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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

SLY BATTEN,

Plaintiff,

v.

P. L. VASQUEZ, et al.,

Defendants.

CASE NO. 1:08-cv-01750-GSA PC

ORDER DISMISSING ACTION, WITHOUT  
PREJUDICE, FOR FAILURE TO EXHAUST  
PRIOR TO FILING SUIT

(Doc. 1)

Plaintiff Sly Batten (“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 November 17, 2008. Pursuant to Plaintiff’s written consent, filed November 26, 2008, and Appendix A(k)(4) of the Local Rules of the Eastern District of California, this case is assigned to the undersigned to conduct any and all proceedings.

In his complaint, Plaintiff alleges that on October 26, 2008, correctional officers used excessive physical force against him, issued a false rules violation report against him, and placed him in administrative segregation. (Doc. 1, Comp., § IV.) Plaintiff submitted an inmate appeal grieving the incident on November 13, 2008, the same day he drafted his complaint. (Id., Ex. 1.) Plaintiff concedes the process is not exhausted, alleging that he has not received a response. (Id., § II.)

Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are

1 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available  
2 administrative remedies prior to filing suit. Jones v. Bock, 127 S.Ct. 910, 918-19 (2007); McKinney  
3 v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required regardless of the relief  
4 sought by the prisoner and regardless of the relief offered by the process, Booth v. Churner, 532 U.S.  
5 731, 741, 121 S.Ct. 1819 (2001), and the exhaustion requirement applies to all prisoner suits relating  
6 to prison life, Porter v. Nussle, 435 U.S. 516, 532, 122 S.Ct. 983 (2002).

7         The Court takes judicial notice of the fact that the California Department of Corrections and  
8 Rehabilitation has an administrative grievance system for prisoner complaints. Cal. Code Regs., tit.  
9 15 § 3084.1 (2009). The process is initiated by submitting a CDC Form 602. Id. at § 3084.2(a).  
10 Four levels of appeal are involved, including the informal level, first formal level, second formal  
11 level, and third formal level, also known as the “Director’s Level.” Id. at § 3084.5. Appeals must  
12 be submitted within fifteen working days of the event being appealed, and the process is initiated by  
13 submission of the appeal to the informal level, or in some circumstances, the first formal level. Id.  
14 at §§ 3084.5, 3084.6(c).

15         In order to satisfy section 1997e(a), California state prisoners are required to use the available  
16 process to exhaust their claims prior to filing suit. Woodford v. Ngo, 548 U.S. 81, 126 S.Ct. 2378,  
17 2383 (2006); McKinney, 311 F.3d at 1199-1201. “[E]xhaustion is mandatory under the PLRA and  
18 . . . unexhausted claims cannot be brought in court.” Jones, 127 S.Ct. at 918-19 (citing Porter, 435  
19 U.S. at 524). “All ‘available’ remedies must now be exhausted; those remedies need not meet  
20 federal standards, nor must they be ‘plain, speedy, and effective.’” Porter, 534 U.S. at 524 (quoting  
21 Booth, 532 U.S. at 739 n.5).

22         Although Plaintiff stated in 602 form that the appeal was an emergency appeal, there is no  
23 exception to the PLRA’s exhaustion requirement. Responses to informal level appeals are due  
24 within ten working days and responses to appeals at the first formal level of review are due within  
25 thirty working days. Tit. 15, § 3084.6(b). If the appeals coordinator determines that processing as  
26 an emergency appeal is warranted, the first level is waived and the second level response is due  
27 within five working days. Tit. 15, § 3084.7(a)(2). Whether or not Plaintiff’s appeal was  
28 subsequently accepted as an emergency appeal, Plaintiff filed suit without waiting for the expiration

1 of the time period prison officials have to respond to his appeal.

2 Because it is clear from the face of Plaintiff's complaint that he has not yet exhausted, this  
3 action must be dismissed. 42 U.S.C. § 1997e(a); Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir.  
4 2003) ("A prisoner's concession to nonexhaustion is a valid grounds for dismissal . . . .").  
5 Accordingly, this action HEREBY ORDERED DISMISSED, without prejudice, based on Plaintiff's  
6 failure to comply with 42 U.S.C. § 1997e(a) by exhausting his claims prior to filing suit.

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9 IT IS SO ORDERED.

10 **Dated: February 12, 2009**

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE