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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANTHONY PARAMORE,
Plaintiff,
v.
J. RUIZ,
Defendant.

CASE No. 1:12-cv-00255-LJO-MJS
ORDER VACATING FINDINGS AND
RECOMMENDATIONS
(ECF No. 22)

Plaintiff Anthony Paramore, a former state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on February 23, 2012. (ECF No. 1.) The action proceeds on Plaintiff's Second Amended Complaint against Defendant Ruiz for use of excessive force in violation of the Eighth amendment. (ECF No. 10.)

Defendant Ruiz moved to dismiss the case under the unenumerated provisions of Federal Rule of Civil Procedure 12(b) for failure to exhaust administrative remedies. Defendant also argued that Plaintiff's claims are barred by Heck v. Humphrey, 512 U.S. 477 (1994), and Edwards v. Balisok, 520 U.S. 641 (1997). (ECF No. 16.)

On March 31, 2014, the Court issued findings and recommendations granting Defendant's Motion to Dismiss based solely on Plaintiff having failed to exhaust administrative remedies. (ECF No. 22.) Having found Plaintiff's claim administratively

1 unexhausted, the Court declined to address Defendant's alternate grounds for dismissal.
2 (Id.) Neither party has filed an objection.

3 However, on April 3, 2014, the United States Court of Appeals for the Ninth Circuit
4 issued a decision overruling Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) with
5 respect to the proper procedural device for raising the issue of administrative exhaustion.
6 Albino v. Baca, 747 F.3d 1162, 1168 (9th Cir. 2014). Following the decision in Albino,
7 Defendant may raise the issue of exhaustion in either (1) a motion to dismiss pursuant to
8 Rule 12(b)(6), in the rare event the failure to exhaust is clear on the face of the
9 complaint, or (2) a motion for summary judgment. Id. at 1168-69. An unenumerated
10 Rule 12(b) motion is no longer the proper procedural device for raising the issue of
11 exhaustion. Id.

12 Accordingly, the Findings and Recommendations are HEREBY VACATED.
13 Defendant's unenumerated Rule 12(b) motion is no longer proper in light of Albino.
14 However, the argument that Plaintiff's claims are barred by Heck and Edwards was
15 properly raised via Federal Rule of Civil Procedure 12(b)(6) and will therefore be
16 considered in a forthcoming order.

17
18 IT IS SO ORDERED.

19 Dated: May 30, 2014

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE