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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION**

LARRY DONNELL BOGARD,
BOP #80859-011,

Plaintiff,

vs.

JESSIE BERNAL,

Defendant.

Civil No. 1:08-1157 MJL (NLS)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS PURSUANT
TO FED.R.CIV.P. 12(b)**

I.

PROCEDURAL HISTORY

On August 6, 2008, Plaintiff, an inmate currently incarcerated at the Federal Correctional Institution in Big Spring, Texas and proceeding pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) which the Court granted on August 14, 2008 [Doc. No. 6].

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1 On November 25, 2008, this matter was reassigned to District Judge M. James Lorenz
2 for all further proceedings [Doc. No. 10]. The United States Marshal was directed to effect
3 service of Plaintiff's Complaint upon Defendant Bernal. *See* Jan. 8, 2009 Order at 3-4. On June
4 10, 2009, Defendant Bernal filed a Motion to Dismiss pursuant to FED.R.CIV.P. 12(b) and
5 12(b)(6). Plaintiff filed his Opposition to the Defendant's Motion on August 12, 2009 [Doc. No.
6 21].

7 II.

8 FACTUAL ALLEGATIONS

9 On February 13, 2008, Plaintiff, a federal inmate, was housed at the Taft Correctional
10 Institution which is operated by a private company, Management & Training Corporation
11 ("MTC"). *See* Compl. at 3. Plaintiff, an African American, claims that he approached his "Unit
12 Manager," Jessie Bernal, to inquire whether he could be employed as an orderly in his housing
13 unit. *Id.* at 1. Plaintiff claims that Defendant Bernal replied that he would never give an
14 African American inmate a job as an orderly and used a racially derogatory word. *Id.* at 2. At
15 the time of his request, Plaintiff was employed in the prison's chapel. *Id.* As Plaintiff left, he
16 claims Defendant Bernal told him "watch for your name in food service." *Id.* Plaintiff alleges
17 that it is well known throughout the federal prison institutions that work assignments in the food
18 service department are considered punishment. *Id.* Jobs in the food service department are
19 "often dangerous jobs that imperil [prisoner's] safety and where physical injury is common."
20 *Id.* at 3. Plaintiff alleges Defendant Bernal ordered that Plaintiff be fired from his chapel job and
21 placed in the food services department. *Id.* Plaintiff claims that "Bernal was obviously
22 motivated by [Bernal's] racial discrimination against the plaintiff, who [Bernal] viewed as
23 having the effrontery, as an African-American, to ask [Bernal] for a job." *Id.*

24 III.

25 DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)

26 Defendant Bernal moves to dismiss Plaintiff's entire Complaint for failing to exhaust
27 available administrative remedies pursuant to FED.R.CIV.P. 12(b) and 42 U.S.C. § 1997e(a).

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1 **A. Standard of Review per FED.R.CIV.P. 12(b) and 42 U.S.C. § 1997e(a)**

2 Defendant claims Plaintiff failed to exhaust his available administrative remedies
3 pursuant to 42 U.S.C. § 1997e(a) before bringing this suit, therefore, he seeks dismissal under
4 the “non-enumerated” provisions of FED.R.CIV.P. 12(b). The Ninth Circuit has held that “failure
5 to exhaust nonjudicial remedies is a matter of abatement” not going to the merits of the case and
6 is properly raised pursuant to a motion to dismiss, including a non-enumerated motion under
7 FED.R.CIV.P. 12(b). See *Ritza v. Int’l Longshoremen’s & Warehousemen’s Union*, 837 F.2d
8 365, 368-69 (9th Cir. 1988); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (finding a
9 non-enumerated motion under Rule 12(b) to be “the proper pretrial motion for establishing
10 nonexhaustion” of administrative remedies under 42 U.S.C. § 1997e(a)).¹ *Wyatt* also holds that
11 non-exhaustion of administrative remedies as set forth in 42 U.S.C. § 1997e(a) is an affirmative
12 defense which defendant prison officials have the burden of raising and proving. *Wyatt*, 315
13 F.3d at 1119. However, unlike under Rule 12(b)(6), “[i]n deciding a motion to dismiss for
14 failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide
15 disputed issues of fact.” *Id.* at 1120 (citing *Ritza*, 837 F.2d at 369).

16 **B. Exhaustion of Administrative Remedies per 42 U.S.C. § 1997e(a)**

17 The Prison Litigation Reform Act (“PLRA”) amended 42 U.S.C. § 1997e(a) to provide
18 that “[n]o action shall be brought with respect to prison conditions under section 1983 . . . by a
19 prisoner confined in any jail, prison or other correctional facility until such administrative
20 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Federal inmates suing under
21 *Bivens* “must first exhaust inmate grievance procedures just as state prisoners must exhaust
22 administrative processes prior to instituting a § 1983 suit.” *Porter v. Nussle*, 534 U.S. 516, 524
23 (2002). 42 U.S.C. § 1997e(a) has been construed broadly to “afford [] corrections officials time
24 and opportunity to address complaints internally before allowing the initiation of a federal case,
25 *id.* at 525-26, and to encompass inmate suits about both general circumstances and particular

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27 ¹ In so finding, the Ninth Circuit also made clear that unlike a motion for summary judgment,
28 “dismissal of an action on the ground of failure to exhaust administrative remedies is not on the merits.”
Wyatt, 315 F.3d at 1119 (citation omitted). Thus, if the court finds that the prisoner has failed to exhaust
nonjudicial remedies, “the proper remedy is dismissal of the claim without prejudice.” *Id.* (citing *Ritza*,
837 F.2d at 368 & n.3).

