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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 EDWARD JOSEPH PROKOP,

11 Plaintiff,

No. CIV S-07-1915 JAM KJM P

12 vs.

13 JAMES E. TILTON, et al.,

14 Defendants.

FINDINGS & RECOMMENDATIONS

15 _____/
16 Plaintiff is a California prisoner proceeding pro se with an action for violation of
17 civil rights under 42 U.S.C. § 1983. This action is currently proceeding against defendant Koos
18 (defendant) based upon an alleged violation of the Eighth Amendment. Defendant has filed a
19 motion in which she asserts this action should be dismissed for plaintiff's failure to exhaust
20 administrative remedies with respect to his claim prior to filing suit.

21 A motion to dismiss for failure to exhaust administrative remedies prior to filing
22 suit arises under Rule 12(b) of the Federal Rules of Civil Procedure. Wyatt v. Terhune, 315 F.3d
23 1108, 1119 (9th Cir. 2003). In deciding a motion to dismiss for failure to exhaust non-judicial
24 remedies, the court may look beyond the pleadings and decide disputed issues of fact. Id. at
25 1120. If the district court concludes that the prisoner has not exhausted non-judicial remedies,
26 the proper remedy is dismissal of the claim without prejudice. Id.

1 The exhaustion requirement is rooted in the Prison Litigation Reform Act, which
2 provides that “[n]o action shall be brought with respect to prison conditions under section 1983
3 of this title, . . . until such administrative remedies as are available are exhausted.” 42 U.S.C.
4 § 1997e(a). California Department of Corrections and Rehabilitation (CDCR) regulations
5 provide administrative procedures in the form of one informal and three formal levels of review
6 to address plaintiff’s claims. See Cal. Code Regs. tit. 15, §§ 3084.1-3084.7. Administrative
7 procedures generally are exhausted once a prisoner has received a “Director’s Level Decision,”
8 or third level review, with respect to his issues or claims. Cal. Code Regs. tit. 15, § 3084.5. All
9 steps must be completed before a civil rights action is filed, unless a plaintiff demonstrates a step
10 is unavailable to him; exhaustion during the pendency of the litigation will not save an action
11 from dismissal. McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir. 2002). Defendants bear the
12 burden of proving plaintiff’s failure to exhaust. Wyatt, 315 F.3d at 1119.

13 In his complaint, plaintiff alleges that on March 1, 2007, defendant purposefully
14 gave plaintiff the wrong medication, which resulted in plaintiff’s passing out and experiencing
15 terrible pain, among other things. Plaintiff also asserts he did not exhaust administrative
16 remedies with respect to his allegations against defendant because the facts presented are “non-
17 gri[e]vable.” Compl. at 3.¹

18 The California Code of Regulations provides that an inmate may appeal “any
19 departmental decision, action, condition, or policy which they can demonstrate as having an
20 adverse effect on their welfare.” Cal. Code Regs. tit. 15, § 3084.1. Plaintiff asserts several
21 reasons why this court should excuse the exhaustion requirement. None has any merit. Opp’n at
22 3-4.² Plaintiff also asks that the court stay this action while plaintiff exhausts administrative

23 ¹ Page references are to those assigned by the court’s CM/ECF system.

24 ² For example, plaintiff asserts he should not have to exhaust administrative remedies
25 because he seeks money damages, which he says cannot be obtained through the inmate
26 grievance process. However, this argument has been specifically rejected by the Supreme Court.
Booth v. Churner, 532 U.S. 731 (2001).

1 remedies. Id. at 4. The law is clear, however, that plaintiff must exhaust administrative remedies
2 before bringing an action under 42 U.S.C. § 1983. McKinney, 311 F.3d at 1200.

3 For the foregoing reasons, the court will recommend that defendant's motion to
4 dismiss be granted, that plaintiff's remaining claim be dismissed without prejudice for plaintiff's
5 failure to exhaust administrative remedies with respect to his claim prior to filing suit and that
6 this case be closed.³

7 Accordingly, IT IS HEREBY RECOMMENDED that:

8 1. Defendant Koos's motion to dismiss (#16) be granted;

9 2. Plaintiff's Eighth Amendment claim against defendant Koos be dismissed
10 without prejudice for plaintiff's failure to exhaust administrative remedies with respect to his
11 claim prior to filing suit; and

12 3. This case be closed.

13 These findings and recommendations are submitted to the United States District
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
15 days after being served with these findings and recommendations, any party may file written
16 objections with the court and serve a copy on all parties. Such a document should be captioned
17 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
18 shall be served and filed within ten days after service of the objections. The parties are advised

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22 ³ Defendant also argues the court should dismiss any causes of action plaintiff has against
23 defendant arising under California law. On April 22, 2008, the court screened plaintiff's
24 complaint under 28 U.S.C. § 1915(A) and found that plaintiff's complaint states only a cause of
25 action under the Eighth Amendment against defendant Koos. Even if this case were proceeding
26 on causes of action based on California law as well, it would be appropriate to decline to accept
supplemental jurisdiction under 28 U.S.C. § 1367. See *Carnegie-Mellon University v. Cohill*,
484 U.S. 343, 350 n.7 (1988) (when all federal claims have been dismissed before trial, the
interests promoted by supplemental jurisdiction are no longer present, and a court should decline
to exercise jurisdiction over state law claims).

1 that failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: January 22, 2009.

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6 U.S. MAGISTRATE JUDGE
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