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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THOMAS D. BRALEY,

Plaintiff,

v.

WASCO STATE PRISON, et al.,

Defendants.

CASE NO. 1:07-cv-01423-AWI-BAM

FINDINGS AND RECOMMENDATIONS
RECOMMENDING GRANTING
DEFENDANTS' MOTION TO DISMISS FOR
FAILURE TO EXHAUST ADMINISTRATIVE
REMEDIES

(ECF Nos. 78, 81, 82)

OBJECTIONS DUE WITHIN THIRTY DAYS

Findings and Recommendations - Defendants' Motion to Dismiss

I. Procedural History

Plaintiff Thomas D. Braley ("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 September 28, 2007. On August 24, 2011, pursuant to 28 U.S.C. § 1915A, the Magistrate Judge issued findings and recommendations recommending dismissing certain claims and defendants. On October 3, 2011, an order adopting the findings and recommendations issued, and this action is proceeding against Defendants Markmann and Miller for failure to protect in violation of the Eighth Amendment.¹ Fed. R. Civ. P. 8(a); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

¹ In the order adopting the findings and recommendations, Plaintiff's remaining Eighth Amendment claims, and Defendants Williams, Martinez, Massa, George, Thompson, Wasco State Prison, C. Cooper, and M. Hunter were dismissed from this action for Plaintiff's failure to state a cognizable claim.

1 On December 15, 2011, Defendant Miller filed a motion to dismiss for failure to exhaust
2 administrative remedies. Fed. R. Civ. P. 12(b). Plaintiff filed an opposition on February 6, 2012.²
3 Defendant Miller filed a reply on February 13, 2012. On March 28, 2012, Defendant Markmann
4 joined in the motion to dismiss. The motion has been deemed submitted. Local Rule 230(l).

5 **II. Failure to Exhaust**

6 **A. Legal Standard**

7 Defendants argue that Plaintiff failed to exhaust his claims in compliance with 42 U.S.C. §
8 1997e(a), subjecting the claims to dismissal. Pursuant to the Prison Litigation Reform Act
9 (“PLRA”) of 1995, “[n]o action shall be brought with respect to prison conditions under [42 U.S.C.
10 § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
11 facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).
12 The section 1997e(a) exhaustion requirement applies to all prisoner suits relating to prison
13 conditions. Woodford v. Ngo, 548 U.S. 81, 85 (2006). All available remedies must be exhausted,
14 not just those remedies that meet federal standards, Woodford, 548 U.S. at 84, nor must they be
15 “plain, speedy, and effective,” Booth v. Churner, 532 U.S. 731, 739 (2001). Prisoners must complete
16 the prison’s administrative process, regardless of the relief sought by the prisoner and regardless of
17 the relief offered by the process, as long as the administrative process can provide some sort of relief
18 on the complaint stated. Id at 741; see Woodford, 548 U.S. at 93.

19 The California Department of Corrections has an administrative grievance system for
20 prisoner complaints. Cal. Code Regs., tit. 15 § 3084, et seq. “Any inmate or parolee under the
21 department’s jurisdiction may appeal any departmental decision, action, condition, or policy which
22 they can demonstrate as having an adverse effect upon their welfare.” Cal. Code Regs. tit. 15, §
23 3084.1(a). At the time of the claims at issue in this action, four levels of appeal were involved,
24 including the informal level, first formal level, second formal level, and third formal level, also
25 known as the “Director’s Level.” Cal. Code Regs. tit 15, § 3084.5.

26 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative
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28 ²Plaintiff was provided with notice of the requirements for opposing a motion to dismiss for failure to exhaust in an order filed on October 18, 2011. Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003).

1 defense which defendants have the burden of raising and proving the absence of exhaustion. Lira
2 v. Herrera, 427 F.3d 1164, 1171 (9th Cir. 2005). The failure to exhaust nonjudicial administrative
3 remedies that are not jurisdictional is subject to an unenumerated Rule 12(b) motion, rather than a
4 summary judgment motion. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) (citing Ritza
5 v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 368 (9th Cir. 1998) (per curium)).
6 "In deciding a motion to dismiss for failure to exhaust, a court may look beyond the pleadings and
7 decide disputed issues of fact." Sapp v. Kimbrell, 623 F.3d. 813, 821 (9th Cir. 2010) (quoting
8 Wyatt, 315 F.3d at 1119-20). If the court concludes that the prisoner has failed to exhaust
9 administrative remedies, the proper remedy is dismissal without prejudice, even where there has
10 been exhaustion while the suit is pending. Lira, 427 F.3d at 1171.

11 **B. Discussion**

12 **1. Plaintiff's Claims**

13 Plaintiff alleges that on August 9, 2007, while incarcerated at Wasco State Prison, Inmate
14 Gary Battle was moved into Plaintiff's cell. Plaintiff claims that ninety percent of the prison staff
15 know Battle from past cell fights. On the first day that Battle was placed in Plaintiff's cell, he went
16 through Plaintiff's personal property. Plaintiff states that Battle kicked and threw Plaintiff's
17 wheelchair. On August 12, 2007, Plaintiff informed Defendant Markmann about Battle, but
18 Defendant Markmann did not do anything about the situation. (Second Amended Compl. 3,³ ECF
19 No. 51.)

20 On August 24, 2007, Plaintiff gave Defendant Markmann a note listing all the staff that
21 Plaintiff had requested move Battle, and Defendant Markmann did not do anything. On August 27,
22 2007, Battle told Defendant Markmann that he was going to kill Plaintiff if Plaintiff was not moved
23 out of the cell. Defendant Markmann just smiled and walked away. On September 4, 2007, Battle
24 threw Plaintiff's wheelchair and broke it. (Id.)

25 On September 9, 2007, Defendant Markmann returned from days off. Defendant Markmann
26 spoke to Plaintiff about Plaintiff complaining that Defendant Markmann had not moved Battle.

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28 ³All references to pagination of specific documents pertain to those as indicated on the upper right corners
via the CM/ECF electronic court docketing system.

1 Defendant Markmann told Plaintiff that he was not moving Battle. On September 17, 2007, Battle
2 attacked Plaintiff. Defendant Miller saw Plaintiff being attacked by Battle. Two times Battle told
3 Defendant Miller to walk away, and Defendant Miller did. After the attack, Plaintiff was taken to
4 the medical clinic. (Id. at 5.)

5 **2. Exhaustion of Eighth Amendment Claim**

6 Defendants contend that, during the time he was housed at Wasco State Prison, Plaintiff filed
7 three inmate appeals. None of the appeals filed by Plaintiff address the incidents alleged in the
8 second amended complaint. Since Plaintiff did not submit any inmate appeals regarding his claims
9 that Defendants Markmann and Miller failed to protect him, Plaintiff failed to exhaust his
10 administrative remedies, and the motion to dismiss should be granted.

11 In his opposition, Plaintiff does not address Defendants' contention that he did not file an
12 inmate appeal regarding the claims proceeding in this action. Rather Plaintiff argues that he was not
13 required to exhaust his administrative remedies in order to bring this action. Plaintiff further alleges
14 that, after he was transferred from Wasco State Prison, his property was taken from him, and his
15 inmate appeals have not been processed.

16 Defendants evidence shows that while Plaintiff was housed at Wasco State Prison he
17 submitted three inmate appeals. Two of the appeals grieved ADA accommodations and Plaintiff did
18 not pursue the appeals beyond the first level. The second appeal was a medical appeal and was not
19 submitted for third level review.

20 In support of his opposition, Plaintiff submits seventy three pages of exhibits. A review of
21 the inmate appeals which Plaintiff attaches as exhibits, reveals that the appeals all involve incidents
22 after he was transferred from Wasco State Prison.