1 episodes of prison life--including incidents of alleged excessive force. *Id.* at 532. Finally, “[t]he
2 ‘available’ ‘remed[y]’ must be ‘exhausted’ before a complaint under § 1983 may be entertained,”
3 “regardless of the relief offered through administrative procedures.” *Booth v. Churner*, 532 U.S.
4 731, 738, 741 (2001); *see also McKinney v. Carey*, 311 F.3d 1198, 1200-01 (9th Cir. 2002)
5 (finding that prisoner’s civil rights action must be dismissed without prejudice unless prisoner
6 exhausted available administrative remedies *before* he filed suit, even if he fully exhausts while
7 the suit is pending).

8 **C. Application of 42 U.S.C. § 1997e(a) to Plaintiff’s Case**

9 It is well established that the failure to exhaust administrative remedies is an affirmative
10 defense under the PLRA which the Defendant must plead and prove. *See Jones v. Bock, et al.*
11 594 U.S. 199, 216 (2007). Here, Defendant Bernal states “plaintiff has failed to properly exhaust
12 all of the Administrative Remedies available to him.” *See* Def.’s Mot. at 3. In addition,
13 Defendant claims “plaintiff failed to file any administrative remedy request to staff in an attempt
14 to informally resolve the issue, as required.” *Id.*

15 In his Opposition, Plaintiff concedes that he did not even attempt to exhaust his
16 administrative remedies prior to filing this suit. *See* Pl.’s Opp’n at 1-4. Plaintiff maintains that
17 he could not exhaust his administrative remedies because he was “in the clutches of the private
18 prison” and he had a “credible belief that he would suffer immediate physical injury at the hands
19 of the perpetrator.” *Id.* at 3-4.

20 The Supreme Court has made clear that Plaintiff must “properly exhaust” his
21 administrative remedies before filing a prison conditions action. In *Woodford v. Ngo*, 548 U.S.
22 81, 91 (2006), the Supreme Court held that “[p]roper exhaustion demands compliance with an
23 agency’s deadlines and other critical procedural rules because no adjudicative system can
24 function effectively without imposing some orderly structure on the course of its proceedings.”
25 *Woodford*, 548 U.S. at 91. The Court further held that “[proper exhaustion] means ... a prisoner
26 must complete the administrative review process in accordance with the applicable procedural
27 rules ... as a precondition to bring suit in federal court.” *Id.*

1 Plaintiff has failed to rebut Defendants' showing that he failed to properly exhaust his
2 administrative grievances with respect any of the claims found in his Complaint. Plaintiff speaks
3 of an overall fear of retaliation if he were to file an administrative grievance but provides no
4 specific examples of an actual threat to his physical safety if he were to file such a grievance.
5 For example, Plaintiff claims that he fears "violent retaliation" and cites to the alleged retaliation
6 by Defendant Bernal. *See* Pl.'s Opp'n at 2. However, the only actual retaliation alleged by
7 Plaintiff with regards to Bernal is the switching of prison jobs, there are no actual claims of
8 violence by Bernal. Plaintiff is attempting to carve out an exception to the mandatory exhaustion
9 requirement that simply does not exist in any case law to date. Thus, the Court finds that
10 Plaintiff's Opposition is a concession that Plaintiff did not even attempt to exhaust his available
11 administrative remedies. *See Wyatt*, 315 F.3d at 1120 ("A prisoner's concession to
12 nonexhaustion is a valid ground for dismissal.").

13 Accordingly, the Court **GRANTS** Defendant's Motion to Dismiss Plaintiff's Complaint
14 for failing to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). Because
15 the Court finds that Plaintiff's entire action must be dismissed for failing to exhaust, it need not
16 address Defendant's Motion to Dismiss Plaintiff's Complaint pursuant to FED.R.CIV.P. 12(b)(6).

17 **IV.**

18 **CONCLUSION AND ORDER**

19 Good cause appearing, **IT IS HEREBY ORDERED** that:

20 Defendant's Motion to Dismiss Plaintiff's Complaint for failing to exhaust administrative
21 remedies pursuant to FED.R.CIV.P. 12(b) [Doc. No. 17] is **GRANTED**. Plaintiff's Complaint
22 is **DISMISSED** without prejudice.

23 The Clerk of Court shall close the file.

24
25 DATED: August 24, 2009

26 
27 M. James Lorenz
28 United States District Court Judge