

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

TIMOTHY HOWARD,  
  
                                Plaintiff,  
  
                                v.  
  
GONZALES,  
  
                                Defendant.

Case No. 1:12-cv-00487 LJO DLB PC  
  
FINDINGS AND RECOMMENDATIONS  
REGARDING DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT FOR FAILURE TO  
EXHAUST  
(Document 46)  
  
THIRTY-DAY OBJECTION DEADLINE

Plaintiff Timothy Howard (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action on March 30, 2012. He filed a First Amended Complaint (“FAC”) as of right on June 27, 2014. The action is proceeding against Defendant Gonzales for violations of the First and Eighth Amendments.

Defendant filed her answer on July 9, 2014.

On August 21, 2014, Defendant filed the instant motion for summary judgment based on Plaintiff’s failure to exhaust his administrative remedies.<sup>1</sup> Plaintiff opposed the motion on September 12, 2014, and Defendant filed her reply on September 18, 2014. On October 3, 2014, Plaintiff filed a “Request for Judicial Notice.”

The motion is deemed submitted pursuant to Local Rule 230(l).

**A. PLAINTIFF’S ALLEGATIONS**

Plaintiff is currently incarcerated at Pelican Bay State Prison in Crescent City, California. The events at issue occurred while he was housed at the California Substance Abuse Treatment Facility in Corcoran, California.

---

<sup>1</sup> Concurrent with her motion, Defendant provided Plaintiff with the requirements for opposing a summary judgment motion. Rand v. Rowland, 154 F.3d 952, 962-963 (9th Cir. 1998).

1 Plaintiff alleges that he submitted numerous appeals against Defendant Gonzales for  
2 unprofessional misconduct, retaliation and destruction of property by personally handing the appeals  
3 to her for informal level response. Defendant Gonzales failed to submit and/or destroyed the  
4 appeals.

5 On or about December 22, 2009, Plaintiff verbally informed Defendant Gonzales that he  
6 wasn't feeling well. At some point while in her presence, he collapsed and had a seizure. He alleges  
7 that he was denied medical care.

8 Later that day, Plaintiff confronted Defendant Gonzales and asked why he didn't receive  
9 medical attention. She stated, "Fuck you, and I wished you would've died fucker for stabbing one of  
10 my partners in Corcoran." ECF No. 39, at 3.

11 When Plaintiff asked an unknown nurse about the matter, Plaintiff was informed that  
12 "custody said no treatment." Several prisoners started yelling, "we screamed man down and they  
13 did nothing." ECF No. 39, at 3.

14 Plaintiff submitted another 602 on December 22, 2009, to the Sergeant in Administrative  
15 Segregation. On December 29, 2009, Plaintiff was interviewed by Sergeant Zinani, Correctional  
16 Officer Langner and Defendant Gonzales. Plaintiff explained that he had submitted numerous  
17 appeals to Defendant Gonzales, but she failed to return the appeal as required. He also explained  
18 that Defendant Gonzales failed to notify medical when he had a seizure, and that she has started to  
19 harass him. Plaintiff was informed that staff matters were confidential and beyond the scope of the  
20 appeals process, but that appropriate action would be taken. They requested that Plaintiff withdraw  
21 the appeal, but he refused to do so.

22 Also on December 29, 2009, several correctional officers arrived at Plaintiff's cell,  
23 screaming and ordering him to submit to handcuffs. Plaintiff was taken to the Administrative  
24 Segregation Unit as punishment for filing appeals. To justify the punishment, Plaintiff was told that  
25 he threatened to kill Defendant Gonzales during the appeal interview. Plaintiff spent 495 days in a  
26 management cell.

27 Plaintiff submitted an appeal on this issue on December 29, 2009.

28 On January 8, 2010, Plaintiff was issued a CDCR 115 Rules Violation Report for threatening  
a peace officer at the December 29, 2009, hearing. The report was written by Defendant Gonzales.

1 Plaintiff submitted complaints to Internal Affairs, the Appeals Coordinator, Defendant Gonzales and  
2 the Warden on January 8, 2010.

3 On February 6, 2010, Plaintiff had a hearing on the Rules Violation and was found not guilty.  
4 Plaintiff had submitted evidence of his prior appeals against Defendant Gonzales. Moreover, the  
5 witnesses who were present during the interview did not hear any of what Defendant Gonzales wrote  
6 in the report. The Rules Violation Report was dismissed in the interest of justice on February 6,  
7 2010.

8 Plaintiff contends that he never received a response to the appeals dated December 22, 2009,  
9 December 29, 2009, and January 8, 2010. Therefore, he repeatedly submitted the appeals to the  
10 Appeal Coordinator and the Director of Appeals. The Director of Appeals directed Plaintiff to return  
11 the appeals to the institutional level, and he has done so “without processing.” ECF No. 39, at 5.  
12 The Office of Internal Affairs forwarded a complaint to the Appeals Office, but it was screened out.  
13 He has repeatedly resubmitted the appeals but has not received a response. Plaintiff contends that  
14 the appeals are exhausted because no remedies are available.

15 Plaintiff alleges that Defendant Gonzales (1) violated his First Amendment right to file  
16 grievances; (2) violated his Eighth Amendment right to medical care on December 22, 2009; and (3)  
17 retaliated against him in violation of the First Amendment by issuing a false Rules Violation Report.

18 **B. LEGAL STANDARD**

19 The failure to exhaust is subject to a motion for summary judgment in which the court may  
20 look beyond the pleadings. Albino v. Baca, 747 F.3d 1162, 1170 (9th Cir. 2014). If the Court  
21 concludes that Plaintiff has failed to exhaust, the proper remedy is dismissal without prejudice.  
22 Jones, 549 U.S. at 223-24; Lira v. Herrera, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

23 “If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to  
24 exhaust, a defendant is entitled to summary judgment under Rule 56.” Albino, 747 F.3d at 1166.  
25 However, “[i]f material facts are disputed, summary judgment should be denied, and [following such  
26 denial] the district judge rather than a jury should determine the facts.” Id. The Albino court  
27 specified that the court should act as the finder of fact in connection with an exhaustion challenge  
28 “in a preliminary proceeding” and, “if feasible, before reaching the merits of a prisoner’s claim.” Id.  
at 1168, 1170.

1 In judging the evidence at the summary judgment stage, the Court may not make credibility  
2 determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984  
3 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all inferences in the light  
4 most favorable to the nonmoving party and determine whether a genuine issue of material fact  
5 precludes entry of judgment, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,  
6 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted), cert. denied, 132 S.Ct.  
7 1566 (2012). The Court determines only whether there is a genuine issue for trial, and Plaintiff's  
8 filings must be liberally construed because he is a pro se prisoner. Thomas v. Ponder, 611 F.3d  
9 1144, 1150 (9th Cir. 2010) (quotation marks and citations omitted).

10 **C. APPEALS PROCESS**

11 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with  
12 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner  
13 confined in any jail, prison, or other correctional facility until such administrative remedies as are  
14 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available  
15 administrative remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211, 127 S.Ct. 910, 918-19  
16 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required  
17 regardless of the relief sought by the prisoner and regardless of the relief offered by the process,  
18 Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct. 1819, 1825 (2001), and the exhaustion requirement  
19 applies to all suits relating to prison life, Porter v. Nussle, 435 U.S. 516, 532, 122 S.Ct. 983, 992  
20 (2002).

21 The California Department of Corrections and Rehabilitation has an administrative grievance  
22 system for prisoner complaints, and the process is initiated by submitting a CDCR Form 602. Cal.  
23 Code Regs., tit. 15 §§ 3084.1, 3084.2(a). During the relevant time period, four levels of appeal were  
24 involved, including the informal level, first formal level, second formal level, and third formal level,  
25 also known as the “Director’s Level,” and appeals had to be submitted within fifteen working days  
26 of the event being appealed. Id. at §§ 3084.5, 3084.6(c).

1 **D. ANALYSIS**

2 1. *Parties' Arguments*

3 Defendant acknowledges that Plaintiff filed numerous appeals both before and after the  
4 alleged events of December 2009, but she contends that he never submitted an appeal claiming that  
5 she denied him medical care, destroyed his legal property,<sup>2</sup> filed a false report or retaliated against  
6 him. Defendant also contends that Plaintiff did not file *any* appeals, whether screened out or not,  
7 within fifteen working days of either December 22, 2009, or December 29, 2009.

8 Plaintiff opposes the motion by arguing that a hearing was held on December 29, 2009,  
9 regarding his December 22, 2009, appeal, making all issues raised in that appeal (retaliation,  
10 destruction of legal property and denial of medical care) exhausted. He also argues that the repeated  
11 failure to respond to his appeals dated December 29, 2009, and January 8, 2010, rendered the  
12 exhaustion process unavailable to him.

13 In reply, Defendant maintains that Plaintiff did not properly submit any appeals to the  
14 Appeals Coordinator. However, even taking Plaintiff's evidence as submitted, Defendant contends  
15 that Plaintiff did not submit any appeals to the Appeals Coordinator until the middle of February  
16 2010, nearly two months after the events occurred.

