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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WILLIE PAUL VIGIL, JR.,

Plaintiff,

v.

R. VALENCIA,

Defendant.

Case No. 1:10-cv-01977-LJO-SAB (PC)

FINDINGS AND RECOMMENDATIONS
REGARDING DEFENDANT VALENCIA’S
MOTION TO DISMISS

[ECF No. 49]

THIRTY-DAY DEADLINE

Plaintiff Willie Paul Virgil, Jr., is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff declined United States Magistrate Judge Jurisdiction; therefore, this matter was referred to undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.¹

Currently before the Court is Defendant R. Valencia’s motion to dismiss the third amended complaint, filed on December 2, 2016. (EFC No. 49.)

I.
RELEVANT HISTORY

Plaintiff filed his original complaint in this action on October 18, 2010, (EFC No. 1), a first amended complaint on November 9, 2012, (ECF No. 9), a second amended complaint on June 14, 2011, (ECF No. 18), and a third amended complaint on September 22, 2014, (ECF No.

¹ Plaintiff declined United States Magistrate Judge Jurisdiction on November 10, 2012. (EFC No. 6.)

1 27).² Following screening, the Court ordered that this action proceed on Plaintiff's third
2 amended complaint against Defendant R. Valencia for excessive force in violation of the Eighth
3 Amendment for events on March 11, 2010 and June 7, 2010. (EFC No. 36.) All other claims
4 and defendants were dismissed. (Id. at 2.)

5 On December 2, 2016, Defendant filed a motion to dismiss Plaintiff's third amended
6 complaint under Federal Rule of Civil Procedure 12(b)(6). (EFC No. 49.) On January 20, 2017,
7 Plaintiff filed an opposition to Defendant's motion to dismiss. (EFC No. 52.) On January 27,
8 2017, Defendant replied to Plaintiff's opposition brief. (EFC No. 53.)

9 Accordingly, Defendant's motion to dismiss is deemed submitted for review without oral
10 argument. Local Rule 230(l).

11 II.

12 SUMMARY OF THE ARGUMENTS

13 Defendant filed a motion to dismiss arguing that on the face of the third amended
14 complaint, Plaintiff failed to exhaust his administrative remedies before bringing this suit.
15 Defendant also argues as an additional basis for dismissal that she is entitled to qualified
16 immunity because it was not clearly established under the law that the conduct Plaintiff
17 challenges violated his Eighth Amendment rights. (EFC No. 49.)

18 In opposition, Plaintiff asserts that he did exhaust his administrative remedies, and that
19 Defendant is not entitled to qualified immunity. Accordingly, Plaintiff argues that Defendant's
20 motion to dismiss should be denied. Plaintiff's response attaches grievance forms and responses
21 that he argues are proof that he properly exhausted his administrative remedies. (EFC No. 52.)

22 In reply, Defendants argue that Plaintiff actually confirms his failure to exhaust his
23 administrative remedies in his opposition and attachments. (EFC No. 53.) Specifically,
24 Defendant asserts that Plaintiff brought the instant action prior to exhausting all of his
25

26 ² Unless otherwise noted, Plaintiff's filing dates referenced herein are based on the prison mailbox rule,
27 pursuant to which a document is deemed served or filed on the date a prisoner signs the document (or
28 signs the proof of service, if later) and gives it to prison officials for mailing. See Houston v. Lack, 487
U.S. 266 (1988) (establishing prison mailbox rule); Campbell v. Henry, 614 F.3d 1056, 1059 (9th Cir.
2010) (applying the mailbox rule to both state and federal filings by prisoners).

1 administrative remedies, because this action was commenced on October 18, 2010, and the
2 director’s level responses to the grievances that Plaintiff relies upon were not issued until after
3 that date. (EFC No. 52.) Defendant further argues that she is entitled to qualified immunity, and
4 Plaintiff’s opposition did not substantially address her arguments on that issue. Accordingly,
5 Defendant requests that her motion to dismiss be granted.

