 12, 2007, he submitted a request for interview  
5 form, inquiring into the status of his grievance, as well as another submitted on February 2, 2007.  
6 (Doc. 33, Lowman Decl. ¶¶8, 10.) In response to his inquiry, Plaintiff was informed that the  
7 grievance bearing log number 07-693 was completed (granted) and returned to him on February 26,  
8 2007. (Id., ¶¶17,18.) Plaintiff argues that because the appeal was granted at the first level of appeal,  
9 no other remedy was available and so he filed the instant lawsuit on April 9, 2007. Plaintiff further  
10 argues that he had exhausted this appeal, as well as appeal bearing Log No 07-1781 (see Section  
11 C.iii, below) by the time he filed his amended complaint in this action on March 9, 2008.

12 Plaintiff’s evidence indicates that he submitted his grievance for second level review on  
13 March 5, 2007. (Doc. 33, Lowman Decl., Ex. A, CDC 602 form, section F.) Plaintiff indicated that  
14 he was dissatisfied and that although his appeal was granted, he had yet to receive any medical  
15 treatment, was in pain, and needed medical help. Plaintiff’s appeal was partially granted at the  
16 second level on October 29, 2007 and returned to Plaintiff the following day. (Id., section G.) On  
17 November 4, 2007, Plaintiff submitted his appeal for a Director’s Level Review. (Id., section H.)  
18 Again, Plaintiff indicated that he failed to receive a timely response to his serious medical needs, that  
19 he was still having serious medical problems to which staff had failed to provide adequate treatment.  
20 The appeal was denied at the Director’s level on April 1, 2008. (Id.)

21 “[A] prisoner need not press on to exhaust further levels of review once he has either  
22 received all ‘available’ remedies at an intermediate level or has been reliably informed by an  
23 administrator that no remedies are available.” Brown v. Valoff, 422 F.3d 926, 935-36 (9th Cir.  
24 2005). Based on the evidence submitted, the Court is not persuaded by Plaintiff’s argument that no  
25 other remedies were available to him after the first level of review and that he therefore exhausted  
26 at the time he filed suit on April 9, 2007. The evidence shows that his grievance was partially  
27 granted at the first level of review. Plaintiff appealed the decision through to the Director’s level,  
28 even after he filed the instant federal action, continually seeking medical care. Plaintiff sought

1 further remedies (*i.e.*, medical treatment) through the prison administrative grievance system by  
2 pursuing his appeal until it was finally denied at the Director's level on April 1, 2008. Plaintiff's  
3 argument that the grievance process could not provide any further remedy beyond the first level of  
4 review is unpersuasive.

5 Finally, exhaustion must occur prior to filing suit, not while the suit is pending. Jones, 127  
6 S.Ct. at 918-19. Plaintiff was required to exhaust administrative remedies by the time he filed suit  
7 on April 9, 2007, not by the time he filed his amended complaint on March 3, 2008.

8 **ii. Grievance / Appeal Log No. CSPC-2-07-00748 ("07-748")**

9 Defendants submit evidence that on February 15, 2007, an inmate grievance form was  
10 received from Plaintiff. (Doc. 22, Jones Decl. ¶10.) The grievance was logged as Appeal number  
11 COR-2-07-00748 and was screened out on or about February 20, 2007 on the basis of it being a  
12 duplicate of appeal 07-693. (Id.) There is no record that Plaintiff sought further review of this  
13 appeal.

14 Plaintiff does not address this grievance in his opposition. Therefore, in the absence of any  
15 evidence to the contrary, the Court finds that rejection of this appeal does not constitute satisfaction  
16 of the exhaustion requirement.

17 **iii. Grievance / Appeal Log No. COR-2-07-01781 ("07-1781")**

18 Next, Defendants submit evidence that Plaintiff filed another inmate grievance dated April  
19 9, 2007, which was received on April 19, 2007. (Doc. 22, Jones Decl. ¶11.) In the grievance,  
20 Plaintiff complains of severe pain and requests that the surgery and tissue testing ordered by the  
21 doctor be performed immediately.

22 Defendants submit evidence that the first level response was completed on or around May  
23 16, 2007. (Id.) Defendants submit evidence that Plaintiff did not pursue a second level or Director's  
24 level review. (Id.)

25 In opposition, Plaintiff argues that the appeal was granted at the first level and therefore he  
26 was not required to pursue the grievance further. Exhaustion must occur prior to filing suit. Jones,  
27 127 S.Ct. at 918-19. The evidence submitted by both parties show that Plaintiff filed this grievance  
28 the same day he filed suit, and that the grievance was not granted at the first level until after he filed

1 suit. Plaintiff did not exhaust administrative remedies prior to filing suit by submitting grievance 07-  
2 1781.

3 **iv. Grievance / Appeal Log No. CSPC-2-07-01911**

4 Defendants submit evidence that a fourth inmate appeal was received on April 27, 2007,  
5 dated April 22, 2007. (Doc.22, Jones Decl. ¶12.) Defendants submit evidence that the appeal was  
6 withdrawn. (Id., Attachment C.)

7 Plaintiff does not address this grievance in his opposition. Therefore, in the absence of any  
8 evidence to the contrary, the Court finds that withdrawal of this grievance/ appeal does not constitute  
9 satisfaction of the exhaustion requirement.

10 **III. Conclusion and Order**

11 For the reasons set forth above, the Court finds that Plaintiff did not exhaust his Eighth  
12 Amendment medical care claim prior to filing suit. Accordingly, the Court HEREBY GRANTS  
13 Defendants' motion to dismiss, filed March 9, 2009. This action is HEREBY ORDERED  
14 DISMISSED, without prejudice, for failure to exhaust.

15 IT IS SO ORDERED.

16 **Dated: September 23, 2009**

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE