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

DARNELL DUKES,)	Case No.: 1:12cv00941 LJO DLB (PC)
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS
)	REGARDING DEFENDANT’S MOTION FOR
v.)	SUMMARY JUDGMENT FOR FAILURE TO
)	EXHAUST
GARCIA,)	(Document 51)
)	
Defendant.)	THIRTY-DAY OBJECTION DEADLINE
)	

Plaintiff Darnell Dukes (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action on June 11, 2012. This action is proceeding on a First Amendment retaliation claim against Defendant Garcia. All other claims and Defendants have been dismissed.

A. PROCEDURAL HISTORY

On October 2, 2013, Defendant filed an unenumerated Rule 12(b) motion to dismiss based on exhaustion. The Court issued Findings and Recommendations that the motion be granted on January 8, 2014, and the findings were adopted on February 24, 2014.

Plaintiff appealed the dismissal on March 24, 2014.

On August 19, 2014, the Ninth Circuit remanded the action “for further proceedings in light of the intervening authority of Albino v. Baca.” ECF No. 45, at 2. The Court made no substantive findings.

Pursuant to the order of remand, the Court vacated the judgment on September 12, 2014.

1 On October 15, 2014, Defendant filed the instant motion for summary judgment based on
2 Plaintiff's failure to exhaust his administrative remedies. After receiving an extension of time,
3 Plaintiff opposed the motion on December 18, 2014. Defendant filed his reply on December 30, 2014.
4 The motion was deemed submitted when Defendant filed his reply pursuant to Local Rule 230(1).

5 On January 26, 2015, Plaintiff submitted an unauthorized surreply.¹

6 **B. PLAINTIFF'S ALLEGATIONS**²

7 Plaintiff is currently incarcerated at Kern Valley State Prison ("KVSP"), where the events at
8 issue occurred.

9 Plaintiff alleges that in June 2010, while he was housed at California State Prison, Los Angeles
10 County ("CSP-LAC"), he received a false Rules Violation Report ("RVR"). The RVR resulted in his
11 transfer to KVSP, which Plaintiff contends is a much harsher environment than CSP-LAC.

12 Plaintiff arrived at KVSP in April 2011. Shortly thereafter, he received an order from the
13 Chief Inmate Appeals Office dated June 16, 2011. The order requested that Plaintiff forward a copy
14 of his general chrono and classification chrono. To obtain the documents, Plaintiff sent an "inmate
15 request for interview" to Defendant Garcia, his assigned counselor. Plaintiff had staff sign and date
16 the request and deliver it to Defendant Garcia. Defendant Garcia did not respond or send Plaintiff the
17 documents. Plaintiff therefore filed an inmate grievance against him.

18 Plaintiff alleges that on October 18, 2011, Defendant Garcia came to his cell and yelled,
19 "Here's your shit, don't fuck with me anymore." ECF No. 1, at 6.

20 On October 29, 2011, Plaintiff had a rehearing on the June 2010 RVR. The RVR was
21 dismissed. Plaintiff informed Defendant Garcia of the program review changes that he was now
22 entitled to through an "inmate request for interview" dated November 17, 2011. The form indicates
23 that staff hand-delivered it to Defendant Garcia on November 17, 2011. Plaintiff states that staff
24 signed and dated the document and delivered it to Defendant Garcia.

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26
27 ¹ Defendant did not move to strike the filing.

28 ² Only allegations relating to the remaining claim are relevant

1 On November 28, 2011, Plaintiff filed another inmate grievance against Defendant Garcia.
2 Plaintiff believed that he no longer fit the criteria for incarceration at KVSP, and he alleges that
3 Defendant Garcia retaliated against him by failing to take him to the Institutional Classification
4 Committee (“ICC”) for program review and potential transfer.

5 Plaintiff alleges that Officer Borrero acted in concert with Defendant Garcia in retaliating
6 against him by improperly screening out his valid inmate grievance.

