

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

WAYNE ALLEN,

Plaintiff, No. CIV S-08-2523 EFB P

VS.

CALIFORNIA DEPARTMENT OF
CORRECTIONS, et al.,

Defendants. ORDER

16 Plaintiff is a state prisoner proceeding without counsel in an action brought under 42
17 U.S.C. § 1983. He seeks leave to proceed *in forma pauperis*. See 28 U.S.C. § 1915(a). This
18 proceeding was referred to this court by Local Rule 72-302 pursuant to 28 U.S.C. § 636(b)(1)
19 and is before the undersigned pursuant to plaintiff's consent. See 28 U.S.C. § 636; see also E.D.
20 Cal. Local Rules, Appx. A, at (k)(1)-(2)

Plaintiff's declaration makes the showing required by 28 U.S.C. § 1915(a)(1) and (2).

22 Plaintiff must pay the \$350 filing fee. *See* 28 U.S.C. §§ 1914(a), 1915(b)(1). Plaintiff
23 must make monthly payments of 20 percent of the preceding month's income credited to his trust
24 account. *See* 28 U.S.C. § 1915(b)(2). The agency having custody of plaintiff shall forward
25 payments from plaintiff's account to the Clerk of the Court each time the amount in the account
26 exceeds \$10 until the filing fee is paid.

1 The court has reviewed plaintiff's December 15, 2008 amended complaint pursuant to 28
2 U.S.C. § 1915A and finds that it must be dismissed because plaintiff concedes that he has not
3 exhausted his administrative remedies. *See Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir.
4 2003) (stating that a prisoner's concession to nonexhaustion is a valid ground for dismissal of an
5 action).

6 The Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e, was amended to provide
7 that “[n]o action shall be brought with respect to prison conditions under section 1983 of this
8 title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
9 facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).
10 This requirement is mandatory and unequivocal. *Booth v. Churner*, 532 U.S. 731, 741 (2001);
11 *McKinney v. Carey*, 311 F.3d 1198, 1200 (9th Cir. 2002) (“Congress could have written a statute
12 making exhaustion a precondition to judgment, but it did not. The actual statute makes
13 exhaustion a precondition to *suit*.”). A prisoner seeking leave to proceed *in forma pauperis* in an
14 action challenging the conditions of his confinement brings an action for purposes of 42 U.S.C.
15 § 1997e when he submits his complaint to the court. *Vaden v. Summerhill*, 449 F.3d 1047, 1050
16 (9th Cir. 2006). Therefore, a prisoner must exhaust available administrative remedies before
17 filing any papers in federal court and is not entitled to a stay of judicial proceedings in order to
18 exhaust. *Id.* at 1051; *McKinney*, 311 F.3d 1198.

19 California prisoners may appeal “any departmental decision, action, condition, or policy
20 which they can demonstrate as having an adverse effect upon their welfare.” Cal. Code Regs. tit.
21 15, § 3084.1(a). The regulations require the use of specific forms but contain no guidelines for
22 grievance content. *Id.* at §§ 3084.2, 3085. Prisoners ordinarily must present their allegations on
23 one informal and three formal levels of review, although the informal and the first formal levels
24 may be bypassed. *Id.* at § 3084.5. A division head reviews appeals on the first formal level, *see*
25 *id.* at § 3084.5(b)(3) (authorizing bypass of the first formal level when the division head cannot
26 resolve it), and the warden or a designee thereof reviews appeals on the second formal level. *See*

1 *id.* at § 3084.5(e)(1). Generally, completion of the third level, the Director's Level of Review,
2 exhausts the remedy. *Id.* at § 3084.1(a).

3 On plaintiff's complaint form Question II.B. asks "Have you filed a grievance concerning
4 the facts relating to this complaint?" Plaintiff has checked the "Yes" box. Question II.C. asks
5 "Is the grievance process completed?" Plaintiff has checked the "No" box. Since plaintiff
6 concedes he has not properly exhausted his administrative remedies, dismissal is appropriate.
7 *See Wyatt*, 315 F.3d at 1120. Accordingly, this action is dismissed without prejudice due to
8 plaintiff's failure to exhaust administrative remedies prior to filing suit.¹ *See Ansel v. Super. Ct.*,
9 2008 U.S. App. LEXIS 26216 (9th Cir. Nov. 25, 2008) (affirming district court's dismissal
10 pursuant to 28 U.S.C. § 1915A where plaintiff conceded that he failed to exhaust administrative
11 remedies before filing his complaint); *Burroughs v. Sacramento County Main Jail*, 2007 U.S.
12 Dist. LEXIS 75214, at *3-4 (E.D. Cal. Oct. 10, 2007) (dismissing complaint pursuant to 28
13 U.S.C. § 1915A where plaintiff conceded that the administrative grievance process was not
14 completed).

15 Plaintiff is informed that if he decides to file a new action, he should not include this case
16 number on the new complaint. In addition, the new complaint should be accompanied by a
17 properly completed, updated application to proceed *in forma pauperis*.

18 Accordingly, IT IS HEREBY ORDERED that:

19 1. Plaintiff's request to proceed *in forma pauperis* is granted.
20 2. Plaintiff must pay the statutory filing fee of \$350 for this action. All payments shall
21 be collected and paid in accordance with the notice to the Director of the California Department
22 of Corrections and Rehabilitation filed concurrently herewith.

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26 ¹ Dismissal without prejudice may permit plaintiff to file a new action upon exhaustion of
the prison grievance process.

1 3. This action is dismissed without prejudice for failure to exhaust administrative
2 remedies.

3 DATED: April 14, 2009.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE