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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAQUES FEARENCE,

1:08-cv-00615-LJO-GSA-PC

Plaintiff,

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT DEFENDANTS’
MOTION TO DISMISS FOR FAILURE TO
EXHAUST BE GRANTED
(Doc. 22.)

v.

L. L. SCHULTEIS, et al.,

Defendants.

**OBJECTIONS, IF ANY, DUE IN THIRTY (30)
DAYS**

I. BACKGROUND

Jaques Fearence (“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 the Complaint commencing this action on May 1, 2008. (Doc. 1.) This case now proceeds on Plaintiff’s First Amended Complaint, filed on March 1, 2010, against defendants Sergeant J. Busby, Correctional Officer (“C/O”) T. C. Davis, C/O Duffy, and Lieutenant S. Hopkins (collectively “Defendants”) for use of excessive force in violation of the Eighth Amendment. (Doc. 10.) On December 16, 2011, Defendants filed a motion to dismiss under Rules 12(b) and 12(b)(6), on the grounds that Plaintiff failed to exhaust administrative remedies for the claims against Defendants before filing suit, and failed to state an Eighth Amendment excessive force claim against defendants Davis and Duffy. (Doc. 22.) On

1 February 15, 2012, Plaintiff filed an opposition to the motion.¹ (Doc. 25.) On February 22, 2012,
2 Defendants filed a reply to Plaintiff's opposition. (Doc. 26.) Defendants' motion to dismiss is now
3 before the Court.

4 **II. PLAINTIFF'S ALLEGATIONS**

5 Plaintiff is a state prisoner presently incarcerated at Pelican Bay State Prison in Crescent City,
6 California. The events at issue in this action allegedly occurred at the California Correctional
7 Institution ("CCI") in Tehachapi, California, when Plaintiff was incarcerated there. Plaintiff alleges
8 as follows in the First Amended Complaint.

9 On August 11, 2005, Plaintiff was removed from his cell with restraints on his ankles and
10 hands, and placed in a holding cage. Defendants Sergeant J. Busby, C/O T. C. Davis, C/O Duffy,
11 and Lieutenant S. Hopkins then subjected him to verbal abuse. Defendant Hopkins reached into the
12 cage and assaulted Plaintiff aggressively. Defendants put on gas masks and agreed to pepper spray
13 Plaintiff, even though Plaintiff did not pose any threat to staff or anyone. Defendant Busby sprayed
14 a whole can of O.C. pepper spray. Defendants Hopkins, Busby, Davis, and Duffy were all involved
15 in the incident. Plaintiff requests unspecified relief.

16 **III. MOTION TO DISMISS FOR FAILURE TO EXHAUST**

17 **A. Statutory Exhaustion Requirement**

18 Section 1997e(a) of the Prison Litigation Reform Act of 1995 ("PLRA") provides that "[n]o
19 action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other
20 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such
21 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Prisoners are
22 required to exhaust the available administrative remedies prior to filing suit. Jones v. Bock, 549 U.S.
23 199, 211, 127 S.Ct. 910, 918-19 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir.
24 2002). Exhaustion is required regardless of the relief sought by the prisoner and regardless of the
25 relief offered by the process, Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct. 1819 (2001), and the

26
27 ¹Plaintiff was provided with notice of the requirements for opposing an unenumerated Rule 12(b) motion on
28 September 23, 2011, July 9, 2012, and August 23, 2012. Woods v. Carey, 684 F.3d 934 (9th Cir. 2012) Wyatt v.
Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003); Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998). (Docs. 17, 28,
30.) On August 23, 2012, the Court granted Plaintiff the opportunity to file an amended opposition to Defendants'
motion within thirty days, but Plaintiff did not do so. (Doc. 29.)

1 exhaustion requirement applies to all prisoner suits relating to prison life, Porter v. Nussle, 435 U.S.
2 516, 532, 122 S.Ct. 983 (2002).

3 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative
4 defense under which Defendants have the burden of raising and proving the absence of exhaustion.
5 Jones, 549 U.S. at 216; Wyatt, 315 F.3d at 1119. The failure to exhaust nonjudicial administrative
6 remedies that are not jurisdictional is subject to an unenumerated Rule 12(b) motion, rather than a
7 summary judgment motion. Wyatt at 1119 (citing Ritza v. Int'l Longshoremen's & Warehousemen's
8 Union, 837 F.2d 365, 368 (9th Cir. 1998) (per curium)). In deciding a motion to dismiss for failure
9 to exhaust administrative remedies, the Court may look beyond the pleadings and decide disputed
10 issues of fact. Wyatt at 1119-20. If the Court concludes that the prisoner has failed to exhaust
11 administrative remedies, the proper remedy is dismissal without prejudice. Id.

12 The Court takes judicial notice of the fact that the California Department of Corrections and
13 Rehabilitation ("CDCR") has an administrative grievance system for prisoner complaints. Cal.Code
14 Regs., tit. 15 § 3084.1 (2005). The process is initiated by submitting a CDC Form 602. Id. at §
15 3084.2(a). In 2005, prisoners were required to submit appeals within fifteen working days of the
16 event being appealed, and the process is initiated by submission of the appeal to the informal level,
17 or in some circumstances, the first formal level. Id. at §§ 3084.5, 3084.6(c) (2005). Four levels of
18 appeal are involved, including the informal level, first formal level, second formal level, and third
19 formal level, also known as the "Director's Level." Id. at § 3084.5. In order to satisfy § 1997e(a),
20 California state prisoners are required to use this process to exhaust their claims prior to filing suit.
21 Woodford v. Ngo, 548 U.S. 81, 85 (2006); McKinney, 311 F.3d. at 1199-1201.

22 **B. Defendants' Motion**

23 Defendants argue that this action should be dismissed because Plaintiff failed to exhaust the
24 CDCR's administrative appeals process regarding his claims against Defendants. Defendants
25 acknowledge that Plaintiff submitted a prison grievance, log number CCI-05-02644, in September
26 2005, regarding Defendants' alleged actions of August 11, 2005. (First Amd. Cmp., Doc. 10, Exh.
27 1.) Defendants also acknowledge that on September 27, 2005, the grievance was denied at the
28 second level of review. (Id.; Declaration of Sampson, Doc. 22-3 ¶¶3-4). However, Defendants

1 argue that Plaintiff failed to complete the grievance process because he did not submit the appeal to
2 the third level of review until nearly three years later on November 19, 2008, which was untimely.
3 (First Amd. Cmp., Doc. 10, Exh. 1; Declaration of Foston, Doc. 22-2 ¶¶6-8.)

4 **C. Plaintiff's Opposition**

5 The Court looks to Plaintiff's opposition filed on February 15, 2012, Plaintiff's Complaint
6 filed on May 1, 2008, and Plaintiff's First Amended Complaint filed on March 1, 2010.² Plaintiff
7 declares that he did not complete the appeals process because correctional officers searched his cell
8 and confiscated and lost his appeal before he could send it to the third level of review. (Complaint,
9 Doc. 1 at 2 ¶II.C.) Plaintiff submits a copy of the appeal, log number CCI-05-02644, dated
10 September 2, 2005, and a copy of the second level response denying the appeal, dated September 27,
11 2005. (Id. at 5-6, 8-9.) Plaintiff also submits copies of letters from Plaintiff to the Chief Director
12 of Corrections (dated October 21, 2005; January 21, 2006; April 23, 2006, and May 31, 2007) and
13 Warden Schulteis (dated October 28, 2005; January 31, 2006; and April 27, 2006), requesting
14 assistance in exhausting his appeal to the third level of review. (Id. at 29-35.) On November 19,
15 2008, Plaintiff's appeal was screened out at the third level of review, for failure to submit the appeal
16 within 15 working days. (First Amd Cmp, Doc. 10 at 2 ¶II.C, 10.)

17 In his unverified opposition, asserts that he attempted to file a new appeal, complaining about
18 the cell search, and wrote letters to the Chief Director of Corrections and Warden Schulteis, but he
19 did not receive any response. Plaintiff asserts that he requested an Olson Review and was able to
20 obtain a copy of the appeal from his C-File, after which he sent the appeal to the third level of
21 review. Plaintiff argues that he used due diligence in his attempts to abide by the PLRA, and it was
22 because prison officials confiscated his property and failed to respond to his letters that his
23 administrative remedies were unavailable to him.

24 ///

26 ²In deciding a motion to dismiss for failure to exhaust administrative remedies, the Court may look beyond
27 the pleadings and decide disputed issues of fact. Wyatt, 315 F.3d at 1119-20. Plaintiff signed the Complaint and
28 First Amended Complaint under penalty of perjury. (Doc. 1 at 3; Doc. 10 at 3.) Therefore, Plaintiff's opposition to
the motion to dismiss is based in part on the evidence in his verified complaints and their accompanying exhibits.
However, Plaintiff's opposition filed on February 15, 2012 is not verified and therefore does not contain admissible
evidence. (Doc. 25.)

1 ***Discussion***

2 The parties do not disagree that Plaintiff failed to exhaust his remedies at the third level of
3 review with respect to the allegations and claims upon which this action proceeds. However, a third
4 level, or Director's Level, response is not necessary to satisfy the exhaustion requirement and the
5 mere absence of a Director's Level response does not entitle Defendants to dismissal. Brown v.
6 Valoff, 422 F.3d 926, 935-36 (9th Cir. 2005) (“[A] prisoner need not press on to exhaust further
7 levels of review once he has either received all ‘available’ remedies at an intermediate level or has
8 been reliably informed by an administrator that no remedies are available”). As discussed above,
9 § 1997e(a) provides that “[n]o action shall be brought with respect to prison conditions under [42
10 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other
11 correctional facility until such administrative remedies *as are available* are exhausted.” 42 U.S.C.
12 § 1997e(a) (emphasis added). The question here is whether Plaintiff exhausted all of the remedies
13 that were made available to him.