7 **C. LEGAL STANDARD**

8 The failure to exhaust is subject to a motion for summary judgment in which the court may
9 look beyond the pleadings. Albino v. Baca, 747 F.3d 1162, 1170 (9th Cir. 2014). If the Court
10 concludes that Plaintiff has failed to exhaust, the proper remedy is dismissal without prejudice. Jones,
11 549 U.S. at 223-24; Lira v. Herrera, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

12 Defendant bears the burden of proof in moving for summary judgment for failure to exhaust,
13 Albino, 747 F.3d at 1166, and he must “prove that there was an available administrative remedy, and
14 that the prisoner did not exhaust that available remedy,” id. at 1172. If Defendant carries his burden,
15 the burden of production shifts to Plaintiff “to come forward with evidence showing that there is
16 something in his particular case that made the existing and generally available administrative remedies
17 effectively unavailable to him.” Id. This requires Plaintiff to “show more than the mere existence of a
18 scintilla of evidence.” In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010) (citing
19 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505 (1986)). “If the undisputed
20 evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is
21 entitled to summary judgment under Rule 56.” Albino, 747 F.3d at 1166. However, “[i]f material
22 facts are disputed, summary judgment should be denied, and the district judge rather than a jury should
23 determine the facts.” Id.

24 **D. APPEALS PROCESS**

25 The California Department of Corrections and Rehabilitation has an administrative grievance
26 system for prisoners to appeal any departmental decision, action, condition, or policy having an
27 adverse effect on prisoners’ welfare. Cal. Code Regs. tit. 15, § 3084.1. In order to satisfy section
28 1997e(a), California state prisoners are required to use this process to exhaust their claims prior to

1 filing suit. Woodford v. Ngo, 548 U.S. 81, 85-86, 126 S.Ct. 2378 (2006); McKinney v. Carey, 311
2 F.3d 1198, 1199-1201 (9th Cir. 2002).

3 To exhaust available remedies during the relevant time period, an inmate must proceed through
4 three formal levels of review unless otherwise excused under the regulations. Cal. Code Regs. tit. 15,
5 § 3084.5. The appeal must be submitted within thirty calendar days of (1) the occurrence of the event
6 being appealed; (2) upon first having knowledge of the event; or (3) upon receiving an unsatisfactory
7 departmental response to an appeal. Cal. Code Regs. tit., § 3084.8(b). An inmate is not required to
8 seek resolution at the informal level, but they must continue to secure review at all three formal levels
9 of review, culminating in a third-level decision.³ Cal. Code Regs. tit. 15, § 3084.7

10 **E. UNDISPUTED FACTS⁴**

11 Based on Plaintiff's concession in his complaint, as well as in his opposition, it is undisputed
12 that he did not appeal his grievance to the highest level. ECF No. 1, 7-8.

13 Plaintiff filed a grievance in November 28, 2011, requesting that he be taken to ICC for a
14 special program review. The appeal alleged that Defendant Garcia was biased against Plaintiff
15 because of prior appeals filed against him. The appeal explained that Plaintiff attempted to resolve the
16 issue informally with Defendant Garcia and references an "attached 'inmate request for interview.'" ECF
17 No. 1, at 23.

18 Plaintiff cites to a CDCR 22 (inmate request for interview) attached to his complaint. The
19 request form is addressed to Defendant Garcia and requests that he take Plaintiff back to ICC for
20 "change in program." ECF No. 1, at 29. According to the form, "S. Lopez" received it on November
21 17, 2011. There is a signature, and the form indicates that S. Lopez forwarded the request to C. Garcia
22 on November 17, 2011. It states that the method of delivery was "in person." Section B ("Staff
23 Response") and Section C ("Request for Supervisor Review") are blank. ECF No. 1, at 29.

24 On December 7, 2011, Officer Borrero, an Appeals Coordinator, returned Plaintiff's
25 documents and rejected the appeal, explaining that the appeal was "missing necessary supporting

26 ³ Prior to January 28, 2011, an inmate was required to present an appeal at the informal level of review.

27 ⁴ Defendant did not provide a separate statement of undisputed facts. Nonetheless, the Court can easily discern the
28 undisputed and disputed facts.

1 documents as established in CCR 3084.3.” ECF No. 1, at 22; Tallerico Decl. ¶ 8. Specifically,
2 Officer Borrero instructed Plaintiff to “attach a completed CDCR 22 showing you[] have exhausted
3 the CDCR 22 process.” ECF No. 1, at 22.

4 Plaintiff did not resubmit his appeal with the requested documentation. Rather, on December
5 8, 2011, Plaintiff submitted a second inmate appeal contending that the screen-out at the First Level
6 was incorrect. ECF No. 1, at 21; Tallerico Decl. ¶ 12. In the appeal, Plaintiff noted that “there is
7 nothing in the [DOM] or title 15 that states that I must first file a CDCR inmate request form.” ECF
8 No. 1, at 21; Tallerico Decl. ¶ 12.

