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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER DICKSON,
Plaintiff,
v.
GOMEZ, *et al.*,
Defendant.

No. 1:17-cv-00294-DAD-BAM (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND GRANTING IN
PART DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

(Doc. No. 37)

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

On November 9, 2020, the assigned magistrate judge issued findings and recommendations recommending that: (1) defendants' motion for summary judgment based upon plaintiff's failure to exhaust his administrative remedies prior to filing suit be granted in part and denied in part; (2) plaintiff's deliberate indifference claim brought against defendant Sao be dismissed, without prejudice, due to plaintiff's failure to first exhaust administrative remedies; (3) defendant Sao be dismissed from this action; and (4) this action proceed on plaintiff's claims against defendants Gomez, Rios, and Martinez for excessive force and against defendants Duncan and Esparza for violations of plaintiff's due process rights. (Doc. No. 57.) The findings and

1 recommendations were served on the parties and contained notice that any objections thereto
2 were to be filed within fourteen (14) days of the date of service. (*Id.* at 18.) Defendants filed
3 objections to the findings and recommendations on November 19, 2020. (Doc. No. 58.) To date,
4 plaintiff has not filed objections to the pending finds and recommendations, and the time in which
5 to do so has now passed.

6 In their objections, defendants do not address the magistrate judge’s findings that they
7 failed to oppose or dispute the factual allegations plaintiff set forth regarding his inability to
8 utilize the prison grievance system properly, despite his best efforts. (*See* Doc. No. 58.) Instead,
9 defendants merely repeat the arguments they presented to the magistrate judge which were
10 properly rejected in light of the evidence on summary judgment that plaintiff submitted a timely
11 administrative grievance and that prison officials simply failed to process it thereby rendering
12 administrative remedies unavailable to plaintiff at the time this suit was filed. *See Andres v.*
13 *Marshall*, 867 F.3d 1076, 1079 (9th Cir. 2017) (dismissal due to a failure to exhaust is
14 inappropriate if administrative remedies were unavailable at the time complaint was filed, even
15 where plaintiff was still utilizing the grievance process).

16 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this court has conducted a
17 *de novo* review of this case. Having carefully reviewed the entire file, including defendants’
18 objections, the court finds the findings and recommendations to be supported by the record and
19 by proper analysis. Nothing raised in defendant’s objections persuades the undersigned
20 otherwise.

21 Accordingly,

- 22 1. The findings and recommendations issued on November 9, 2020 (Doc. No. 57) are
23 adopted in full;
- 24 2. Defendants’ motion for summary judgment for failure to exhaust administrative
25 remedies (Doc. No. 37) is granted in part and denied in part;
- 26 3. Plaintiff’s deliberate indifference claim against defendant Sao is dismissed, without
27 prejudice, for the failure to exhaust available administrative remedies;
- 28 4. Defendant Sao is dismissed from this action;

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5. This action shall proceed on plaintiff's claims against defendants Gomez, Rios, and Martinez for excessive force and against defendants Duncan and Esparza for violations of plaintiff's due process rights; and

6. This matter is referred back to the magistrate judge for further proceedings consistent with this order.

IT IS SO ORDERED.

Dated: December 16, 2020


UNITED STATES DISTRICT JUDGE