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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

JOWELL FINLEY,

Plaintiff,

v.

T. GONZALEZ, et al.,

Defendants.

CASE NO. 1:08-cv-00075-LJO-DLB PC

ORDER DISREGARDING PLAINTIFF’S  
MOTIONS

(Docs. 69, 70)

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

(Doc. 60)

/ OBJECTIONS DUE WITHIN 30 DAYS

**Findings and Recommendations**

**I. Background**

Plaintiff Jowell Finley (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation. Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on Plaintiff’s complaint, filed January 15, 2008, against Defendants Pina and Olive for violation of the Eighth Amendment. On October 29, 2009, Defendants’ filed a motion to dismiss for failure to exhaust administrative remedies, pursuant to the unenumerated portion of 12(b) of the Federal Rules of Civil Procedure,. (Doc. 60.) On November 19, 2009, Plaintiff filed his opposition. (Doc. 62.) On December 2, 2009, Defendants filed their reply. (Doc. 63.) The matter is submitted pursuant to Local Rule 230(l).

On February 22, 2010, and April 5, 2010, Plaintiff filed motions seeking a ruling on Defendants’ motion to dismiss. Because the Court issues the following Findings and

1 Recommendations addressing Defendants' motion, Plaintiff's motions are HEREBY  
2 DISREGARDED.

3 **II. Summary of Complaint**

4 Plaintiff contends that on November 12, 2007, Plaintiff was assaulted by his cellmate,  
5 inmate Galbart. Plaintiff contends that Defendant Olive was warned on October 24, 2007 and  
6 October 29, 2007 that he intended to hurt Plaintiff, but that defendant Olive did not do anything.  
7 Plaintiff alleges that Defendant Pina was repeatedly informed of the threats made against  
8 Plaintiff on the day of the assault, but Defendant Pina ignored the threats. Plaintiff alleges a  
9 violation of the Eighth Amendment.<sup>1</sup>

10 **III. Failure to Exhaust Administrative Remedies**

11 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with  
12 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner  
13 confined in any jail, prison, or other correctional facility until such administrative remedies as are  
14 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available  
15 administrative remedies prior to filing suit. *Jones v. Bock*, 549 U.S. 199, 211, 127 S. Ct. 910,  
16 918-19 (2007); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (per curiam).  
17 Exhaustion is required regardless of the relief sought by the prisoner and regardless of the relief  
18 offered by the process, *Booth v. Churner*, 532 U.S. 731, 741, 121 S.Ct. 1819 (2001), and the  
19 exhaustion requirement applies to all prisoner suits relating to prison life, *Porter v. Nussle*, 435  
20 U.S. 516, 532, 122 S. Ct. 983 (2002).

21 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative  
22 defense under which Defendants have the burden of raising and proving the absence of  
23 exhaustion. *Jones*, 127 S. Ct. at 921; *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003).  
24 The failure to exhaust nonjudicial administrative remedies that are not jurisdictional is subject to  
25 an unenumerated Rule 12(b) motion, rather than a summary judgment motion. *Wyatt*, 315 F.3d  
26 at 1119 (citing *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 368 (9th  
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28 <sup>1</sup> The Court dismissed all of Plaintiff's other claims for failure to state a claim upon which relief may be granted. (Doc. 21, Findings and Recommendations; Doc. 27, Order Adopting Findings and Recommendations.)

1 Cir. 1998) (per curiam)). In deciding a motion to dismiss for failure to exhaust administrative  
2 remedies, the Court may look beyond the pleadings and decide disputed issues of fact. *Wyatt*,  
3 315 F.3d at 1119-20. If the Court concludes that the prisoner has failed to exhaust administrative  
4 remedies, the proper remedy is dismissal without prejudice. *Id.*

