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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT E. THOMPSON,
Plaintiff,
v.
J. HARTLEY, et al.,
Defendants.

Case No. 1:10-cv-02260-LJO-MJS
FINDINGS AND RECOMMENDATIONS
TO:
1) GRANT DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT
(ECF No. 30.)
2) DENY PLAINTIFF'S MOTION FOR
EXTENSION OF TIME
(ECF No. 50.)
FOURTEEN (14) DAY OBJECTION
DEADLINE

I. PROCEDURAL HISTORY

Plaintiff is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action brought pursuant to 28 U.S.C. § 1983. (ECF No. 1 & 4.) The action proceeds on an excessive force claim against Defendants Tercero and Campbell. (ECF No. 22.)

Before the Court is Defendant Tercero's August 7, 2014 motion for summary judgment on exhaustion grounds. (ECF No. 30.) Defendant Campbell joined the motion. (ECF Nos. 37 & 39.) Plaintiff opposes the motion (ECF No. 33.), and

1 Defendants filed a joint reply. (ECF No. 41.)

2 Also, before the Court is Plaintiff's third motion for an extension of time to
3 authenticate the exhibits attached to his opposition to Defendants' motion for summary
4 judgment. (ECF No. 50.)

5 These matters are deemed submitted.

6 **II. LEGAL STANDARD – MOTION FOR SUMMARY JUDGMENT**

7 Any party may move for summary judgment, and "[t]he [C]ourt shall grant
8 summary judgment if the movant shows that there is no genuine dispute as to any
9 material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
10 56(a). Each party's position, whether it be that a fact is disputed or undisputed, must be
11 supported by (1) citing to particular parts of materials in the record, including but not
12 limited to depositions, documents, declarations, or discovery; or (2) "showing that the
13 materials cited do not establish the absence or presence of a genuine dispute, or that
14 an adverse party cannot produce admissible evidence to support the fact." Fed R. Civ.
15 P. 56(c)(1).

16 "Where the moving party will have the burden of proof on an issue at trial, the
17 movant must affirmatively demonstrate that no reasonable trier of fact could find other
18 than for the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th
19 Cir. 2007). Once the moving party has met its burden, the nonmoving party must point
20 to "specific facts showing that there is a genuine issue for trial." *Id.* (quoting *Anderson*
21 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

22 In evaluating the evidence, "the [C]ourt does not make credibility determinations
23 or weigh conflicting evidence," and "it draws all inferences in the light most favorable to
24 the nonmoving party." *Id.*

25 **III. PLAINTIFF'S CLAIMS**

26 Plaintiff complains in his Second Amended Complaint ("SAC") that Defendants
27 used excessive force against him on December 27, 2007, while he was a prisoner at
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1 Avenal State Prison ("ASP"). (ECF No. 21.) Plaintiff alleges that while handcuffed
2 behind his back, Defendants picked him up by the handcuffs and injured his shoulder.
3 Defendants then escorted Plaintiff to the prison clinic where Defendant Tercero threw
4 him to the floor and continued to hit and kick Plaintiff even though he was restrained
5 and compliant.

6 **IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

7 **A. Legal Standard -- Exhaustion**

8 The Prison Litigation Reform Act ("PLRA") stipulates, "No action shall be brought
9 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by
10 a prisoner confined in any jail, prison, or other correctional facility until such
11 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).
12 Therefore, prisoners are required to exhaust all available administrative remedies prior
13 to filing suit. *Jones v. Bock*, 549 U.S. 199, 211 (2007).

14 "The primary purpose of a [prisoner's administrative] grievance is to alert the
15 prison to a problem and facilitate its resolution, not to lay groundwork for litigation."
16 *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009). "A grievance need not include
17 legal terminology or legal theories unless they are in some way needed to provide
18 notice of the harm being grieved. A grievance also need not contain every fact
19 necessary to prove each element of an eventual legal claim." *Id.* Instead, the grievance
20 must alert "the prison to the nature of the wrong for which redress is sought," *id.* at
21 1120 (*quoting Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)), and must give the
22 prison an opportunity "to reach the merits of the issue." *Id.* at 1119.

23 A motion for summary judgment is the proper means to raise a prisoner's failure
24 to exhaust administrative remedies. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir.
25 2014). Defendants have the burden of proving Plaintiff failed to exhaust available
26 administrative remedies. *Id.* A defendant's burden of establishing an inmate's failure to
27 exhaust administrative remedies has been characterized by the Ninth Circuit as "very
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1 low.” *Albino v. Baca*, 697 F.3d 1023, 1031 (9th Cir. 2012). The “defendant need only
2 show the existence of . . . [a grievance procedure] that the plaintiff did not use.” *Id.*
3 (citing *Hilao v. Estate of Marcos*, 103 F.3d 767, 778, n.5 (9th Cir. 1996)).

4 “If undisputed evidence viewed in the light most favorable to the prisoner shows
5 a failure to exhaust, a defendant is entitled to summary judgment under Rule 56.”
6 *Albino*, 747 F.3d at 1166. If material facts are disputed, summary judgment should be
7 denied, and the district court should decide “disputed factual questions relevant to
8 exhaustion . . . in the same manner a judge rather than a jury decides disputed factual
9 questions relevant to jurisdiction and venue.” *Id.* at 1170-71.

10 **B. Factual Background**

11 The excessive force claim alleged in Plaintiff’s SAC occurred on December 27,
12 2007, while he was a prisoner at ASP. Plaintiff resided at ASP until March 9, 2009,
13 when he was transferred to Corcoran State Prison (“CSP”).

14 At the time of the incident, Plaintiff was required to submit an appeal within fifteen
15 working days of the event or decision being appealed. Appeals were to go through the
16 following processes: 1) informal resolution, 2) first formal level of appeal, 3) second
17 level appeal by the institution head, and then 4) third level appeal by the Director of
18 CDCR.

19 CDCR has no record of an excessive force appeal having been submitted by
20 Plaintiff while he was housed at ASP.

21 Plaintiff asserts that from November 2007 to at least July 2008 he suffered from a
22 psychotic state that prevented him from filing an administrative appeal. Additionally,
23 Plaintiff attests to having feared retaliation by Defendants if he had filed a grievance
24 against them in the period from the date of the incident to the date of his March 2009
25 transfer from ASP to CSP.

26 Plaintiff submitted an appeal form on April 19, 2009. It complains that his inability
27 to receive proper medication put him “in a state of insanity from December 07 to July
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1 08.” (ECF No. 33 at 50). Plaintiff further complained of being “accused of grabbing
2 correctional officer (Tacero) while [he] was in this state of mental disorder, dysfunction,”
3 and that he suffered “from a ‘torn rotator cuff.’ Right Shoulder”. (ECF No. 33 at 51.) On
4 April 22, 2009, Plaintiff received a response that his appeal was being screened out as
5 a duplicate to a CDC 1824 medical appeal submitted on the same date.

6 On October 4, 2009, Plaintiff submitted another appeal form complaining of the
7 same issues as his April 19, 2009 appeal. Plaintiff received a response that his appeal
8 was being returned due to a time constraint violation.

9 **C. Parties’ Arguments**

10 Defendants argue that Plaintiff failed to exhaust his administrative remedies.
11 CDCR has no record of Plaintiff submitting an excessive force appeal within fifteen days
12 of the alleged incident. They also claim that Plaintiff’s allegation in his SAC that he
13 submitted an inmate appeal that was dismissed twice for untimeliness is effectively a
14 concession of his failure to exhaust. Defendants further argue that Plaintiff has not met
15 his burden of demonstrating that administrative remedies were not available to him.
16 Plaintiff’s claim of being in a psychotic state is unsupported by anything other than his
17 inadmissible medical opinion and exhibits and his self-serving testimony. Likewise,
18 even if fear of retaliation was a grounds for failing to exhaust, Plaintiff’s generalized
19 allegation does not support such a claim. Finally, even if the Court accepts Plaintiff’s
20 reasons for failing to appeal prior to March 9, 2009, his April 2009 appeal was still
21 untimely and fails to address his claims of excessive force against Defendants.