23 Plaintiff relies on Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961); White
24 v. California, 195 Cal.App.3d 452 (1987); and Graham v. Bryant, 123 Cal.App.2d 66 (1954), to
25 support his argument that he is not required to exhaust his administrative remedies prior to filing
26 suit. In Deering Milliken, Inc., the plaintiff was seeking an injunction against the National Relations
27 Labor Board. The court found that the plaintiff did not need to exhaust administrative remedies
28 because the National Labor Relations Act did not provide an adequate remedy for enforcement.

1 Deering Milliken, Inc., 295 F.2d at 866. In White the court found that the Education of the
2 Handicapped Act (“EHA”) did not have an effective remedy for past wrongs, and therefore, the
3 exhaustion requirement did not apply to the handicapped children’s claim that they were
4 systematically excluded from EHA services. White v. California, 195 Cal.App.3d at 466. The
5 plaintiff in Graham was a civil service employee who was seeking a peremptory writ of mandate.
6 The court found that there was no requirement for a civil employee to avail himself of available
7 administrative remedies in order to access the court. Graham, 123 Cal.App.2d at 70. None of the
8 cases cited address the PLRA, and they do not support Plaintiff’s argument that he is not required
9 to exhaust his administrative remedies.

10 Since Plaintiff is a prisoner his claims are governed by the PLRA, and under the PLRA the
11 exhaustion requirement is mandatory. McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002).
12 The requirement that an inmate exhaust administrative remedies prior to bringing suit serves two
13 purposes. “Exhaustion gives an agency an opportunity to correct its own mistakes with respect to
14 the programs it administers before being haled into federal court[,]” and “promotes efficiency by
15 allowing claims to be resolved much more quickly and economically . . . than in litigation in federal
16 court.” Sapp, 623 F.3d at 823 (internal punctuation and citations omitted). The inmate “must
17 complete the administrative review process in accordance with the applicable procedural rules,
18 including deadlines,” Harvey v. Jordan, 605 F.3d 681, 683 (9th Cir. 2010) (citations omitted), as a
19 precondition to bringing suit, McKinney, 311 F.3d at 1200; Harvey, 605 F.3d at 683. The PLRA
20 requires that the administrative grievance process be completed prior to initiating the action in
21 federal court. Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006).

22 In order to find that Plaintiff’s appeals exhausted his administrative remedies the appeals
23 must “ provide enough information . . . to allow prison officials to take appropriate responsive
24 measures.” Griffin v. Arpaio, 557 F.3d 1117, 1121 (9th Cir. 2009) (quoting Johnson v. Testman,
25 380 F.3d 691, 697 (2nd Cir. 2004)). The primary purpose of the grievance is to alert the prison to
26 the problem and facilitate resolution. Griffin, 557 F.3d at 1120. “A grievance suffices to exhaust
27 a claim if it puts the prison on adequate notice of the problem for which the prisoner seeks redress.
28 Sapp, 623 F.3d at 823. None of the appeals submitted by Plaintiff provided information to allow

1 prison officials to take appropriate responsive measures to his claims that Defendants Markmann and
2 Miller failed to protect him.

3 In this instance, Defendants have submitted evidence that Plaintiff did not exhaust his
4 administrative remedies, because he failed to file an inmate grievance regarding the claims
5 proceeding in this action. Since Plaintiff did not exhaust his administrative remedies prior to filing
6 suit, this action must be dismissed, without prejudice. Lira, 427 F.3d at 1171.

7 **III. Conclusion and Recommendation**

8 The Court finds that Plaintiff failed to exhaust his administrative remedies for his failure to
9 protect claims against Defendants Markmann and Miller. Accordingly, the Court HEREBY
10 RECOMMENDS that Defendants' motion to dismiss be granted, and this action be dismissed,
11 without prejudice, for failure to exhaust administrative remedies.

12 These findings and recommendations will be submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30)
14 days after being served with these findings and recommendations, Plaintiff may file written
15 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
16 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
17 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d
18 1153 (9th Cir. 1991).

19 IT IS SO ORDERED.

20 **Dated: April 16, 2012**

21 /s/ Barbara A. McAuliffe
22 UNITED STATES MAGISTRATE JUDGE
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