5 **IV. Discussion**

6 The California Department of Corrections and Rehabilitation (“CDCR”) has an  
7 administrative grievance system for prisoner complaints. Cal. Code Regs., tit. 15 § 3084.1  
8 (2009). The process is initiated by submitting a CDC Form 602. *Id.* § 3084.2(a). Four levels of  
9 appeal are involved, including the informal level, first formal level, second formal level, and  
10 third formal level, also known as the “Director’s Level.” *Id.* § 3084.5. Appeals must be  
11 submitted within fifteen working days of the event being appealed, and the process is initiated by  
12 submission of the appeal to the informal level, or in some circumstances, the first formal level.  
13 *Id.* §§ 3084.5, 3084.6(c). In order to satisfy section 1997e(a), California state prisoners are  
14 required to use this process to exhaust their claims prior to filing suit. *Woodford v. Ngo*, 548  
15 U.S. 81, 85-86, 126 S. Ct. 2378 (2006); *McKinney*, 311 F.3d at 1199-1201. Exhaustion does not  
16 *always* require pursuit of an appeal through the Director’s Level of review. What is required to  
17 satisfy exhaustion is a fact specific inquiry, and may be dependent upon prison officials’ response  
18 to the appeal. *See Brown v. Valoff*, 422 F.3d 926, 935-36 (9th Cir. 2005).

19 Defendants contend that Plaintiff did not exhaust his administrative remedies prior to the  
20 filing of this action. Defendants contend that Plaintiff did file an administrative remedy  
21 regarding Defendants’ alleged failure to protect. (Doc. 60, Mot. To Dismiss 5:12-14.) However  
22 the Director’s level decision was issued April 16, 2008, four months after Plaintiff initiated this  
23 action. (*Id.*) Defendants submit as evidence a declaration from N. Grannis, Chief of the Inmate  
24 Appeals Branch for the CDCR, and the Director’s level decision regarding Grievance No. Cor-  
25 07-05302, dated April 16, 2008. (N. Grannis Decl.; Exh. 1.) Grannis declares that no other  
26 grievances concerning this incident were filed. (Grannis Decl. ¶ 6.)

27 Defendants have met their burden of demonstrating that Plaintiff failed to exhaust  
28 administrative remedies. The burden shifts to Plaintiff to demonstrate compliance.

1 In opposition, Plaintiff attests that he exhausted his administrative remedies. (Doc. 62,  
2 Opp'n ¶ 4.) Plaintiff attests that he filed a civil rights complaint in January 2008. (*Id.* ¶ 5.)  
3 Plaintiff attests that prior to determining the merits of the case, and before Defendants were  
4 served with summons and complaint, Plaintiff had exhausted his administrative remedies. (*Id.*)

5 Plaintiff has failed to demonstrate that he exhausted his administrative remedies in  
6 compliance with the PLRA. As previously stated, prisoners are required to exhaust the available  
7 administrative remedies **prior** to filing suit. *McKinney*, 311 F.3d at 1199-1201. “[A]n action is  
8 ‘brought’ for purposes of § 1997e(a) when the complaint is tendered to the district clerk . . . .”  
9 *Vaden v. Summerhill*, 449 F.3d 1047, 1050 (9th Cir. 2006) (quoting *Ford v. Johnson*, 362 F.3d  
10 395, 400 (7th Cir. 2004)). Plaintiff brought this action on January 15, 2008. (Doc. 1.) Plaintiff  
11 exhausted his administrative remedies on April 15, 2008. Thus, Plaintiff did not exhaust his  
12 administrative remedies **prior** to filing suit, and did not comply with § 1997e(a).

13 **V. Conclusion and Recommendation**

14 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 15 1) Defendants’ motion to dismiss pursuant to Rule 12(b) of the Federal Rules of  
16 Civil Procedure, filed October 29, 2009, should be GRANTED; and  
17 2) This action be DISMISSED, without prejudice, for Plaintiff’s failure to exhaust  
18 administrative remedies pursuant to 42 U.S.C. § 1997e(a).

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

26 IT IS SO ORDERED.

27 **Dated: April 19, 2010**

/s/ Dennis L. Beck  
UNITED STATES MAGISTRATE JUDGE