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

KYLE AVERY,

No. CIV S-08-2605-JAM-CMK-P

Plaintiff,

vs.

FINDINGS AND RECOMMENDATIONS

JAMES WALKER, 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. 30) for failure to exhaust administrative remedies prior to filing suit. In his opposition, plaintiff has requested that the court “grant immediate discovery against defendants motion to dismiss” (see Doc. 32).

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1 **I. STANDARD FOR MOTION TO DISMISS**

2 A motion to dismiss based on a prisoner’s failure to exhaust administrative
3 remedies is properly the subject of an unenumerated motion under Federal Rule of Civil
4 Procedure 12(b). See Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). “In deciding a
5 motion to dismiss for failure to exhaust non-judicial remedies, the court may look beyond the
6 pleadings and decide disputed issues of fact.” Id. at 1119-20. Where the court looks beyond the
7 pleadings to a factual record in deciding the motion to dismiss, which is “. . . a procedure closely
8 analogous to summary judgment,” the court must assure that the plaintiff has fair notice of his
9 opportunity to develop a record. Id. at 1120 n.14 (referencing the notice requirements outlined in
10 Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (en banc), and Klinge v. Eikenberry, 849 F.2d
11 409 (9th Cir. 1988). Defendants bear the burden of establishing that the plaintiff failed to
12 exhaust administrative remedies prior to filing suit. See Wyatt, 315 F.3d at 1120. If the court
13 concludes that administrative remedies have not been exhausted, the unexhausted claim should
14 be dismissed without prejudice. See id. at 1120; see also Jones v. Bock, 127 S.Ct. 910 (2007).

15
16 **II. DISCUSSION**

17 Prisoners seeking relief under § 1983 must exhaust all available administrative
18 remedies prior to bringing suit. See 42 U.S.C. § 1997e(a). This requirement is mandatory
19 regardless of the relief sought. See Booth v. Churner, 532 U.S. 731, 741 (2001) (overruling
20 Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999)). Because exhaustion must precede the filing of
21 the complaint, compliance with § 1997e(a) is not achieved by exhausting administrative remedies
22 while the lawsuit is pending. See McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). The
23 Supreme Court recently addressed the exhaustion requirement in Jones v. Bock, 549 U.S. 199
24 (2007), and held: (1) prisoners are not required to specially plead or demonstrate exhaustion in
25 the complaint because lack of exhaustion is an affirmative defense which must be pleaded and
26 proved by the defendants; (2) an individual named as a defendant does not necessarily need to be

1 named in the grievance process for exhaustion to be considered adequate because the applicable
2 procedural rules that a prisoner must follow are defined by the particular grievance process, not
3 by the PLRA; and (3) the PLRA does not require dismissal of the entire complaint if only some,
4 but not all, claims are unexhausted.

5 The Supreme Court also held in Woodford v. Ngo that, in order to exhaust
6 administrative remedies, the prisoner must comply with all of the prison system's procedural
7 rules so that the agency addresses the issues on the merits. 548 U.S. 81, 89-96 (2006). Thus,
8 exhaustion requires compliance with "deadlines and other critical procedural rules." Id. at 90.
9 Partial compliance is not enough. See id. Substantively, the prisoner must submit a grievance
10 which affords prison officials a full and fair opportunity to address the prisoner's claims. See id.
11 at 90, 93. The Supreme Court noted that one of the results of proper exhaustion is to reduce the
12 quantity of prisoner suits "because some prisoners are successful in the administrative process,
13 and others are persuaded by the proceedings not to file an action in federal court." Id. at 94.

14 A prison inmate in California satisfies the administrative exhaustion requirement
15 by following the procedures set forth in §§ 3084.1-3084.7 of Title 15 of the California Code of
16 Regulations. In California, inmates "may appeal any departmental decision, action, condition, or
17 policy which they can demonstrate as having an adverse effect upon their welfare." Cal. Code
18 Regs. tit. 15, § 3084.1(a). These regulations require the prisoner to proceed through several
19 levels of appeal: (1) informal resolution; (2) formal appeal; (3) second level appeal to institution
20 head; (4) third level appeal to the director of the California Department of Corrections and
21 Rehabilitation. A decision at the third formal level, which is also referred to as the director's
22 level, is not appealable and concludes a prisoner's departmental administrative remedy. See Cal.
23 Code Regs. tit. 15, §§ 3084.1(a) and 3084.5(e)(2). Departmental appeals coordinators may
24 summarily reject a prisoner's untimely administrative appeal. See Cal. Code Regs. tit. 15, §§
25 3084.3(c)(6) and 3084.6(c). If a group of inmates intend to appeal the same decision or action,
26 one grievance form is used and a list of the participating inmates must be attached. The list must

1 be legible and state the inmates' names, departmental identification numbers, and housing
2 assignment. The form must also be signed by all participating inmates. Currently, California
3 regulations do not contain any provision specifying who must be named in the grievance.

4 In this case, plaintiff refers to a 2003 group inmate grievance, but defendants
5 argue that plaintiff was not part of that group and did not submit any of his own grievances
6 (either singly or as part of group) concerning the claims outlined in the complaint. Defendants'
7 motion is supported by the declaration of R. Carter, the Appeals Coordinator at California State
8 Prison – Sacramento ("SAC"), which is where the events alleged in the complaint occurred. R.
9 Carter states that plaintiff did not file any inmate appeals while housed at SAC which were
10 accepted for review and which concerned the subject matter of the complaint. Defendants'
11 motion is also supported by the declaration of N. Grannis, the Director of Appeals in the Inmate
12 Appeals Branch of the California Department of Corrections and Rehabilitation. N. Grannis
13 states that no appeals concerning the subject of the complaint were submitted for review at the
14 final level.

15 In his opposition to defendants' motion, plaintiff argues: (1) the motion to dismiss
16 is procedurally improper given that defendants filed an answer to the complaint before filing their
17 motion to dismiss; and (2) he should be permitted an opportunity to conduct discovery to "gather
18 the proof which he knows is available" concerning the merits of the claims alleged in the
19 complaint. Turning to plaintiff's first argument, Federal Rule of Civil Procedure 12(b) specifies
20 that certain enumerated defenses must be raised before a responsive pleading has been filed. The
21 instant motion is an unenumerated motion and, as such, was not required to be filed before an
22 answer.

23 As to plaintiff's second argument, he does not identify any discovery which he
24 seeks related to the issue of exhaustion. Rather, he says that he should be permitted to conduct
25 discovery on the merits of the underlying claims alleged in the complaint. Thus, this argument
26 does not in any way defeat defendants' motion, and plaintiff does not otherwise challenge the

1 arguments and declarations submitted by defendants.

2
3 **III. CONCLUSION**

4 Based on the foregoing, the undersigned recommends that defendants' motion to
5 dismiss (Doc. 30) be granted and this action be dismissed without prejudice for failure to exhaust
6 administrative remedies.

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

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14 DATED: October 28, 2009

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16 **CRAIG M. KELLISON**
17 UNITED STATES MAGISTRATE JUDGE
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