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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JOHN WASHINGTON,  
Plaintiff,

No. CIV S-08-0386-MCE-CMK-P

vs.

FINDINGS AND RECOMMENDATIONS

SALEM MOHAMED, et al.,  
Defendants.

\_\_\_\_\_ /

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants’ motion to dismiss (Doc. 16) based on failure to exhaust administrative remedies prior to filing suit. On June 5, 2009, the court issued an order providing the parties an opportunity to file supplemental briefing. Specifically, the court’s order began by outlining the following applicable legal principles:

A motion to dismiss based on a prisoner’s failure to exhaust administrative remedies is properly the subject of an unenumerated motion under Federal Rule of Civil Procedure 12(b). See Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). “In deciding a motion to dismiss for failure to exhaust non-judicial remedies, the court may look beyond the pleadings and decide disputed issues of fact.” Id. at 1119-20. Where the court looks beyond the pleadings to a factual record in deciding the motion to dismiss, which is “. . . a procedure closely analogous to summary judgment,” the court must assure that the plaintiff has fair notice of his

1 opportunity to develop a record. Id. at 1120 n.14 (referencing the notice  
2 requirements outlined in Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998)  
3 (en banc), and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).  
4 Defendants bear the burden of establishing that the plaintiff failed to  
5 exhaust administrative remedies prior to filing suit. See Wyatt, 315 F.3d  
6 at 1120. If the court concludes that administrative remedies have not been  
7 exhausted, the unexhausted claim should be dismissed without prejudice.  
8 See id. at 1120; see also Jones v. Bock, 127 S.Ct. 910 (2007).

6 The court's order continued as follows:

7 In this case, defendants have submitted evidence, by way of  
8 declarations, establishing that plaintiff did not file any grievances  
9 whatsoever related to the incident which is the subject of the complaint. In  
10 his opposition, plaintiff submits his own declaration in which he states that  
11 he had prepared a grievance and handed it to defendant Hilliard but that he  
12 was instructed by defendant Hilliard not to file any grievances because it  
13 could interfere with a related FBI investigation. In their reply, defendants  
14 submit the declaration of defendant Hilliard in which he states that  
15 plaintiff "never mentioned to me that he planned to file an administrative  
16 appeal" and "[a]t no time did I discourage Washington from filing an  
17 administrative appeal." In response to defendant Hilliard's declaration,  
18 plaintiff states that he was interviewed by two FBI agents two weeks after  
19 giving his grievance to defendant Hilliard. Plaintiff further states that one  
20 of these agents, identified as Special Agent Rachel, "had a copy of the  
21 grievance Plaintiff gave Hilliard." Plaintiff states that he wrote to Special  
22 Agent Rachel on November 20, 2008, requesting a copy of her  
23 investigation report and requesting that the agent provide plaintiff with a  
24 copy of the grievance she received. Plaintiff attaches a copy of his letter to  
25 the agent and states that, as of the date of his filing (December 5, 2008), he  
26 had not received a response.

17 This case requires the court to look beyond the pleadings in  
18 order to resolve a factual dispute. Specifically, the dispute is whether  
19 plaintiff was prevented from filing an inmate grievance because he was  
20 instructed not to do so by defendant Hilliard. In an abundance of caution,  
21 the court hereby provides plaintiff with the advisements required by  
22 Wyatt, and will provide plaintiff an opportunity to further develop the  
23 record by submitting any documents he may have in support of his  
24 position, including any response to the November 20, 2008, letter he has  
25 received from Special Agent Rachel.

22 In response, plaintiff filed a document entitled "Status of the FBI's Response to  
23 Plaintiff's Letter Requesting a Copy of their Investigative Report into Plaintiff's Grievance that  
24 was Submitted to Prison Staff." In this document, plaintiff states that his letter to the FBI was  
25 returned as undeliverable. Attached to plaintiff's document is a copy of the envelope indicating  
26 that the post office marked it "Undeliverable as Addressed – Forwarding Order Expired." The

1 letter was addressed to the United States Department of Justice at 650 Capital Mall in  
2 Sacramento, California.

3           As discussed in the prior order, defendants have submitted evidence in the form of  
4 declarations which indicate that plaintiff did not submit any prison grievances relating to the  
5 issues raised in his complaint. Defendants, therefore, have met their burden of establishing non-  
6 exhaustion. The court finds that, in asserting that his efforts to exhaust were thwarted, the  
7 burden must logically shift to plaintiff to establish the applicability of this exception to the  
8 exhaustion requirement. All plaintiff has submitted, however, is his own declaration that he was  
9 instructed by defendant Hilliard not to file a grievance, a contention which defendant Hilliard  
10 flatly denies. In light of the competing declarations, the court cannot find that plaintiff has  
11 shown that it is more likely than not that defendant Hilliard instructed him not to file a grievance.

12           Based on the foregoing, the undersigned recommends that defendants' motion to  
13 dismiss (Doc. 16) be granted.

14           These findings and recommendations are submitted to the United States District  
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days  
16 after being served with these findings and recommendations, any party may file written  
17 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
18 Findings and Recommendations." Failure to file objections within the specified time may waive  
19 the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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21 DATED: August 20, 2009

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23 **CRAIG M. KELLISON**  
24 UNITED STATES MAGISTRATE JUDGE  
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