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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RALPH KELLY HAWTHORNE, JR.,

Plaintiff,

v.

KATHY MENDOZA-POWER, et al.,

Defendants.

Case No. 1:07-cv-01101-OWW-DLB (PC)

ORDER VACATING FINDINGS AND
RECOMMENDATIONS TO DISMISS FOR
FAILURE TO OBEY A COURT ORDER

(Doc. 54)

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DEFENDANTS'
MOTION TO DISMISS BE GRANTED AND
ACTION BE DISMISSED WITHOUT
PREJUDICE

(Doc. 37)

OBJECTIONS, IF ANY, DUE WITHIN
THIRTY DAYS

I. Order Vacating September 30, 2009 Findings and Recommendations

Plaintiff Ralph Kelly Hawthorne ("Plaintiff") is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on Plaintiff's complaint, filed February 23, 2007, against Defendants Kathy Mendoza-Powers and K. Henry. On March 12, 2009, Defendants Kathy Mendoza-Powers and K. Henry, filed a motion to dismiss. On April 21, 2009, the Court ordered Plaintiff to file a response to the motion to dismiss within thirty days. Plaintiff did not do so, and on September 30, 2009, a Findings and Recommendation was issued, recommending dismissal of the action for failure to obey a court order. On December 17, 2009, after several extensions of time, Plaintiff filed his objections to the Findings and Recommendation. (Doc. 63.)

1 Plaintiff contends that he failed to obey the Court's April 21, 2009 order because he did
2 not understand the court's procedures. Plaintiff had assumed that because the Court did not
3 respond to Plaintiff's motion for reconsideration filed on May 8, 2009, the Court was waiting for
4 Plaintiff to file an amended complaint. Plaintiff's May 8, 2009 motion appears to indicate that
5 Plaintiff believed his case had been dismissed in its entirety.

6 Because the Court will adjudicate Defendants' motion to dismiss on the merits, the Court
7 will not dismiss this action for failure to obey a court order. The Court will thus vacate its
8 September 30, 2009 Findings and Recommendations recommending dismissal of this action for
9 failure to obey a court order. The Court now issues the following Findings and Recommendation
10 regarding Defendants' motion to dismiss.

11 **II. Findings and Recommendations Regarding Defendants' Motion to Dismiss**

12 **A. Summary Of Plaintiff's Complaint**

13 Plaintiff is a state prisoner at Avenal State Prison, where the alleged events giving rise to
14 this action occurred. Plaintiff alleges that between July 14, 2006 and January 5, 2007, Defendants
15 Warden Mendoza-Powers and librarian K. Henry did not provide Plaintiff with assistance in
16 preparing his legal documents, namely the filing of a habeas corpus petition. Plaintiff alleges that
17 he has dyslexia. Plaintiff alleges that on January 5, 2007, he received insufficient assistance from
18 a law library clerk after Defendant Henry went to her office rather than assist Plaintiff. Plaintiff
19 alleges that he requested that the court appoint him representation because no one at the library
20 could help him file a writ of habeas corpus or do research.

21 Plaintiff alleges that on July 14, 2006, he gave Defendant Henry a two-page letter with a
22 list of appeals to copy and attach, and defendant Henry was supposed to give the letter to
23 Defendant Mendoza-Powers to mail to the court. Plaintiff alleges that he filed a grievance
24 regarding the letter and that it was partially granted at the first level.

25 Plaintiff also contends that he did not receive sufficient time in the law library. During the
26 months of October and November 2006, Plaintiff claims that he spoke to Defendant Henry several
27 times, asking for library access two times a week. Plaintiff asserts that this request was denied,
28 and concedes that there were many days that he could not go to the law library due to medical

1 reasons. Plaintiff also contends that between January 26 and February 14, 2007, other inmates
2 were permitted access to the law library once or twice a week, but he was not.

3 Plaintiff seeks nominal monetary damages. Plaintiff also seeks an injunction requiring
4 Defendants to grant him and others the same access to the law library as other inmates with a
5 court deadline; a law library program with qualified aides and paralegals, and, alternatively, an
6 order transferring him to another institution that will comply with his requests.

7 **B. Failure to Exhaust Administrative Remedies**

8 ***1. Legal Standard***

9 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with
10 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
11 confined in any jail, prison, or other correctional facility until such administrative remedies as
12 are available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the
13 available administrative remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007);
14 McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required
15 regardless of the relief sought by the prisoner and regardless of the relief offered by the process,
16 Booth v. Churner, 532 U.S. 731, 741 (2001), and the exhaustion requirement applies to all
17 prisoner suits relating to prison life, Porter v. Nussle, 534 U.S. 516, 532 (2002).

18 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative
19 defense under which defendants have the burden of raising and proving the absence of
20 exhaustion. Jones, 549 U.S. at 216; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003).
21 The failure to exhaust nonjudicial administrative remedies that are not jurisdictional is subject to
22 an unenumerated Rule 12(b) motion, rather than a summary judgment motion. Wyatt, 315 F.3d
23 at 1119 (citing Ritza v. Int’l Longshoremen’s & Warehousemen’s Union, 837 F.2d 365, 368 (9th
24 Cir. 1988) (per curiam)). In deciding a motion to dismiss for failure to exhaust administrative
25 remedies, the court may look beyond the pleadings and decide disputed issues of fact. Wyatt,
26 315 F.3d at 1119-20. If the court concludes that the prisoner has failed to exhaust administrative
27 remedies, the proper remedy is dismissal without prejudice. Id.