22 Plaintiff argues that he was prevented from filing an administrative appeal within
23 fifteen days of December 27, 2007 because he was in a psychotic state until July 2008
24 and feared for his safety until March 9, 2009 when he transferred to CSP. He contends
25 that his April 19, 2009 appeal is the relevant appeal of his SAC claims and that it was
26 not his fault that it was not processed through all three levels of review and denied as
27 duplicative and untimely.

1 **D. Analysis**

2 Defendants have met their burden of demonstrating that there was an available
3 administrative process and that Plaintiff failed to exhaust it.

4 Plaintiff concedes that there was an administrative grievance process in place at
5 the time of the incident, but alleges that he was excused from complying with it until
6 April 19, 2009. (ECF No. 33 at 11-12, 16-17). Assuming, without deciding, that Plaintiff
7 had valid excuses for not filing his appeal prior to March 9, 2009, he has not met his
8 burden of demonstrating the procedure was unavailable to him from March 9, 2009 until
9 April 19, 2009 when he filed a grievance. *See Albino*, 747 F.3d at 1172 (the prisoner
10 bears the burden “to come forward with evidence showing that there is something in his
11 particular case that made the existing and generally available administrative remedies
12 effectively unavailable to him”). Plaintiff concedes that he was required to submit an
13 appeal within fifteen days. (ECF No. 33 at 16.). Yet, he offers no justification for his
14 failure to do so even though he was no longer in a psychotic state or in fear of retaliation
15 for filing a grievance.

16 Additionally, Plaintiff’s April 19, 2009 grievance fails to alert “the prison to the
17 nature of the wrong for which redress is sought.” *Griffin*, 557 F.3d at 1120 (*quoting*
18 *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)). The grievance fails to mention
19 Defendant Campbell’s name or any alleged actions by him. While the grievance
20 discusses the December 27, 2007 incident of Defendant Tercero grabbing Plaintiff, it
21 does not allege Defendant Tercero was too rough or used an excessive amount of force
22 against Plaintiff or any other wrongdoing on the behalf of Defendant Tercero.

23 Accordingly, Defendants’ motion for summary judgment should be GRANTED.

24 **V. MOTION FOR EXTENSION OF TIME**

25 Defendants argue in their reply that Plaintiff did not properly authenticate the
26 progress notes and medical exhibits attached to his opposition in support of his
27 allegation that he was suffering from a psychotic state. Plaintiff requests a third
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1 extension of time to authenticate his exhibits. (ECF No. 50.) In light of the Court's
2 finding that even if Plaintiff's mental state rendered the administrative grievance process
3 unavailable to him until July 2008, he still failed to timely file an appeal and exhaust his
4 administrative remedies, the authentication of Plaintiff's documents will not alter the
5 Court's recommendation to grant Defendants' motion for summary judgment.
6 Accordingly, Plaintiff's motion for an extension of time to authenticate said documents is
7 DENIED.

8 **VI. CONCLUSION AND RECOMMENDATION**

9 The Court finds that Defendants have met their burden of proving Plaintiff failed
10 to exhaust his administrative remedies. Based on the foregoing, the Court HEREBY
11 RECOMMENDS that Defendants' motion for summary judgment (ECF No. 30.) be
12 GRANTED. Given the Court's findings and recommendation, Plaintiff's third motion for
13 an extension of time is DENIED. (ECF No. 50.)

14 These Findings and Recommendations are submitted to the United States
15 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).
16 Within **fourteen** (14) days after being served with these Findings and
17 Recommendations, any party may file written objections with the Court and serve a
18 copy on all parties. Such a document should be captioned "Objections to Magistrate
19 Judge's Findings and Recommendations." Any reply to the objections shall be served
20 and filed within **fourteen** (14) days after service of the objections. The parties are
21 advised that failure to file objections within the specified time may result in the waiver of
22 rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (*citing Baxter*
23 *v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).
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25 IT IS SO ORDERED.

26 Dated: February 23, 2015

27 /s/ Michael J. Seng
28 UNITED STATES MAGISTRATE JUDGE

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