17 Plaintiff's claims in this action arise from Defendant Gonzales' alleged (1) repeated refusal  
18 to file any of his appeals during an unknown time period prior to December 22, 2009; (2) refusal to  
19 summon medical care on December 22, 2009; and (3) falsely accusing him of threatening her on  
20 December 29, 2009.

21 As an initial matter, Plaintiff repeatedly argues that Defendant has failed to dispute certain  
22 facts in his FAC because she did not submit a declaration to contradict his claims that he gave her  
23 numerous appeals. However, Plaintiff misunderstands the burdens on summary judgment. The  
24 Ninth Circuit described the parties' burdens as they relate to exhaustion as follows:

25 [T]he defendant's burden is to prove that there was an available administrative remedy, and  
26 that the prisoner did not exhaust that available remedy. (Citation omitted.) Once the  
27 defendant has carried that burden, the prisoner has the burden of production. That is, the  
28 burden shifts to the prisoner to come forward with evidence showing that there is something

---

<sup>2</sup> Destruction of legal property is not a claim in this action.

1 in his particular case that made the existing and generally available administrative remedies  
2 effectively unavailable to him. (Citations omitted.)

3 Albino, 747 F.3d at 1172.

4 Therefore, in moving for summary judgment, Defendant does not have the burden of  
5 disputing the allegations in Plaintiff's FAC relating to exhaustion. Rather, Defendant bears the  
6 burden of demonstrating the absence of any genuine issue of material fact. Plaintiff's argument that  
7 Defendant has conceded facts in his FAC is therefore without merit.

8 Finally, Plaintiff's substantive arguments on the merits of his claims are not relevant to the  
9 analysis of this motion.

10 Turning to the issue of exhaustion, it is clear that most of the facts relating to Plaintiff's  
11 attempts to exhaust are disputed. The Court will address each claim separately, viewing the  
12 evidence in the light most favorable to Plaintiff.

13 2. *Refusal to File Grievances*

14 Plaintiff maintains that he submitted numerous appeals "surrounding unprofessional  
15 misconduct, retaliation and destruction of legal property" directly to Defendant Gonzales by  
16 "personally handing" them to her for a response at the informal level. Pl.'s Decl. ¶ 3 (ECF No. 50,  
17 at 1). He contends that her failure to respond made the grievance procedure unavailable, and renders  
18 all appeals given to her prior to December 22, 2009, exhausted.

19 Plaintiff's appeals given to Defendant Gonzales *prior* to the December 22, 2009, incident,  
20 however, have not been submitted to the Court as evidence. Plaintiff contends that these appeals  
21 exhausted his claim that Defendant Gonzales prevented him from filing grievances, but he has not  
22 submitted evidence of the appeals.

23 While her alleged refusal to accept his appeals prior to December 22 may support his actual  
24 claim, there is no evidence that he submitted an appeal directed at Defendant Gonzales' failure to  
25 accept his grievances. The December 22, 2009, appeal states that Plaintiff "has submitted various  
26 appeals, and requested (CSATF) supervisors to reprimand C. Gonzales for inciting violence,  
27 unprofessional conduct, disrespect, reprisal and destruction of prisoner's property that includes legal  
28 materials, photos and other minute items. . ." Pl.'s Ex. D (ECF No. 49, at 41). The appeal then goes  
on to raise the alleged denial of medical care on December 22, 2009. The December 29, 2009,

1 appeal also mentions the unprofessional conduct, etc., but then describes the alleged retaliatory  
2 accusations. Pl.'s Ex. I (ECF No. 49, at 78). Finally, the January 8, 2010, appeal deals solely with  
3 the allegedly false RVR. Pl.'s Ex. J (ECF No. 49, at 80).

4 Accordingly, the undisputed facts show that Plaintiff has not exhausted his claim that  
5 Defendant Gonzalez refused to accept his grievances.

6 *3. Denial of Medical Care*

7 Plaintiff states that he submitted an appeal on December 22, 2009, to the ASU/Ad-Seg  
8 Sergeant. Pl.'s Decl. ¶ 9; Ex. D (ECF No. 49, at 41).<sup>3</sup> Plaintiff requested an interview in the appeal,  
9 and states that on December 29, 2009, the interview took place with Ad-Seg Sergeant Zinani,  
10 Correctional Officer Langner and Defendant. Pl.'s Decl. ¶ 10. He argues that this interview shows  
11 that the medical claim was exhausted.

12 Taking these facts as undisputed, Defendant argues that Plaintiff did not *properly* exhaust  
13 because he was required to submit his appeal through the institutional mail directly to the Appeals  
14 Coordinator. Corral Decl. ¶ 4 (ECF No. 46-4, at 2). Indeed, according to Plaintiff's facts, he gave  
15 the appeal directly to the ASU/Ad-Seg Sergeant on December 22, 2009.

16 Beginning on January 19, 2010, Plaintiff wrote various letters to the Warden and Internal  
17 Affairs, but these letters did not properly exhaust his claim. On February 9, 2010, Plaintiff wrote a  
18 letter to the Appeals Coordinator explaining that his appeals had not been processed. Pl.'s Dec. ¶ 21  
19 (ECF No. 50, at 3). Plaintiff's copy of the December 22, 2009, appeal shows that it was received by  
20 the Inmate Appeals Branch on February 16, 2010. Pl.'s Ex. D (ECF No. 49, at 41).

---

23 <sup>3</sup> Defendant states that according to Plaintiff's Declaration, Plaintiff gave the appeal directly to Defendant, and that  
24 Defendant then destroyed it. Plaintiff's declaration, however, does not specifically say that he gave the December 22,  
25 2009, appeal to Defendant. Rather, Plaintiff declares that he gave Defendant appeals "on various occasions," none of  
26 which involved medical care. Pl.'s Decl. ¶ 3 (ECF No. 50, at 3). Plaintiff later states that he submitted the appeals "on"  
27 Defendant Gonzales. Pl.'s Decl. ¶ 18 (ECF No. 50, at 3). The Court notes that in a January 19, 2010, letter to the  
28 Warden, attached as an exhibit to Plaintiff's opposition, he states, "your officer refused to answer and return appeals,  
therefore copies of appeals have been made prior to submission on 12/22/09, 12/29/09 and 1/8/09, however, C/O  
Gonzales has refused to answer the informal level and return appeals." Pl.'s Ex. K (ECF No. 49, at 82).

Although there may be some confusion as to whether Plaintiff gave the December 22, 2009, appeal to Defendant, the  
issue is not relevant. According to Defendant, Plaintiff was not required to exhaust at the informal level where he  
accuses an officer of misconduct, and Plaintiff is not arguing that giving the appeal to Defendant sufficed to exhaust it.

The Court also notes that if Plaintiff contends that he gave the appeal to Defendant and she did not process it, his  
argument that a hearing was held on the appeal would be nonsensical.

1 Under Plaintiff's facts, then, he did not submit any appeals to the Appeals Coordinator until  
2 February 9, 2010. However, this was far beyond the fifteen working-day time period to submit an  
3 appeal for the December 22, 2009, event.

4 Insofar as Plaintiff contends that the December 29, 2009, hearing exhausted the appeal, he is  
5 incorrect. The parties dispute whether the hearing was an appeal hearing. While Plaintiff contends  
6 that the hearing was related to his appeal, Defendant asserts that the hearing addressed the threats  
7 Plaintiff was making against Defendant. Regardless, and even if the meeting was related to his  
8 appeal, Plaintiff did not continue to exhaust his appeal to the final level in a timely manner.

9 Plaintiff's appeals dated December 29, 2009, and January 8, 2010, were related to his claims  
10 of retaliation, and did not serve to exhaust his denial of medical care claim. Similarly, while  
11 Plaintiff continued to write letters to various entities through March 2012, they did not serve to  
12 timely and properly exhaust his claim.

13 Therefore, taking the facts in the light most favorable to Plaintiff, he has failed to *properly*  
14 exhaust his administrative remedies on the denial of medical care claim.

#### 15 4. *Retaliation*

16 Plaintiff states that he filed an appeal on December 29, 2009, relating to the allegedly false  
17 Rules Violation Report stemming from the December 29, 2009, interview. Pl.'s Decl. ¶15; Ex. I  
18 (ECF No. 49, at 78).<sup>4</sup> He does not state to whom it was submitted. Plaintiff also submitted a second  
19 appeal on the issue on January 8, 2009, "to the Appeals Office (Coordinator), C. Gonzales, Internal  
20 Affairs and Warden Ken Clark." Pl.'s Decl. ¶ 17; Ex J (ECF No. 49, at 80). Plaintiff argues that he  
21 did not receive a response to these appeals, despite his diligence, and that the failure to respond  
22 rendered the appeals process unavailable.

23 In her reply, Defendant argues that in Plaintiff's January 10, 2010, letter to the Warden,  
24 attached to his opposition as Exhibit K, Plaintiff both clarifies and contradicts his testimony. The  
25 letter states, "your officer refused to answer and return appeals, therefore copies of appeals have  
26 been made prior to submission on 12/22/09, 12/29/09 and 1/8/09, however, C/O Gonzales has  
27 refused to answer the informal level and return appeals." Pl.'s Ex. K (ECF No. 49, at 82).

---

28 <sup>4</sup> Plaintiff was given a copy of the RVR on January 8, 2010. However, Plaintiff knew of the charge on December 29,  
2009, when he submitted his first appeal on the issue.



1 As to the December 29, 2009, appeal, Defendant argues that the letter clarifies that Plaintiff  
2 gave the appeal only to Defendant. Defendant argues that this is consistent with Plaintiff’s copy of  
3 the appeal, which shows that it wasn’t received by the Inmate Appeals Branch until February 16,  
4 2010. Pl.’s Ex. I (ECF No. 49, at 78). Under this scenario, Defendant argues that (1) Plaintiff could  
5 not have exhausted by submitting the document directly to the officer involved in claims of  
6 misconduct;<sup>5</sup> and (2) his February 16, 2010, submission to the Appeals Branch was late.

7 The Court agrees that the evidence, taken in the light most favorable to Plaintiff, shows that  
8 the December 29, 2009, appeal did not exhaust his retaliation claim. Plaintiff does not specifically  
9 state to whom he gave the appeal in either his opposition or his declaration, and the only evidence  
10 before the Court is his letter to the Warden, which states that he that he gave it to Defendant  
11 Gonzales. His evidence also indicates that the appeal did not reach the Inmate Appeal Branch until  
12 February 16, 2010.

13 Turning to the January 8, 2010, appeal, Defendant contends that the letter to the Warden  
14 directly contradicts Plaintiff’s statement in his declaration that he gave the appeal to Defendant, *as*  
15 *well as* the Appeals Office, Internal Affairs and the Warden. Defendant also suggests that Plaintiff’s  
16 contention that he submitted the January 8, 2010, appeal to the Appeals Office is not believable  
17 because (1) there is no reason that he would submit it to the Appeals Office at the same time he  
18 submitted it to Defendant for informal review; and (2) unlike Plaintiff’s other two appeals, the  
19 January 8, 2010, appeal is not stamped as received by the Inmate Appeals Branch.

20 Insofar as Defendant characterizes Plaintiff’s claim as “suspicious,” such a determination  
21 goes beyond that permitted on summary judgment. Soremekun v. Thrifty Payless, Inc., 509 F.3d  
22 978, 984 (9th Cir. 2007). The Court is also hesitant to conclude that Plaintiff’s statements are  
23 directly contradictory. While he may say that he gave it to Defendant in his letter to the Warden, he  
24 does not say that *he did not* give it to anyone else.

25 The path of Plaintiff’s January 8, 2010, appeal is therefore disputed. While Defendant  
26 contends that Plaintiff did not send an appeal to the Appeals Office until the middle of February  
27 2010, Plaintiff contends that he submitted the January 8, 2010, letter directly to the Appeals Office.

28 \_\_\_\_\_  
<sup>5</sup> Defendant cites Cal. Code Regs. tit. 15, § 3084.5(a)(3)(G)(2009), which waives the informal level review requirement for accusations of misconduct by peace officers.

1 Taking the evidence in the light most favorable to Plaintiff, the Court finds that there is a genuine  
2 dispute of material fact as to whether Plaintiff's January 8, 2010, appeal exhausted his retaliation  
3 claim. The Court cannot make findings on Plaintiff's remaining attempts to get a response given this  
4 disputed fact.

5 **E. CONCLUSION AND RECOMMENDATION**

6 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 7 1. Defendant's motion for summary judgment, filed on August 21, 2014, be GRANTED  
8 IN PART and DENIED IN PART;
- 9 2. Defendant's motion be GRANTED as to Plaintiff's claims that Defendant (1) refused  
10 to file his grievances; and (2) denied medical care on December 22, 2009, and these  
11 claims be DISMISSED WITHOUT PREJUDICE; and
- 12 3. Defendant's motion be DENIED as to Plaintiff's claim of retaliation. The Court will  
13 determine if an evidentiary hearing, or the submission of additional evidence, is  
14 necessary upon District Court review of these Findings and Recommendations.

15 These Findings and Recommendations will be submitted to the United States District Judge  
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days**  
17 after being served with these Findings and Recommendations, the parties may file written objections  
18 with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and  
19 Recommendations." A party may respond to another party's objections by filing a response within  
20 **fourteen (14) days** after being served with a copy of that party's objections. The parties are advised  
21 that failure to file objections within the specified time may waive the right to appeal the District  
22 Court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

23 IT IS SO ORDERED.

24  
25 Dated: December 9, 2014

/s/ Dennis L. Beck  
26 UNITED STATES MAGISTRATE JUDGE