

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

DWAYNE MEREDITH,

Plaintiff,

v.

D. OVERLEY, et al.,

Defendants.

Case No. 1:12-cv-0455-LJO-MJS (PC)

**ORDER (1) DENYING UNENUMERATED  
RULE 12(b) MOTION WITHOUT  
PREJUDICE AND (2) REQUIRING  
DEFENDANTS TO FILE RESPONSIVE  
PLEADING OR MOTION WITHIN THIRTY  
DAYS**

**(ECF No. 42)**

Plaintiff Dwayne Meredith, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983. The matter proceeds on an Eighth Amendment conditions of confinement claim against Defendants Overley, Benevidez, Gamboa.

On November 19, 2013, Defendants Overley, Benevidez, Gamboa filed a motion to dismiss the action under the unenumerated provisions of Federal Rule of Civil Procedure 12(b) for failure to exhaust administrative remedies. (ECF No. 42); 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b).

On April 3, 2014, the United States Court of Appeals for the Ninth Circuit issued a decision overruling Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) with respect to the proper procedural device for raising the issue of administrative exhaustion. Albino v. Baca, No. 10-55702, 2014 WL 1317141, at \*1 (9th Cir. Apr. 3, 2014) (en banc). Following

1 the decision in Albino, Defendants may raise the issue of exhaustion in either (1) a motion  
2 to dismiss pursuant to Rule 12(b)(6), in the rare event the failure to exhaust is clear on the  
3 face of the complaint, or (2) a motion for summary judgment. Albino, 2014 WL 1317141, at  
4 \*4. An unenumerated Rule 12(b) motion is no longer the proper procedural device for  
5 raising the issue of exhaustion. Id.

6 For the reasons stated, the unenumerated Rule 12(b) motion is procedurally  
7 deficient in light of the decision in Albino. The unenumerated Rule 12(b) motion shall be  
8 denied, without prejudice, on procedural grounds.

9 Accordingly, for the reasons stated, it is HEREBY ORDERED that:

- 10 1. The unenumerated Rule 12(b) motion filed November 19, 2013 (ECF No. 42)  
11 is DENIED, without prejudice, on procedural grounds; and
- 12 2. Defendants shall, within **thirty (30) days** from the date of service of this order  
13 file a responsive pleading or motion.

14 IT IS SO ORDERED.

15 Dated: May 12, 2014

16 /s/ Michael J. Seng  
17 UNITED STATES MAGISTRATE JUDGE  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28