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1 The California Department of Corrections has an administrative grievance system for
2 prisoner complaints. Cal. Code Regs., tit. 15 § 3084.1 (Deering 2009). The process is initiated
3 by submitting a CDC Form 602. Id. § 3084.2(a). Four levels of appeal are involved, including
4 the informal level, first formal level, second formal level, and third formal level, also known as the
5 “Director’s Level.” Id. § 3084.5. Appeals must be submitted within fifteen working days of the
6 event being appealed, and the process is initiated by submission of the appeal to the informal level,
7 or in some circumstances, the first formal level. Id. §§ 3084.5, 3084.6(c). In order to satisfy
8 section 1997e(a), California state prisoners are required to use this process to exhaust their claims
9 prior to filing suit. Woodford v. Ngo, 548 U.S. 81, 86 (2006); McKinney, 311 F.3d at 1199-
10 1201.

11 Plaintiff does not have to name each defendant in his grievance form. See Jones, 549 U.S.
12 at 218-19 (“The level of detail necessary in a grievance to comply with the grievance procedures
13 will vary from system to system and claim to claim, but it is the prison’s requirements, and not
14 the PLRA, that define the boundaries of proper exhaustion [E]xhaustion is not per se
15 inadequate simply because an individual later sued was not named in the grievances.”). The
16 inmate appeal form CDC-602 does not require identification of specific individuals. See Cal.
17 Code Regs., tit. 15 § 3084.2(a).

18 **C. Arguments**

19 Defendants contend that Plaintiff has not fully exhausted his administrative remedies
20 pertaining to this action. Defendants contend that Plaintiff did not file a grievance related to the
21 events alleged from the time of the first incident in July 2006 through the end of February 2007,
22 when Plaintiff filed his complaint. (Doc. 37, Mem. In Support of Mot. To Dismiss 5:8-13; N.
23 Grannis Decl. ¶ 10; Navarro Decl. ¶ 4.) Defendants submit declarations from N. Grannis, Chief of
24 the Inmate Appeals Branch, and R. Navarro, litigation coordinator at Avenal State Prison.

25 Defendants further contend that the grievance submitted by Plaintiff to demonstrate
26 exhaustion, grievance No. ASP-05-03237, could not be used to exhaust the claims stated in this
27 complaint. (Mem. In Support of Mot. To Dismiss 5:15-23.) That grievance was submitted in
28 December 2005, over six months before the events that give rise to this action. (Id.)

1 Pursuant to title 15, section 3084.6(c) of the California Code of Regulations, inmates are
2 to file a grievance within 15 days following the events appealed from. “[P]roper exhaustion of
3 administrative remedies is necessary” and the exhaustion requirement may not be satisfied “by
4 filing an untimely or otherwise procedurally defective . . . appeal.” Woodford, 548 U.S. at 83-84.
5 “Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural
6 rules” Id. at 90. Defendants have proffered sufficient evidence to demonstrate that Plaintiff
7 did not properly comply with the inmate appeals process.

8 Plaintiff presents no evidence that he exhausted available administrative remedies prior to
9 filing suit.¹ Plaintiff contends that the exhaustion of grievance No. ASP-05-03237 is sufficient
10 because Defendants’ actions were part of an overall chain conspiracy to violate Plaintiff’s
11 constitutional rights. (Doc. 64, p. 15.) However, Plaintiff’s complaint clearly indicates that the
12 first alleged violation occurred in July 2006. (Doc. 3, Compl. 4:24-28.) As stated previously,
13 Plaintiff cannot rely on an inmate appeal filed six months prior to the first alleged violation as
14 proper exhaustion pursuant to prison regulations. Plaintiff’s opposition contends that he filed
15 other inmate appeals, but Plaintiff submits no evidence that these other inmate appeals were ever
16 exhausted prior to filing this suit or even related to this action.

17 Accordingly, Defendants’ motion to dismiss for Plaintiff’s failure to exhaust available
18 administrative remedies should be granted. The proper remedy is dismissal without prejudice.
19 Wyatt, 315 F.3d at 1119-20. Based on the Court’s finding that Plaintiff did not exhaust the
20 available administrative remedies prior to filing suit, the Court does not reach Defendants’
21 arguments regarding dismissal for failure to state a claim. See, e.g., Perez v. Wisconsin Dep’t of
22 Corr., 182 F.2d 532, 534 (7th Cir. 1999) (vacating judgment and remanding with instructions to
23 dismiss for failure to exhaust in case where district court granted summary judgment to
24 defendants on the merits and did not rule on their pending motion for dismissal based on failure to
25 exhaust).

27 ¹ Pursuant to the Federal Rules of Civil Procedure and the Local Rules of this Court, Plaintiff must serve
28 Defendants with his opposition. Fed. R. Civ. P. 5; Local Rule 135(b). It is unclear whether Plaintiff has complied.
The Court will nonetheless consider Plaintiff’s opposition.

1 **III. Conclusion**

2 Based on the foregoing, it is HEREBY ORDERED that the Court's Findings and
3 Recommendations, filed on September 30, 2009, is VACATED.

4 Furthermore, it is HEREBY RECOMMENDED that Defendants' motion to dismiss for
5 failure to exhaust available administrative remedies, filed on March 12, 2009, should be
6 GRANTED, and that this action should be DISMISSED without prejudice.

7 These Findings and Recommendations will be submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
9 **thirty (30) days** after being served with these Findings and Recommendations, the parties may
10 file written objections with the Court. The document should be captioned "Objections to
11 Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file
12 objections within the specified time may waive the right to appeal the District Court's order.
13 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 IT IS SO ORDERED.

15 **Dated: January 11, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE