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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JIMMY GONZALES,
Plaintiff,
v.
HAROLD TATE,
Defendant.

Case No.: 1:11-cv-01997-AWI-MJS (PC)
FINDINGS AND RECOMMENDATIONS
GRANTING DEFENDANT TATE'S MOTION TO
DISMISS
(ECF No. 34)
OBJECTIONS DUE WITHIN FOURTEEN DAYS

Plaintiff Jimmy Gonzales ("Plaintiff") is a prisoner proceeding in this civil rights action pursuant to 42 U.S.C. § 1983.

The Court screened Plaintiff's Third Amended Complaint (Am. Compl., ECF No. 20) and found that it stated a cognizable claim against Defendant Tate for inadequate medical care under the Eighth Amendment of the United States Constitution and under the Americans with Disabilities Act (ECF No. 22).

Defendant Tate has moved to dismiss Plaintiff's action under the unenumerated provisions of Federal Rule of Civil Procedure 12(b)(6) for failure to exhaust his administrative remedies. (Def.'s Mot., ECF No. 34.) Plaintiff filed an opposition. (Pl.'s Opp'n, ECF No. 41.)

Defendant Tate's motion is now ready for ruling. Local Rule 230(l).

1 **I. LEGAL STANDARDS**

2 The Prison Litigation Reform Act (“PLRA”) stipulates, “No action shall be brought with
3 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
4 confined in any jail, prison, or other correctional facility until such administrative remedies as
5 are available are exhausted.” 42 U.S.C. § 1997e(a). Therefore, prisoners are required to
6 exhaust all available administrative remedies prior to filing suit. Jones v. Bock, 549 U.S. 199,
7 211 (2007). The Supreme Court held that “the PLRA’s exhaustion requirement applies to all
8 inmate suits about prison life, whether they involve general circumstances or particular
9 episodes, and whether they allege excessive force or some other wrong.” Porter v. Nussle,
10 534 U.S. 516, 532 (2002). Further, the exhaustion of remedies is required, regardless of the
11 relief sought by the prisoner, as long as the administrative process can provide some sort of
12 relief on the prisoner’s complaint. Booth v. Churner, 532 U.S. 731, 741 (2001).

13 The California Department of Corrections and Rehabilitation (“CDCR”) has an
14 administrative grievance system for prisoner complaints; the process is initiated by
15 submitting a CDCR Form 602. Cal. Code Regs., tit. 15, §§ 3084.1, 3084.2(a). During the
16 time relevant to this case, three levels of appeal existed; each successive appeal had to be
17 submitted within thirty calendar days of the event being appealed. Id. at §§ 3084.7, 3084.8.
18 To properly exhaust administrative remedies, a prisoner must comply with the deadlines and
19 other applicable procedural rules. Woodford v. Ngo, 548 U.S. 81, 93 (2006).

20 The exhaustion requirement of § 1997e(a) is not a pleading requirement, but rather an
21 affirmative defense. Defendants have the burden of proving plaintiff failed to exhaust the
22 available administrative remedies before filing a complaint in the District Court. Jones v.
23 Bock, 549 U.S. 199, 216 (2007). A motion raising a prisoner’s failure to exhaust the
24 administrative remedies is properly asserted by way of an unenumerated motion under Fed.
25 R. Civ. P 12(b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003); Ritza v. Int’l
26 Longshoremen’s & Warehousemen’s Union, 837 F.2d 365, 368 (9th Cir. 1998) (per curium).
27 In determining whether a case should be dismissed for failure to exhaust administrative
28 remedies, “the court may look beyond the pleadings and decide disputed issues of fact” in a

1 procedure that is “closely analogous to summary judgment.” Id. at 1119–20. When the court
2 concludes the prisoner has not exhausted all of his available administrative remedies, “the
3 proper remedy is dismissal without prejudice.” Id.

4 **II. PLAINTIFF’S CLAIMS**

5 Plaintiff’s allegations are summarized as follows:

6 Plaintiff has chronic severe back pain. (Am. Compl. at 4.) Prior to his transfer to
7 California Correctional Institution (“CCI”) in Tehachapi, California, Plaintiff was prescribed a
8 number of pain medications and given a Disability Placement Program Verification (“DPPV”).
9 (Id. at 4-5.) The DPPV allowed Plaintiff to rest every thirty yards when walking. (Id. at 5.)
10 Plaintiff was also provided additional accommodations for his condition. (Id. at 5-6.)

11 Plaintiff was transferred to CCI in 2011. (Am. Compl. at 8.) Upon his arrival, he met
12 with Defendant Tate who determined there was no reason for Plaintiff to be on the powerful
13 pain medications previously prescribed. (Id.) Defendant Tate canceled Plaintiff’s
14 prescriptions, removed Plaintiff’s DPPV and denied Plaintiff proper treatment for his medical
15 conditions. (Id.) Defendant Tate told Plaintiff he would not provide him any pain medication.
16 (Id. at 10.) Plaintiff experienced severe pain as a result of Defendant Tate’s actions. (Id. at
17 11.) Plaintiff saw other doctors when Defendant Tate was away and they provided pain
18 medication and additional care. (Id. at 12-13.) Defendant Tate however refused to allow
19 refills of these prescriptions. (Id. at 13.)

20 **III. ANALYSIS**

21 Defendant Tate is entitled to dismissal pursuant to the unenumerated provisions of
22 Fed. R. Civ. P. 12(b)(6).

23 Plaintiff proceeds on claims under the Eighth Amendment for inadequate medical care
24 and under the Americans with Disabilities Act (“ADA”). Under the PLRA, Plaintiff had to have
25 exhausted available administrative remedies for these complaints prior to initiating this action
26 in federal court. Plaintiff did not do so. He did not exhaust any administrative remedies prior
27 to initiating this action on December 2, 2011.

28

1 Between October 12, 2011, the date on which Defendant Tate took away Plaintiff's
2 pain medications, and December 2, 2011, the date on which Plaintiff initiated this action,
3 Plaintiff filed seven different health care appeals at CCI. (Ledford Decl., ECF No. 34-2 at ¶
4 6.) All related to Plaintiff's lack of pain medications and ADA accommodations. (Id. at p. 5-
5 8.) Only one of these appeals, log number CCI-HC-11033065, was exhausted to the third
6 level as required by the PLRA. (Ledford Decl. at p. 5.) However, it was exhausted on May
7 29, 2012, almost six months **after** this action was initiated. The PLRA requires that appeals
8 be exhausted **before** initiating a court action.

9 Of the six other appeals filed during the relevant time period, five were rejected due to
10 Plaintiff's failure to use proper forms, incompleteness, excessive verbiage and/or
11 documentation. (Ledford Decl. at p. 5-8.) The last of the seven was rejected because
12 Plaintiff submitted it directly to the third level without having completed the lower two levels
13 as required by California regulations. (Id. at p. 6.)

14 In his opposition to Defendant Tate's motion, Plaintiff admits he failed to properly
15 exhaust the claims.¹ (Pl.'s Opp'n at 1.) He argues that he should be excused from the
16 PLRA's exhaustion requirements because he seeks only injunctive, not monetary, relief and
17 he needed the relief immediately.

18 The failure to exhaust may be excused where the administrative remedies are
19 rendered "unavailable," where prison officials obstructed the prisoner's attempt to exhaust, or
20 where the prisoner was prevented from exhausting because the procedures for processing
21 grievances were not followed. See Nunez v. Duncan, 591 F.3d 1217, 1224 (9th Cir. 2010)
22 (citations omitted). However, Plaintiff bears the burden of demonstrating that unavailability
23 and the absence of fault on his part. See Sapp v. Kimbrell, 623 F.3d 813, 822-23 (9th Cir.
24 2010); Nunez v. Duncan, 591 F.3d at 1224; Brown v. Valoff, 422 F.3d 926, 939-40 (9th Cir.
25 2005).

26
27 ¹ "I cannot dispute that I did file this 42 U.S.C. § 1983 complaint while the appeals process was ongoing." (Pl.'s
28 Opp'n at 1.)

1 Although the Nunez list of exceptions is not exhaustive, it does provide guidance as to
2 when a prisoner might be exempted. Plaintiff raises nothing falling even remotely within the
3 ambit of Nunez. He fails to cite, and the Court is unable to find, any authority for the
4 proposition that exhaustion should be excused where a prisoner seeks injunctive relief he
5 claims is unavailable through the grievance process. Plaintiff has not demonstrated that he
6 was exempt from the PLRA's exhaustion requirements.

7 Nothing filed by Plaintiff raises any doubt as to the accuracy of Defendant Tate's
8 history of Plaintiff's administrative appeals. Defendant Tate has satisfied his burden of
9 demonstrating that Plaintiff failed to exhaust administrative remedies. His motion to dismiss
10 should be granted and this action dismissed without prejudice.

11 **IV. CONCLUSION AND RECOMMENDATION**

12 Based on the foregoing, the Court HEREBY RECOMMENDS that Defendant Tate's
13 motion to dismiss (ECF No. 34) be granted and that this action be DISMISSED without
14 prejudice. The Court also recommends that all pending motions be DISMISSED as moot.

15 These Findings and Recommendations are submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
17 fourteen (14) days after being served with these Findings and Recommendations, any party
18 may file written objections with the Court and serve a copy on all parties. Such a document
19 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."
20 Any reply to the objections shall be served and filed within ten days after service of the
21 objections. The parties are advised that failure to file objections within the specified time
22 may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th
23 Cir. 1991).

24
25 IT IS SO ORDERED.

26 Dated: January 29, 2014

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