6 III.

7 LEGAL STANDARD

8 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss on
9 the grounds that a complaint “fail[s] to state a claim upon which relief can be granted.” In
10 assessing the sufficiency of a complaint, all well-pleaded factual allegations must be accepted as
11 true. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). In ruling on a motion to dismiss, the Court
12 may consider documents attached to or referenced in the complaint, see Branch v. Tunnell, 14
13 F.3d 449, 453–54 (9th Cir. 1994), and is not required to accept as true conclusory allegations that
14 are contradicted by those documents, see Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295–
15 96 (9th Cir. 1998).

16 IV.

17 DISCUSSION

18 A. Summary of Relevant Third Amended Complaint Allegations

19 Plaintiff alleges that on March 11, 2010, Defendant Valencia and Correctional Officer
20 Diez were ordered to escort Plaintiff from his cell to Lieutenant Brown’s office. Correctional
21 Officers Diez and Valencia approached Plaintiff’s cell and looked at Plaintiff “with a mad face.”
22 (Third Am Compl., ECF No. 27, at p. 6.) Defendant Valencia opened the tray slot and applied
23 handcuffs to Plaintiff, “purposely tightening both handcuffs all the way press down into
24 plaintiff’s wrists deeply into his skin cutting off Plaintiff’s circulation in both of his hands [and]
25 pulled on the chain of the handcuffs as hard as she could through the cell door tray slot repelling
26 Plaintiff backwards causing him to hit his lower back against his cell door.” (Id. at 6.)

27 Defendant Valencia pulled Plaintiff out of the cell and then both officers “raised up
28 Plaintiff’s cuff hands behind his back with extreme force as high as both women officers could

1 dipping Plaintiff forward while Defendant Valencia had a hold of Plaintiff's left five fingers
2 while purposely squeezing and twisting Plaintiff's fingers and left wrist with extreme force."
3 (Id. at 7.) Plaintiff asked Defendant Valencia, "are you trying to break my wrist?" Defendant
4 Valencia responded that she was only escorting Plaintiff. Plaintiff tried to avoid water on the
5 floor, but Defendant Valencia pushed Plaintiff's head forcefully forward. Plaintiff slipped and
6 grunted in pain but somehow caught himself from falling. Plaintiff was escorted to Lt. Brown's
7 office and sat down in a chair.

8 After the shift change at 1:45, Correctional Officer Massetti removed Plaintiff from the
9 cage and, along with Defendant Valencia, escorted Plaintiff back to his cell. Plaintiff alleges that
10 after he entered his cell and backed up to the tray slot to allow Defendant Valencia to remove his
11 handcuffs, Defendant Valencia "purposely twisted Plaintiff's handcuffs on his wrists by pulling
12 hard on the chain and twisting it then Defendant Valencia had unlocked Plaintiff's right handcuff
13 then had started once again purposely twisting Plaintiff's left handcuff forcefully on Plaintiff's
14 wrist causing him to yell in pain." (Id. at 8.) Plaintiff told Defendant Valencia that he would file
15 a staff complaint if she broke his wrist. Defendant Valencia then "twisted the handcuff on
16 Plaintiff on his left wrist one last time with force." (Id.)

17 On June 7, 2010, Defendant Valencia escorted Plaintiff to the medical clinic. Plaintiff
18 alleges that the following occurred:

19 Defendant Valencia had purposely put plaintiff's right handcuff on him twisted
20 with one part of the cuff on Plaintiff's wrist and the other part of the same right
21 cuff was put on Plaintiff's right forearm while in the stand-up cage then
22 Defendant Valencia, had pulled Plaintiff out of the stand-up cage and proceeded
23 to escort Plaintiff down B section tier and put Plaintiff back in his cell then
24 Defendant Valencia, had pulled and twisted Plaintiff's right handcuff with force
25 through the tray slot door which Plaintiff had yelled out in pain then had
26 unhandcuff him.

25 (Am Compl. 11.)