9 The appeal was returned by Officer Borrero on December 14, 2011. ECF No. 1, at 25;
10 Tallerico Decl. ¶13. The letter explained that Plaintiff’s appeal was cancelled as a duplicate. Plaintiff
11 was instructed to comply with the directive in the December 7, 2011, screen-out. The letter further
12 states that Plaintiff must attempt to resolve the issue informally through the CDCR 22 process.⁵
13 “Complete a CDCR 22 and hand deliver or mail to the staff member who is knowledgeable or is in the
14 position to respond to your issue.” ECF No. 1, at 25.

15 Plaintiff submitted another duplicate appeal on December 22, 2011. ECF No. 1, at 19;
16 Tallerico Decl. ¶ 14. On December 28, 2011, Officer Borrero returned the documents and rejected the
17 appeal because Plaintiff did not submit supporting documents. Plaintiff was instructed to complete a
18 CDCR 22 and hand deliver or mail it to the staff member knowledgeable or in the position to respond
19 to the issue. ECF No. 1, at 19; Tallerico Decl. ¶ 14. The letter warned Plaintiff to follow the
20 instructions if he wanted his November 28, 2011, appeal processed; otherwise, the appeal would be
21 cancelled. ECF No. 1, at 19; Tallerico Decl. ¶ 14.

22 Plaintiff submitted the appeal a third time on January 11, 2012. Tallerico Decl. ¶ 15. Officer
23 Borrero screened out the appeal in a letter dated January 17, 2012, noting, “you are not permitted to
24 appeal a screen-out.” Tallerico Decl. ¶ 15. Plaintiff was again directed to follow the instructions and
25 complete the CDCR 22 process. The letter stated, “If what you claim is true, forward the CDCR 22 to
26 the counselor’s supervisor.” Tallerico Decl. ¶ 15.

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28 ⁵ Officer Borrero cites Title 15 of the California Code of Regulations, section 3084.2(b). This section simply states that Plaintiff must submit the signed original appeal forms and supporting documents.

1 Plaintiff is familiar with the administrative appeals process in California’s prisons. Tallerico
2 Decl. ¶ 16.

3 **F. DISCUSSION**

4 Defendant contends that Plaintiff failed to properly exhaust his administrative remedies by
5 repeatedly failing to comply with instructions to submit a completed CDCR 22 with his appeal.
6 Indeed, it is undisputed that Plaintiff did not file his appeal to the highest level of review, and even
7 though he was offered numerous opportunities to correct the deficiency, he failed to do so. Defendant
8 has therefore carried his burden of proving that there was an available administrative remedy, and that
9 Plaintiff did not exhaust that available remedy.

10 The burden now shifts to Plaintiff “to come forward with evidence showing that there is
11 something in his particular case that made the existing and generally available administrative remedies
12 effectively unavailable to him.” Albino, 747 F.3d at 1172. Plaintiff mainly argues that Officer
13 Borrero falsely screened out his appeal to prevent exhaustion.

14 To determine whether the screen-out was proper, an examination of the CDCR 22 that Plaintiff
15 submitted is necessary. As explained above, it is undisputed that Plaintiff was instructed in the first
16 screen-out to submit a *completed* CDCR 22. As a matter of law, an appeals coordinator can properly
17 reject an appeal when an inmate seeks a written response to a request for interview, but has not yet
18 received the response at the time of filing the appeal. Cal. Code Regs. tit. 15, § 3086(e)(2). In this
19 case, a response to the request for interview was necessary so that reviewing staff had a response to act
20 upon. Tallerico Decl. ¶¶ 9-10. This is not disputed.⁶

21 Plaintiff argues, however, that because he did not receive a response to the CDCR 22, he could
22 not exhaust any further and the appeal should have been accepted at the First Level. ECF No. 59, at 2.
23 Defendant disputes this, arguing that Plaintiff should have completed Section C (“Request for
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26 ⁶ Under the regulations in place after January 2011, an inmate was no longer required to seek resolution at the informal
27 level prior to filing an appeal, and Officer Borrero’s screen-out was not based Plaintiff’s general failure to request informal
28 resolution. In this instance, Plaintiff was seeking to have the appeals staff act upon Defendant Garcia’s apparent refusal to
take him back to ICC, which makes having Defendant Garcia’s response (or that of his supervisor), i.e., a *completed* form
22, a necessary prerequisite.

1 Supervisor Review”) if he did not receive a response from Defendant Garcia. Defendant explains that
2 receiving a response to Section C would have completed the CDCR 22.

3 It is undisputed that Section B (“Staff Response”) and Section C (“Request for Supervisor
4 Review”) of the form are blank. ECF No. 1, at 29. Section B would have been where Defendant
5 Garcia provided his response. Section C permits the inmate to request review from a supervisor where
6 he disagrees with the staff response. Indeed, pursuant to section 3086(g), “if an inmate is dissatisfied
7 with or disagrees with the staff member’s response,” he or she may submit the request to the
8 employee’s supervisor. Tallerico Decl. ¶ 11. According to Defendant, upon the submission of the
9 CDCR 22, the inmate keeps the original and the goldenrod copy.

10 Plaintiff attempts to dispute this by arguing that if he does not receive a response from staff, he
11 “can’t exhaust the CDCR 22 form. . .” ECF No. 60, at 3. To support his argument, Plaintiff contends
12 that Defendant is deceiving the Court by “acting as if the CDCR 22 form is a one page document
13 which in reality it’s a four (4) page document. . .” ECF No. 60, at 3. Plaintiff’s argument, however,
14 does not dispute the fact that he was required to complete Section C to complete the CDCR 22.
15 Defendant is not arguing that the document is four pages and that each page requires a different action.
16 Rather, both parties are correct that the form consists of an original and three copies.

17 If Plaintiff is suggesting that he only had the original copy and could not submit anything to
18 the supervisor, he does not support his argument. Plaintiff points to Exhibit A to his opposition, which
19 is a blank CDCR 22. Plaintiff highlights the bottom of the form, which states, “Distribution: Original-
20 Return to Inmate/Parolee; Canary- Inmate/Parolee 2nd Copy; Pink- Staff Members Copy; Goldenrod-
21 Inmate/Parolee’s 1st Copy.” ECF No. 60, at 8. Plaintiff’s evidence therefore belies any such
22 argument.

23 Plaintiff repeats this argument in his surreply, arguing that he was “denied the right” to exhaust
24 his CDCR 22. ECF No. 62, at 2. He states that he did his best to comply with the rules and disagrees
25 with Defendant’s contention that he could have bypassed Defendant Garcia by completing Section C.
26 “[T]here is no way possible that plaintiff could complete or go to the next level only with his first copy
27 receipt that is on file with this court.” ECF No. 3, at 6. Even if, for some reason, Plaintiff did not
28 have the copies that he should have received when he submitted the CDCR 22 to Officer Lopez, he

1 could have explained why he could not have completed the form when he resubmitted his appeal. He
2 did not do so and instead continued to submit duplicate appeals. Thus, Sapp v. Kimbrell, 623 F.3d
3 813 (9th Cir. 2010), cited by Plaintiff, is inapplicable because the screen-out was proper in the first
4 instance.

5 It is therefore undisputed that Plaintiff was instructed to complete the CDCR 22 form, and that
6 he could have done so by completing Section C and submitting it to Defendant Garcia's supervisor. It
7 is also undisputed that Plaintiff was instructed *four* times to complete the form. Instead, Plaintiff
8 disregarded the instructions and continued to submit duplicate appeals. Plaintiff did not raise the issue
9 of his alleged inability to complete the CDCR 22 to the appeals staff.

10 To the extent that the parties' dispute whether Defendant Garcia received the appeal, the
11 dispute is irrelevant. In his declaration, Defendant Garcia states that he does not recall receiving the
12 CDCR 22, even though his first initial and last name appear on the document. Defendant Garcia states
13 that he did not sign the form, and that it appears that Officer Lopez filled out Defendant Garcia's
14 name, "indicating he left the document for [him]." Garcia Decl. ¶¶ 5-6. Plaintiff disputes this, calling
15 it "laughable because once the plaintiff received his signed and dated copy of the CDCR 22 form it
16 became a legal document. . ." EFC No. 60, at 3.

17 Again, however, regardless of whether Defendant Garcia actually received the form, Plaintiff
18 should have filled out Section C to complete the form. If Defendant Garcia did receive it and simply
19 ignored it, Plaintiff could have completed Section C. Likewise, if Defendant Garcia did not receive
20 the form and thus did not respond, Plaintiff could have completed Section C.

21 Based on the above, the Court finds that Plaintiff was given numerous opportunities to correct
22 the deficiency but failed to do so. Plaintiff has therefore failed to carry his burden and his claim is
23 unexhausted.

24 **G. CONCLUSION AND RECOMMENDATION**

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

- 26 1. Defendant's motion to dismiss, filed October 15, 2014, be GRANTED; and
- 27 2. This action be DISMISSED WITHOUT PREJUDICE for Plaintiff's failure to exhaust.

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

9
10 IT IS SO ORDERED.

11 Dated: March 11, 2015

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE