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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ARTHUR T. BUSSIERE,

Plaintiff,

v.

CANO, et al.,

Defendants.

CASE NO. 1:10-cv-00945-AWI-GBC (PC)

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING GRANTING  
DEFENDANT’S MOTION TO DISMISS AND  
DISMISSING ACTION, WITHOUT  
PREJUDICE, FOR FAILURE TO EXHAUST  
ADMINISTRATIVE REMEDIES

Doc. 62

/ OBJECTIONS DUE WITHIN THIRTY DAYS

**Findings and Recommendations**

**I. Procedural History and Allegations in Plaintiff’s Complaint**

On May 26, 2010, Plaintiff Arthur T. Bussiere (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983. Pl. Compl., Doc. 1. In Plaintiff’s complaint, he states that in June 1995, Plaintiff was arrested on sexual assault charges in New Hampshire, but the district attorney did not prosecute him on the charges. *Id.* at 5, Doc. 1. In 1997, Plaintiff was sentenced to sixteen years to life on a second degree murder charge in San Diego, California. *Id.* On August 10, 2001, Plaintiff arrived at Pleasant Valley State Prison (“PVSP”).<sup>1</sup> *Id.* Due to the prior arrest in 1995, Plaintiff was given a classification code “R”, which designates an inmate with a history of sex crimes. *Id.* Defendants Cano and six unknown committee members refused to remove the “R” suffix, which Plaintiff contends is erroneously placed in his file.

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<sup>1</sup> Plaintiff is currently held at California Substance Abuse Treatment Facility in Corcoran, California.

1 *Id.* Defendants Cano and six unknown committee members released Plaintiff into the general  
2 population knowing his safety would be threatened. *Id.* On November 21, 2009, Plaintiff’s cell mate  
3 assaulted him because of the “R” designation. *Id.* at 6. On January 3, 2010, Defendant Lopez opened  
4 his cell door, alleging Plaintiff had a medical appointment, and at the same time opened the cell door  
5 of another inmate who then assaulted Plaintiff. *Id.* Defendant Lopez subsequently witnessed another  
6 inmate assaulting Plaintiff again, later that same day. *Id.*

7 In Plaintiff’s complaint, he seeks to have the “R” suffix removed from his file, medical and  
8 mental health care for life, and compensatory and punitive damages in the amount of \$2,000,000.  
9 *Id.* at 12-13. On December 28, 2010, the Court issued an order requiring Plaintiff to either file an  
10 amended complaint or notify the Court of willingness to proceed on his cognizable claims against  
11 Defendant Cano and Six Doe Defendants<sup>2</sup> for Eighth Amendment deliberate indifference to safety  
12 and against Defendant Lopez (“Defendant”) for Eighth Amendment failure to protect. Doc. 13. On  
13 January 11, 2011, Plaintiff notified the Court of his willingness to proceed on his cognizable claims.  
14 Doc. 16. On January 24, 2011, the Court issued a second informational order, advising Plaintiff that  
15 Defendants may file an unenumerated 12(b) motion to dismiss for failure to exhaust administrative  
16 remedies and how Plaintiff must oppose the motion in order to avoid dismissal, pursuant to *Wyatt*  
17 *v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (citing *Ritza v. Int’l Longshoremen’s &*  
18 *Warehousemen’s Union*, 837 F.2d 365, 368 (9th Cir. 1998) (per curiam)). Doc. 19.

19 On June 1, 2011, Defendant Cano filed a motion to dismiss, alleging Plaintiff’s 2003 claims<sup>3</sup>  
20 against Defendant Cano are barred by the statute of limitations. Doc. 28. On November 7, 2011,  
21 Defendant Lopez filed a motion to dismiss for failure to exhaust administrative remedies. Doc. 62.  
22 On December 2, 2011, Plaintiff filed an opposition to Defendant Lopez’s motion to dismiss. Doc.  
23 68. On December 13, 2011, Defendant Lopez filed a reply to Plaintiff’s opposition. Doc. 69. On  
24  
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26 <sup>2</sup> The six unknown committee members.

27 <sup>3</sup> In Defendant Cano’s motion to dismiss, he clarified that on July 23, 2003, Plaintiff first appeared before  
28 Defendant Cano for a classification hearing. Def. Cano. Mot. Dismiss at 2 & Ex. A, Doc. 28. Therefore, Plaintiff’s claims  
against Defendant Cano originated in 2003, not 2001, as Plaintiff alleged in his complaint. Pl. Compl. at 5, Doc. 1.

