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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ERNEST MILLER,

Plaintiff,

v.

CALIFORNIA STATE PRISON, et al.,

Defendants.

CASE NO. 1:08-cv-00234-OWW-SMS PC

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DEFENDANTS' MOTION  
TO DISMISS FOR FAILURE TO EXHAUST BE  
GRANTED

(Doc. 60)

OBJECTIONS DUE WITHIN THIRTY DAYS

**Defendants' Motion to Dismiss for Failure to Exhaust**

**I. Background**

Plaintiff Ernest Miller, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on February 15, 2008. The action is proceeding on Plaintiff's second amended complaint, filed September 15, 2008, against Defendant Rodriguez for interference with Plaintiff's mail and for retaliation, in violation of the First Amendment; against Defendants Vikjord, Hernandez, Price, Freshcura, and Brandon for withholding Plaintiff's outgoing mail in violation of the First Amendment; against Defendants Vikjord, Hernandez, and Price for retaliation in violation of the First Amendment; and against all six named defendants for denial of equal protection in violation of the Fourteenth Amendment.

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1 On June 26, 2009, Defendants filed a motion to dismiss for failure to exhaust, pursuant to  
2 the unenumerated portion of Federal Rule of Civil Procedure 12(b). Plaintiff filed an opposition on  
3 July 9, 2009, and Defendants filed a reply on July 15, 2009.<sup>1</sup> Local Rule 78-230(m).

## 4 **II. Statutory Exhaustion Requirement**

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

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

## 24 **III. Discussion**

25 The California Department of Corrections and Rehabilitation has an administrative grievance  
26 system for prisoner complaints. Cal. Code Regs., tit. 15 § 3084.1 (2009). The process is initiated  
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28 <sup>1</sup> Plaintiff was provided with notice of the requirements for opposing an unenumerated Rule 12(b) motion  
on January 7, 2009. Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003). (Doc. 38.)

1 by submitting a CDC Form 602. Id. at § 3084.2(a). Four levels of appeal are involved, including  
2 the informal level, first formal level, second formal level, and third formal level, also known as the  
3 “Director’s Level.” Id. at § 3084.5. Appeals must be submitted within fifteen working days of the  
4 event being appealed, and the process is initiated by submission of the appeal to the informal level,  
5 or in some circumstances, the first formal level. Id. at §§ 3084.5, 3084.6(c). In order to satisfy  
6 section 1997e(a), California state prisoners are required to use this process to exhaust their claims  
7 prior to filing suit. Woodford v. Ngo, 548 U.S. 81, 85-86, 126 S.Ct. 2378 (2006); McKinney, 311  
8 F.3d at 1199-1201.

9 Defendants move for dismissal of the claims against them on the ground that Plaintiff did not  
10 exhaust. Defendants submit evidence that Plaintiff filed appeal log number COR-07-04342 against  
11 Defendant Rodriguez on September 13, 2007, grieving property issues and seeking the removal of  
12 Defendant from his position for discrimination and fraud. (Doc. 61-2, Jones Dec., ¶¶5-7.) That  
13 appeal was exhausted via denial at the third and final level of review on March 6, 2008, after this  
14 suit was filed. (Doc. 61-3, Grannis Dec., ¶¶4-6.) No other appeals involving the Defendants and  
15 the claims against them in this action were filed. (Jones Dec., ¶¶5-7; Grannis Dec., ¶¶4-6.)

16 In opposition, Plaintiff argues that he filed an appeal concerning mail tampering that was  
17 completed through the second level of review, and returned to him on May 11, 2007. (Doc. 63,  
18 Opp., p. 1.) On May 12, 2007, Plaintiff was moved to another building, and his property, apparently  
19 including the appeal, was taken and never returned. (Id.) In addition, Plaintiff cites to appeal log  
20 number 07-04342 as evidence of exhaustion. (Id.)

21 Plaintiff’s claims in this action arise from events which occurred while Plaintiff was  
22 incarcerated at California State Prison-Corcoran. Specifically, Plaintiff alleges that on September  
23 7, 2007, Defendant Rodriguez confiscated his property and told him he had nothing coming in terms  
24 of packages or mail because he testified against officers at High Desert State Prison, and that from  
25 August 2007 through February 2008, Defendants Vikjord, Hernandez, Price, Frescura, and Brandon  
26 withheld his outgoing mail. (Doc. 28, 2nd Amend. Comp., § IV.) Plaintiff also alleges that guards  
27 on the Corcoran SHU yard do not like African-American prisoners, and during the last week of  
28 August 2007, Defendants Vikjord, Hernandez, and Price stated in front of other prisoners,

1 “Prisoner/Nigger is a P/C - protective custody - rat [because] he testified on correctional officers at  
2 H.D.S.P.”, and he gets no mail or packages. (Id.)

3 Plaintiff’s vague reference to an appeal that was apparently lost during a building move in  
4 May 2007 is not sufficient to demonstrate exhaustion. First, Plaintiff’s claims arose between August  
5 2007 and February 2008, making it impossible for a May 2007 appeal to have grieved the conduct  
6 at issue in this action. Further, even had the appeal been submitted during a relevant time period,  
7 Plaintiff fails to specify in his opposition what facts or misconduct was raised in the appeal, which  
8 precludes the Court from determining what claims the appeal sufficiently grieved. Plaintiff also fails  
9 to offer any explanation for his failure to obtain a copy from the appeals office or otherwise take  
10 steps that would have allowed him to submit the appeal to the final level of review.

11 Finally, log number 07-04342, submitted on September 13, 2007, complained about property  
12 issues involving Defendant Rodriguez. “[T]he primary purpose of a grievance is to notify the prison  
13 of a problem, and facilitate its resolution.” Griffin v. Arpaio, 5557 F.3d 1117, 1120 (9th Cir. 2009).  
14 In the absence of greater specificity required by the applicable regulations, a grievance is sufficient  
15 “if it alerts the prison to the nature of the wrong for which redress is sought.” Id. (quoting Strong  
16 v. David, 297 F.3d 646, 650 (7th Cir. 2002)). In California, inmates are required to describe the  
17 problem and the action requested. Cal. Code Regs., tit. 15 § 3084.2(a) (West 2009).

18 In submitting the appeal to the first level of review, Plaintiff wrote, “All due to racial  
19 discrimination,” and the appeal responses acknowledge Plaintiff’s reference to discrimination.  
20 However, because the Director’s Level decision was not issued until March 6, 2008, to the extent  
21 the appeal sufficiently grieved Plaintiff’s claims against Defendant Rodriguez for interference with  
22 mail and racial discrimination, the appeal was not exhausted prior to the filing of this suit. Jones,  
23 549 U.S. at 211; McKinney, 311 F.3d at 1199-1201. In addition, the appeal did not exhaust  
24 Plaintiff’s other claims in this action. Defendants are entitled to dismissal of this action.

25 **IV. Conclusion and Recommendation**

26 Defendants have met their burden of demonstrating that Plaintiff failed to exhaust prior to  
27 filing suit, in compliance with section 1997e(a). Appeal log number 07-04342 was not exhausted  
28 prior to the filing of this action, and Plaintiff has not submitted evidence of any other appeals that

1 satisfy the exhaustion requirement. Therefore, the Court HEREBY RECOMMENDS Defendants'  
2 motion to dismiss, filed June 26, 2009, be GRANTED, and this action be dismissed, without  
3 prejudice, based on Plaintiff's failure to exhaust.

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

11  
12 IT IS SO ORDERED.

13 **Dated: July 27, 2009**

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE