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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRET DILLON,

Plaintiff,

v.

CARMARILLO, et al.,

Defendants.

Case No. 1:11-cv-00091-AWI-DLB PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DEFENDANT’S
MOTION TO DISMISS BE GRANTED

(ECF No. 23)

THIRTY-DAY OBJECTION DEADLINE

I. Procedural History

Plaintiff Brett Dillon, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on December 30, 2010. This action is proceeding on Plaintiff’s First Amended Complaint, filed on August 29, 2011, against Defendant Jimenez for retaliation, in violation of the First Amendment of the United States Constitution. 28 U.S.C. § 1915A.

On June 29, 2012, Defendant filed a motion to dismiss the claim against him for failure to exhaust the available administrative remedies, 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b). (ECF No. 23.) Plaintiff filed an opposition on October 5, 2012, and Defendant filed a reply on October 12, 2012.¹ (ECF Nos. 27 & 29.) On March 26, 2013, the Court issued an order staying Defendant’s Motion to Dismiss to allow limited discovery. (ECF No. 35.) On November 1, 2013,

¹ Plaintiff was provided with contemporaneous notice of the requirements for opposing an unenumerated Rule 12(b) motion. *Stratton v. Buck*, 697 F.3d 1004, 1008 (9th Cir. 2012); *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003). (Doc. 15-4.)

1 the Court issued a sanctioning order lifting the stay and striking Plaintiff's opposition to
2 defendant's motion to dismiss. (ECF No. 51.) Defendant's motion to dismiss has been submitted
3 upon the record without oral argument pursuant to Local Rule 230(l).

4 **II. Motion to Dismiss for Failure to Exhaust**

5 **A. Legal Standard**

6 Pursuant to the Prison Litigation Reform Act of 1996, "[n]o action shall be brought with
7 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
8 confined in any jail, prison, or other correctional facility until such administrative remedies as are
9 available are exhausted." 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available
10 administrative remedies prior to filing suit. *Jones v. Bock*, 549 U.S. 199, 211, 127 S.Ct. 910
11 (2007); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required
12 regardless of the relief sought by the prisoner and regardless of the relief offered by the process,
13 *Booth v. Churner*, 532 U.S. 731, 741, 121 S.Ct. 1819 (2001), and the exhaustion requirement
14 applies to all suits relating to prison life, *Porter v. Nussle*, 435 U.S. 516, 532, 122 S.Ct. 983
15 (2002).

16 The failure to exhaust in compliance with section 1997e(a) is an affirmative defense under
17 which Defendant has the burden of raising and proving the absence of exhaustion. *Jones*, 549
18 U.S. at 216; *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). The failure to exhaust is
19 subject to an unenumerated Rule 12(b) motion, and in resolving the motion, the Court may look
20 beyond the pleadings and decide disputed issues of fact. *Stratton*, 697 F.3d at 1008; *Morton v.*
21 *Hall*, 599 F.3d 942, 945 (9th Cir. 2010); *Wyatt*, 315 F.3d at 1119-20. If the Court concludes that
22 Plaintiff has failed to exhaust, the proper remedy is dismissal without prejudice. *Jones*, 549 U.S.
23 at 223-24; *Lira v. Herrera*, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

24 **B. Discussion**

25 Defendant Jimenez brings this motion to dismiss Plaintiff's retaliation claim on the
26 grounds that Plaintiff did not exhaust his administrative remedies. Without an opposition to the
27 motion to dismiss in the record, the Court must base its findings on the evidence provided in
28 Defendant's motion to dismiss. While in the custody of CDCR, Plaintiff has not filed any inmate

1 appeals that have been reviewed at the first or second level of review while housed at CCI.
2 (Alomari Decl. ¶ 9.) Plaintiff has also not filed any appeals that have been reviewed at the
3 Director’s Level. (Kaestner Decl. ¶ 7.) Although Plaintiff contends that the appeal he filed
4 concerning Defendant’s misconduct during an informal review was “screened at the informal
5 level.” (ECF No. 12, Am. Compl. at 2.), it is undisputed that Plaintiff did not receive a Third Level
6 decision that served to exhaust his administrative remedies, and that he did not file an appeal that
7 was accepted for review at any formal level. (Kaestner Decl. ¶ 7.) As such, the Court finds that
8 Plaintiff failed to exhaust his administrative remedies.

9 **III. Conclusion and Recommendation**

10 Based on the foregoing, the finds that Plaintiff failed to exhaust his retaliation claim
11 against Defendant Jimenez and HEREBY RECOMMENDS that Defendant’s motion to dismiss
12 for failure to exhaust, filed on June 29, 2012, be GRANTED.

13 These Findings and Recommendations will be submitted to the United States District
14 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
15 **thirty (30) days** after being served with these Findings and Recommendations, the parties may
16 file written objections with the Court. The document should be captioned “Objections to
17 Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file
18 objections within the specified time may waive the right to appeal the District Court’s order.
19 *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

20
21 IT IS SO ORDERED.

22 Dated: November 13, 2013

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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