1 January 9, 2012, Plaintiff filed a sur-reply. Doc. 70.<sup>4</sup> On February 9, 2012, Plaintiff filed a motion  
2 to amend his complaint, regarding the 2003 claims against the Six Doe Defendants. Doc. 75. On  
3 February 10, 2012, the Court adopted findings and recommendations and dismissed Plaintiff’s 2003  
4 claims against Defendant Cano, as barred by the statute of limitations. Doc. 77.<sup>5</sup> Pursuant to Local  
5 Rule 230(1), Defendant Lopez’s motion to dismiss for failure to exhaust administrative remedies is  
6 submitted on the record without oral argument.

## 7 **II. Defendant Lopez’s Motion to Dismiss for Failure to Exhaust Administrative Remedies**

### 8 **A. Legal Standard**

9 Pursuant to the Prison Litigation Reform Act of 1995 (“PLRA”), “[n]o action shall be  
10 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a  
11 prisoner confined in any jail, prison, or other correctional facility until such administrative remedies  
12 as are available are exhausted.” 42 U.S.C. § 1997e(a). The PLRA’s exhaustion requirement is  
13 therefore mandatory, and no longer left to the discretion of the district court. *Woodford v. Ngo*, 548  
14 U.S. 81, 85 (2006) (citing *Booth v. Churner*, 532 U.S. 731, 739 (2001)). The PLRA’s exhaustion  
15 requirement requires “proper exhaustion” of administrative remedies. *Ngo*, 548 U.S. at 93. This  
16 means “[p]risoners must now exhaust all ‘available’ remedies,” *id.* at 85, in “compliance with an  
17 agency’s deadlines and other critical procedural rules.” *Id.* at 90–91. The requirement cannot be  
18 satisfied “by filing an untimely or otherwise procedurally defective administrative grievance or  
19 appeal.” *Id.* Further, the remedies “available” need not meet federal standards, nor need they be  
20 “plain, speedy and effective.” *Porter v. Nussle*, 435 U.S. 516, 524 (2002); *Booth*, 532 U.S. at 739-40  
21 & n.5.

22 It is the prison’s requirements, and not the PLRA, that define the boundaries of proper  
23 exhaustion. *Jones v. Bock*, 549 U.S. 199, 218 (2007). The California Department of Corrections and  
24 Rehabilitation (“CDCR”) provides inmates the right to file administrative appeals alleging

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26 <sup>4</sup> The Court will not consider the content of Plaintiff’s sur-reply, since filing a “sur-reply” is a violation of Local Rule 220.

27 <sup>5</sup> Since Plaintiff’s 2003 claims against Defendant Cano were in conjunction with the claims against the Six Doe  
28 Defendants, those claims would also necessarily be barred by the statute of limitations. *See* Screening Order, Doc. 13; Findings and Recommendations, Doc. 46, & Order Adopting Findings and Recommendations, Doc. 77.

1 misconduct by correctional officers or “any departmental decision, action, condition, or policy which  
2 they can demonstrate as having an adverse effect upon their welfare.” *See* Cal. Code Regs. tit. 15,  
3 §§ 3084.1(a) & (e). In order to exhaust all available administrative remedies within this system, a  
4 prisoner must submit his complaint as an inmate appeal on a 602 form, within fifteen<sup>6</sup> working days  
5 from the date the administrative decision or action being complained of, and proceed through several  
6 levels of appeal: (1) informal level grievance filed directly with any correctional staff member; (2)  
7 first formal level appeal filed with one of the institution’s appeal coordinators; (3) second formal  
8 level appeal filed with the institution head or designee; and (4) third formal level appeal filed with  
9 the CDCR director or designee. *Id.* at §§ 3084.5 & 3084.6(c); *Brodheim v. Cry*, 584 F.3d 1262,  
10 1264–65 (9th Cir. 2009); *Barry v. Ratelle*, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). *See Ngo v.*  
11 *Woodford*, 539 F.3d 1108, 1110 (9th Cir. 2008) (*Ngo II*) (finding claims unexhausted where filed  
12 more than fifteen working days after deadline).

13 Non-exhaustion under § 1997e(a) is an affirmative defense, which should be brought by the  
14 defendants in an unenumerated motion to dismiss under Federal Rule of Civil Procedure 12(b).  
15 *Jones*, 549 U.S. at 216; *Wyatt*, 315 F.3d at 1119. In deciding a motion to dismiss for failure to  
16 exhaust administrative remedies, the Court may look beyond the pleadings and decide disputed  
17 issues of fact. *Wyatt*, 315 F.3d at 1119-20. If the Court concludes that the prisoner has failed to  
18 exhaust administrative remedies, the proper remedy is dismissal without prejudice. *Id.*

### 19 **B. Analysis**

20 Plaintiff did not file a staff complaint regarding his allegations that on January 3, 2010,  
21 Defendant Lopez failed to protect him from being assaulted by another inmate. *See* Def. Mot.  
22 Dismiss, Decl. Foston ¶¶ 6-7, Doc. 62-2; Decl. Morgan ¶¶ 3-6, Doc. 62-2, *see also* Record of  
23 Plaintiff Inmate Appeals, Def. Ex. A & B, Doc. 62-2. *Cf.* Pl. Resp. at 24-38, Doc. 68 (Copies  
24 Plaintiff’s staff complaints.) Although Plaintiff has filed numerous inmate appeals since 2002,  
25 Plaintiff did not file a grievance regarding his allegations that on January 3, 2010, Defendant Lopez  
26 failed to protect him from being assaulted by another inmate. *See id.*

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28 <sup>6</sup> As of July 2011, inmates have thirty calendar days to file appeals. § 3084.8(b).

1 A complaint that an officer permitted one inmate to assault another inmate would be  
2 considered a “staff complaint.” Def. Mot. Dismiss, Decl. Morgan ¶ 3, Doc. 62-2. In addition to the  
3 files kept of administrative appeals, staff complaints are also maintained in a filing system under the  
4 name of the accused officer. *Id.* ¶ 4. Both filing systems were examined by the PVSP Appeals  
5 Coordinator and there were no records related to Plaintiff’s claim that Defendant Lopez failed to  
6 protect him from being assaulted by other inmates. *Id.* ¶ 5. A computer printout of Plaintiff’s  
7 administrative appeals from PVSP shows that Plaintiff did not file any appeals between November  
8 3, 2009 and March 11, 2010. *See* Def. Mot. Dismiss, Record of Plaintiff Inmate Appeals, Def. Ex.  
9 B, Doc. 62-2.

10 In Plaintiff’s response, he contends that he did submit inmate appeals and attached copies  
11 of inmate appeals in support of his argument. *See* Pl. Resp., Doc. 68. However, the inmate appeals  
12 Plaintiff attached refer to complaints about the Americans with Disabilities Act (“ADA”), a medical  
13 claim, and loss of personal property. *See* Pl. Resp. at 24-38. None of these appeals involve a  
14 complaint that Defendant Lopez failed to protect Plaintiff from being assaulted by another inmate.

15 For purposes of the PLRA’s exhaustion requirement, “a grievance suffices if it alerts the  
16 prison to the nature of the wrong for which redress is sought.” *Griffin v. Arpaio*, 557 F.3d 1117, 1120  
17 (9th Cir. 2009). Ultimately, a grievance must “provide enough information . . . to allow prison  
18 officials to take appropriate responsive measures.” *Id.* at 1121. Plaintiff’s appeals regarding the  
19 ADA, a medical claim, and loss of personal property did not alert the prison officials of the pending  
20 claims in this civil action, pursuant to *Griffin* and the PLRA.

21 In *Ngo*, the Supreme Court held that full and “proper exhaustion of administrative remedies  
22 is necessary.” *Id.* at 84. While the Supreme Court recognized that this may be harsh, it noted that pro  
23 se prisoners who litigate in federal court will likewise be “forced to comply with numerous  
24 unforgiving deadlines and other procedural requirements.” *Id.* at 103. The Supreme Court recognized  
25 that this will prevent certain prisoner cases from proceeding, but notes that a “centerpiece of the  
26 PLRA’s effort to reduce the quantity . . . of prisoner suits is an ‘invigorated’ exhaustion provision,  
27 § 1997e(a).” *Id.* at 84 & 103. “Exhaustion is no longer left to the discretion of the district court, but  
28 is mandatory.” *Id.* at 85.