26 **B. Exhaustion of Administrative Remedies**

27 The Court first analyzes Defendant's argument that because Plaintiff failed to exhaust his
28 administrative remedies before bringing this action, the suit should be dismissed without

1 prejudice. A claim may be dismissed under Rule 12(b)(6) on the ground that the non-moving has
2 failed to exhaust administrative remedies. The failure to exhaust is an affirmative defense, and
3 defendant bears the burden of raising and proving the absence of exhaustion. Jones, 549 U.S. at
4 216; Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc). “In the rare event that a
5 failure to exhaust is clear from the face of the complaint, a defendant may successfully move for
6 dismissal under Rule 12(b)(6).” Id. The proper remedy is dismissal without prejudice.
7 McKinney, 311 F.3d at 1200-1201.

8 With these principles in mind, the Court turns to the relevant legal requirements for the
9 exhaustion of administrative remedies in this case, and the facts presented here.

10 1. Legal Standards for Exhaustion under the PLRA

11 Pursuant to the Prison Litigation Reform Act (PLRA) of 1996, “[n]o action shall be
12 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by
13 a prisoner confined in any jail, prison, or other correctional facility until such administrative
14 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is a mandatory
15 requirement, McKinney, 311 F.3d at 1199-1201 (citing Booth v Churner, 532 U.S. 731,
16 741(2001)) and prisoners are required to have exhausted all of the “available” administrative
17 remedies before commencing suit challenging prison conditions. Jones v. Bock, 549 U.S. 199,
18 211 (2007). Exhaustion is required regardless of the relief sought by the prisoner and regardless
19 of the relief offered by the process, Booth, 532 U.S. at 741, and the exhaustion requirement
20 applies to all suits relating to prison life, Porter v. Nussle, 435 U.S. 516, 532 (2002).

21 2. Exhaustion Under California Prison Administrative Grievance System

22 The California Department of Corrections and Rehabilitation (“CDCR”) has an
23 administrative grievance system for prisoner complaints. The CDCR requires a prison inmate to
24 satisfy the administrative exhaustion requirement by following the procedures set forth in
25 sections 3084.1 through 3084.8 of Title 15 of the California Code of Regulations. An inmate
26 “may appeal any policy, decision, action, condition, or omission by the department or its staff
27 that the inmate . . . can demonstrate as having a material adverse effect upon his or her health,
28 safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a).

1 The regulations require the prisoner to proceed through all three levels of review. See
2 Cal. Code Regs. tit. 15, § 3084.2(a). A decision at the third level of review, known as the
3 director's level of review, is not appealable and constitutes the third level of administrative
4 review. Id. Cal. Code Regs. Tit. 15 § 3084.8(c)(3). California state prisoners are required to use
5 this process to exhaust their claims prior to filing suit. McKinney v. Carey, 311 F.3d 1198,
6 1199-1201 (9th Cir. 2002); Albino, 747 F.3d at 1166. That is, exhaustion requires that the third
7 level of administrative review must have been completed prior to filing the lawsuit, and
8 exhaustion may not occur during the pendency of the federal law suit. McKinney, 311 F.3d at
9 1200; Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012).

10 3. Analysis

11 In the instant case, Plaintiff referenced and attached the relevant grievances and response
12 to the third amended complaint and subsequent filings thereafter. (ECF No. 27, at pp. 3, 28-48;
13 ECF No. 52, at pp. 5-8, 17-20.) Accordingly, these documents were made a part of the complaint
14 and are not in dispute, and the Court may consider them in ruling on this motion. Branch, 14
15 F.3d at 453-54.

16 Based on Plaintiff's submissions, there are two relevant grievances that he asserts
17 exhausted his administrative remedies with regards to the claims in this action. First, on March
18 15, 2010, Plaintiff submitted an inmate appeal (PVSP No. 10-00481) for the incident that
19 occurred on March 11, 2010 involving Defendant Valencia, seeing an investigation and
20 compensation for the alleged injuries from excessive force. (ECF No. 52, pp. 5-6.) On March
21 17, 2010, the grievance was processed as a staff complaint. On June 15, 2010, the grievance was
22 partially granted at the second level in that there was an investigation of the alleged staff
23 misconduct, but no wrongdoing was found. Plaintiff submitted an appeal to the third level of
24 review on June 22, 2010. On October 28, 2010, Plaintiff received the director's level decision on
25 his grievance. At that level, the grievance was denied on the grounds that no staff misconduct
26 was substantiated. (Id. at 17-18.) Thus, this grievance concerning the March 11, 2010 use of
27 force at issue in this case was fully exhausted as of October 28, 2010.

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1 Second, on June 8, 2010, Plaintiff submitted an inmate appeal (PVSP No. 10-01015) for
2 the incident that occurred on June 7, 2010 involving Defendant Valencia. (Id. at 7-8.) On June
3 21, 2010, the grievance was processed as a staff complaint. On July 27, 2010, the grievance was
4 partially granted at the second level in that there was an investigation of the alleged staff
5 misconduct, but no wrongdoing was found. Plaintiff submitted an appeal to the third level of
6 review on August 30, 2010. On January 5, 2011, Plaintiff received the director’s level decision,
7 in which his appeal was denied on the grounds that no there was no evidence to support a finding
8 that Defendant Valencia violated departmental policy. (Id. at 19-20.) Thus, this grievance
9 concerning the June 7, 2010 use of force at issue in this case was fully exhausted as of January 5,
10 2011.

11 Based on the foregoing, Plaintiff did not exhaust his administrative remedies for the
12 incidents at issue prior to bringing this action. The original complaint was tendered on October
13 18, 2010, and the director’s level review of Plaintiff’s grievances was not completed until after
14 that date—on October 28, 2010 and January 5, 2010, respectively. Exhaustion is a mandatory
15 requirement, and as noted above, a prisoner must exhaust administrative remedies prior to
16 commencing a lawsuit, not while the lawsuit is pending.

17 Plaintiff asserts that this action was filed on November 15, 2010, and therefore he fully
18 exhausted all of his administrative remedies before filing suit. Plaintiff is mistaken; November
19 15, 2010 is the date when his first amended complaint in this action was stamped filed and
20 received by the Clerk of the Court. It is not the date this action was commenced. The Court
21 must use the date that Plaintiff’s original complaint was tendered for filing to determine whether
22 Plaintiff fully exhausted his administrative remedies before bringing suit, not the date of a
23 subsequent amended pleading after the action commenced. Akhtar v. Mesa, 698 F.3d 1202, 1210
24 (9th Cir. 2012) (discussing that an action is brought for purposes of exhaustion under § 1997e(a)
25 when the complaint is tendered to the district clerk); see also id. (“Akhtar asserted his claim for
26 failure to comply with his medical chrono regarding housing in his initial complaint. . . . Thus,
27 Akhtar was required to exhaust this claim before he filed his initial complaint.”) (citing
28 McKinney, 311 F.3d at 1200–01).

1 For these reasons, the Court finds that Plaintiff has failed to exhaust his administrative
2 remedies prior to bringing this action, and the action should be dismissed without prejudice.

3 **C. Qualified Immunity**

4 Defendant's argument that she is entitled to qualified immunity will not be addressed, as
5 the Court finds the exhaustion issue is dispositive.

6 **V.**

7 **CONCLUSION AND RECOMMENDATION**

8 Based on the foregoing, it is HEREBY RECOMMENDED that Defendant's motion to
9 dismiss, filed on December 2, 2016, should be granted on the grounds of failure to exhaust
10 administrative remedies, and this action be dismissed, without prejudice.

11 These Findings and Recommendations will be submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty**
13 **(30) days** after being served with these Findings and Recommendations, the parties may file
14 written objections with the Court. The document should be captioned "Objections to Magistrate
15 Judge's Findings and Recommendations." The parties are advised that failure to file objections
16 within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772
17 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.
18 1991)).

19 IT IS SO ORDERED.

20 Dated: July 25, 2017

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23 UNITED STATES MAGISTRATE JUDGE
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