14 Plaintiff's argument that he was prevented by prison officials from submitting his appeal to
15 the third level of review until 2008, despite his due diligence, is unpersuasive. Pursuant to
16 regulations in effect in 2005, Plaintiff was required to submit his appeal to the third level of review
17 within fifteen working days of “the event or decision being appealed, or of receiving an unacceptable
18 lower level appeal decision.” Cal.Code Regs., tit. 15 § 3084.6(c) (2005). The response denying
19 Plaintiff's appeal at the second level of review is dated September 27, 2005 and signed by prison
20 officials on October 3, 2005 and October 4, 2005. (Complaint, Doc. 1 at 5-6.) While there is no
21 evidence of the exact date Plaintiff received the lower level decision, Plaintiff's evidence shows that
22 by October 21, 2005, when he wrote to the Chief Director of Corrections, he had received the second
23 level response . (Exhibit to Complaint, Doc. 1 at 29.) In the October 21, 2005 letter, Plaintiff stated
24 that his copy of the response had been confiscated by prison officials during a cell search; he had
25 submitted a new 602 appeal regarding the cell search and "to retrieve [his earlier appeal] back;" and
26 he "never got any responses" to the new 602 appeal because it was "never processed." Id. Plaintiff
27 argues that the six letters he wrote to prison administrators between October 21, 2005 and May 31,
28 2007 showed due diligence in attempting to complete the appeals process.

1 Plaintiff's communications to the Warden and the Director of Corrections neither excused
2 his failure to submit an appeal to the third level of review within fifteen days, nor relieved him from
3 proceeding through all the steps in the grievance process. See Woodford, 548 U.S. at 91, 93
4 (exhaustion under the PLRA requires "compliance with an agency's deadlines and other critical
5 procedural rules"); Wilson v. Wann, No. CIV S-06-1629 GEB KJM P, 2008 WL 4166886, at *2
6 (E.D.Cal. Sept.8, 2008) (plaintiff's letters to the Office of the Inspector General, Office of Internal
7 Affairs and the Warden were insufficient to show exhaustion). Plaintiff also contends that he was
8 diligent in submitting a new 602 appeal regarding the cell search, in an attempt to get the confiscated
9 copy back, but there is no evidence that Plaintiff followed up on the new appeal, which he claims
10 was never processed. There is no evidence that Plaintiff sent a timely appeal to the Director's Level
11 explaining his situation, or attempted before 2008 to obtain another copy of the appeal from his C-
12 File or the Appeals Coordinator. Plaintiff did not attempt to complete the grievance process until
13 after he had filed this lawsuit. The PLRA requires that prisoners exhaust the "administrative
14 remedies as are *available*" prior to filing suit, and pertinent relief remained available to Plaintiff
15 through submitting an appeal to the Director's Level before the fifteen day deadline expired.
16 Therefore, Plaintiff failed to comply with § 1997e(a), which required him to exhaust his *available*
17 remedies before filing suit, and Defendants are entitled to dismissal of this action.

18 **IV. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

19 Defendants also argue that the claims against defendants Davis and Duffy should be
20 dismissed based on Plaintiff's failure to state an Eighth Amendment excessive force claim against
21 them.

22 The Court has found that Plaintiff failed to exhaust the available administrative remedies and
23 that Defendants are entitled to dismissal of the action on this ground. Based on the Court's finding
24 that Plaintiff failed to exhaust his available remedies, the Court does not reach Defendants' other
25 arguments. See Perez v. Wisconsin Dep't of Corr., 182 F.3d 532, 534 (7th Cir. 1999) (vacating
26 judgment and remanding with instructions to dismiss for failure to exhaust in case where district
27 court granted summary judgment to defendants on the merits and did not rule on their pending
28 motion for dismissal based on failure to exhaust).

1 **V. CONCLUSION AND RECOMMENDATION**

2 Defendants have met their burden of demonstrating that Plaintiff failed to exhaust his
3 administrative remedies prior to filing suit, in compliance with § 1997e(a). Defendants have shown
4 evidence that Plaintiff failed to exhaust his remedies by an inmate appeal pursuant to Title 15 of the
5 California Code of Regulations § 3084.1, et seq., concerning Plaintiff's allegations in the complaint
6 against Defendants in this action. Plaintiff has not shown that he exhausted all the remedies
7 available to him. Therefore, the Court HEREBY RECOMMENDS that Defendants' motion to
8 dismiss, filed on December 16, 2011, be GRANTED, dismissing this action without prejudice.

9 These Findings and Recommendations will be submitted to the United States District Court
10 Judge assigned to this action pursuant to the provisions of 28 U.S.C. § 636 (b)(1). Within thirty (30)
11 days after being served with a copy of these Findings and Recommendations, any party may file
12 written objections with the Court and serve a copy on all parties. Such a document should be
13 captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the
14 objections shall be served and filed within ten (10) days after service of the objections. The parties
15 are advised that failure to file objections within the specified time may waive the right to appeal the
16 order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17
18 IT IS SO ORDERED.

19 Dated: November 5, 2012

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE