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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 GORDON BULLOCK,

12 Plaintiff,

13 v.

14 BROCK SHEELA, et al.,

15 Defendants.  
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No. 1:14-cv-00092-DAD-EPG

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS, GRANTING IN  
PART AND DENYING IN PART  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT, DENYING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT,  
AND REFERRING MATTER BACK TO  
MAGISTRATE JUDGE FOR EVIDENTIARY  
HEARING

(Doc. Nos. 62, 78, 84)

20 Plaintiff is a state prisoner proceeding pro se and *in forma pauperis* in this civil rights  
21 action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge  
22 pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

23 On February 28, 2018, the assigned magistrate judge issued findings and  
24 recommendations recommending that: (1) plaintiff's motion for summary judgment (Doc. No.  
25 78) be denied; (2) defendants' summary judgment motion due to plaintiff's failure to exhaust  
26 administrative remedies prior to filing suit (Doc. No. 62) be granted in part and denied in part;  
27 and (3) defendants be given twenty-one days from the date any order adopting is entered to  
28 request an evidentiary hearing on the issue of whether plaintiff properly submitted an inmate

1 grievance that prison officials failed to process. (Doc. No. 84.) The findings and  
2 recommendations were served on the parties, and contained notice that objections thereto were to  
3 be filed within twenty-one days.

4 Defendants filed objections to the findings and recommendations on March 21, 2018.  
5 (Doc. No. 88.) Therein, defendants argue plaintiff knew he had previously suffered a heart attack  
6 by December 3, 2013, at the latest, and knew he had previously contracted Valley Fever by  
7 January 14, 2014, at the latest, based on the allegations of his original complaint, as well as those  
8 made in his second and third amended complaints. (*See* Doc. No. 88 at 3–4.) Because of this,  
9 defendants’ contend his purported inmate appeal filed March 7, 2014 was untimely. (*Id.* at 4.)  
10 As the magistrate judge observed in the findings and recommendations, however, plaintiff  
11 testified at his deposition that he did not become aware of the harm he had suffered until February  
12 14, 2014, which would render his March 7, 2014 inmate appeal timely. (Doc. No. 84 at 10.)  
13 Defendants argue that plaintiff’s deposition testimony may not contradict the statements in his  
14 prior complaints. (Doc. No. 88 at 3–4) (citing *Van Asdale v. International Game Technology*,  
15 577 F.3d 989 (9th Cir. 2009)).

16 *Van Asdale*, however, concerned application of the “sham affidavit” rule, which holds  
17 that, as a general rule, “a party cannot create an issue of fact by an affidavit [submitted in defense  
18 of a summary judgment motion] contradicting his prior deposition testimony.” 577 F.3d at 998.  
19 The issue before this court is not the same as that presented in *Van Asdale*, since here plaintiff’s  
20 deposition testimony and not a subsequently-drafted affidavit, creates the genuine dispute of  
21 material fact. Additionally, the Ninth Circuit has noted that the “sham affidavit” rule “should be  
22 applied with caution,” since “[a]ggressive invocation of the rule . . . threatens to ensnare parties  
23 who may have simply been confused during their deposition testimony and may encourage  
24 gamesmanship by opposing attorneys.” *Id.* (quoting *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d  
25 1255, 1264 (9th Cir. 1993)). Thus, in order to invoke the rule, the court must make a factual  
26 finding that the contradicting evidence was indeed a “sham,” and must conclude that the  
27 inconsistency is not the result of “an honest discrepancy, a mistake, or newly discovered  
28 evidence.” *Id.* at 998–99 (quoting *Messick v. Horizon Indus.*, 62 F.3d 1227, 1231 (9th Cir.

1 1995)). What defendants propose here is, in essence, a “sham testimony” rule, holding that  
2 deposition testimony may not deviate from prior pleadings.<sup>1</sup> No authority for such a rule has  
3 been presented to this court. Moreover, no finding was made or should be made here that  
4 plaintiff’s deposition testimony was a sham. The veracity of plaintiff’s testimony will be tested at  
5 an evidentiary hearing in this case, which the magistrate judge has already scheduled for May 17,  
6 2018. (See Doc. No. 87.) This is entirely appropriate. See *Anderson v. Liberty Lobby, Inc.*, 477  
7 U.S. 242, 249 (1986) (“[A]t the summary judgment stage the judge’s function is not himself to  
8 weigh the evidence and determine the truth of the matter but to determine whether there is a  
9 genuine issue for [further factual resolution].”).

10 Defendants also contend they are entitled to summary judgment on plaintiff’s retaliation  
11 claim against defendant Sheela. Particularly, defendants assert plaintiff did not dispute their  
12 statement of undisputed material facts, one of which was that plaintiff never submitted an inmate  
13 grievance alleging defendant Sheela had retaliated against him. (Doc. No. 88 at 5.) In  
14 concluding there was a genuine dispute of material fact as to this issue, the magistrate judge based  
15 the finding and recommendations on the evidence actually presented—plaintiff’s deposition  
16 testimony—rather than defendants’ characterization of that evidence in its statement of facts.  
17 (Doc. No. 84 at 11.) This too is entirely appropriate, and provides no grounds on which to reject  
18 the magistrate judge’s findings. *Bischoff v. Brittain*, 183 F. Supp. 3d 1080, 1084 (E.D. Cal. 2016)  
19 (“The court’s decision [on a summary judgment motion] relies on the evidence submitted rather  
20 than how that evidence is characterized in the statements.”); *Williams v. City of Medford*, No. 09-  
21 3026-CL, 2011 WL 5842768, at \*3 (D. Ore. Oct. 19, 2011) (noting the court only considers

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23 <sup>1</sup> Aside from the dissimilarities between the present case and *Van Asdale*, the court notes that  
24 only one of the three complaints defendants refer to could be considered evidence, because  
25 neither the second nor third amended complaint was signed by plaintiff under penalty of perjury.  
26 See *Schroeder v. McDonald*, 55 F.3d 454, 460 n.10 (9th Cir. 1995) (verified complaint signed  
27 under penalty of perjury which states specific facts admissible in evidence and based on personal  
28 knowledge may be used as affidavit opposing summary judgment). The verified complaint states  
“I put in Lots of Medical request never Saw Doctor until 12-2-13 at Soledad where he Informed  
me of High blood pressure and Put on Medcation for my Heart.” (Doc. No. 1 at 2) (typographical  
errors in original). This allegation does not state that plaintiff was told on December 2, 2013 that  
he had previously suffered a heart attack.

evidence submitted, not a party's characterizations of that evidence), *report and recommendation adopted*, 2011 WL 5842762 (D. Ore. Nov. 21, 2011).

Plaintiff has also filed objections, essentially opposing defendants' objections and reiterating what the magistrate judge had already recommended. (Doc. No. 89.)

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the undersigned has conducted a *de novo* review of this case. Having carefully reviewed the entire file, including the objections of both parties, the undersigned concludes the findings and recommendations are supported by the record and by proper analysis.

Accordingly:

1. The findings and recommendations issued February 28, 2018 (Doc. No. 84) are adopted in full;
2. Defendants' motion for summary judgment due to plaintiff's failure to exhaust administrative remedies prior to filing suit (Doc. No. 62) is denied in part and granted in part;
3. Plaintiff's motion for summary judgment (Doc. No. 78) is denied; and
4. This action is referred back to the assigned magistrate judge for further proceedings, including an evidentiary hearing on the issue of whether plaintiff properly submitted an inmate grievance that prison officials failed to process.

IT IS SO ORDERED.

Dated: March 28, 2018

  
UNITED STATES DISTRICT JUDGE