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

CHARLES CHATMAN,

Plaintiff,

No. CIV S-09-1028 JAM CKD P

vs.

TOM FELKER, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. Defendant Patton, a former employee of the California Department of Corrections and Rehabilitation (CDCR) at High Desert State Prison, has filed a motion to dismiss for failure to exhaust administrative remedies.

I. Standard

A motion to dismiss for failure to exhaust administrative remedies prior to filing suit arises under Rule 12(b) of the Federal Rules of Civil Procedure. 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 1120. If the district court concludes that the prisoner has not exhausted non-judicial remedies, 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 (CDC) regulations provide administrative
5 procedures in the form of one informal and three formal levels of review to address plaintiff’s
6 claims. See Cal. Code Regs. tit. 15, §§ 3084.1-3084.7. Administrative procedures generally are
7 exhausted once a prisoner has received a “Director’s Level Decision,” or third level review, with
8 respect to his issues or claims. Cal. Code Regs. tit. 15, § 3084.5. All steps must be completed
9 before a civil rights action is filed, unless a plaintiff demonstrates a step is unavailable to him;
10 exhaustion during the pendency of the litigation generally will not save an action from dismissal.
11 McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir. 2002).

12 Administrative remedies must be “properly” exhausted which means use of all
13 steps put forward by the agency. Woodford v. Ngo, 548 U.S. 81, 90 (2006). Also, “proper
14 exhaustion demands compliance with an agency’s deadlines and other critical procedural rules
15 because no adjudicative system can function effectively without imposing some orderly structure
16 on the course of its proceedings.” Id. at 90-91.

17 Defendant bears the burden of proving plaintiff’s failure to exhaust. Wyatt, 315
18 F.3d at 1119.¹

19 II. Plaintiff’s Claims Against Defendant Patton

20 In “Count 2” of his complaint, plaintiff alleges defendant Patton violated
21 plaintiff’s rights arising under both the First and Eighth Amendments.² Plaintiff asserts that on
22 or about March 8, 2007, he could not move from his bed and experienced excruciating pain in his
23

24 ¹ On December 2, 2009, plaintiff was informed of the requirements for opposing an
25 motion to dismiss for failure to exhaust administrative remedies.

26 ² “In Count 2” plaintiff makes the same allegations against defendant Uribe and presents
the same facts in support of those allegations as he does against defendant Patton.

1 left foot and shoulder. Complt., ¶ 33. Defendant Patton, a correctional officer, was summoned
2 to assist plaintiff. Id., ¶¶ 7 & 34. After being apprised of plaintiff's condition, defendant Patton
3 failed to offer any assistance. Id., ¶¶ 35-36. Plaintiff spent that evening in pain. Id., ¶ 38. The
4 next day plaintiff was still in pain and was diagnosed with having gout. Id., ¶¶ 39-40. Plaintiff
5 asserts Patton failed to assist plaintiff in retaliation for plaintiff having filed "complaints" against
6 him. Id., ¶ 41.

7 III. Analysis

8 Defendant Patton argues plaintiff failed to exhaust administrative remedies with
9 respect to either his First or Eighth Amendment claims. In response, plaintiff points to evidence
10 indicating he grieved Patton's failure to provide him with medical care on March 8, 2007. Dkt,
11 #33, Ex. F. Apparently, the grievance was screened out because the person reviewing the
12 grievance determined that it was received on April 13, 2007, which was after the fifteen-day
13 deadline for filing grievances. Id., Ex. F at 7. On the grievance form, plaintiff indicated that he
14 submitted his grievance on March 15, 2007. Id., Ex. F at 8. Also, in his declaration attached to
15 his opposition, plaintiff reaffirms he filed his grievance on March 15, 2007. Defendant Patton
16 fails to point to anything upon which this court could reasonably base a finding that plaintiff did
17 not submit the grievance when he says he did and that the grievance process was not made
18 unavailable to plaintiff by virtue of his grievance being inappropriately screened out.

19 For these reasons, the court will recommend that defendants' motion to dismiss be
20 denied with respect to plaintiff's Eighth Amendment claim against defendant Patton. However,
21 the court will recommend that plaintiff's First Amendment claim be dismissed because there is
22 nothing before the court indicating plaintiff complained through the grievance process that
23 defendant Patton's actions on March 8, 2007 were in retaliation for plaintiff's exercise of his
24 First Amendment rights.³

25 ³ In findings and recommendations issued September 12, 2011, the court reached the
26 same conclusion with respect to defendant Uribe's motion to dismiss for failure to exhaust

1 In accordance with the above, IT IS HEREBY RECOMMENDED that:

2 1. Defendant Patton's January 3, 2012 motion to dismiss be granted with respect
3 to plaintiff's First Amendment claim, and denied as to plaintiff's Eighth Amendment claim.

4 2. Defendant Patton be ordered to file his answer within fourteen days of any
5 order adopting the foregoing findings and recommendations.

6 These findings and recommendations are submitted to the United States District
7 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
8 one days after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
11 shall be served and filed within fourteen days after service of the objections. The parties are
12 advised that failure to file objections within the specified time may waive the right to appeal the
13 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 Dated: April 2, 2012

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16 CAROLYN K. DELANEY
17 UNITED STATES MAGISTRATE JUDGE

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