UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MARIO NAVARRO,

Plaintiff,

v.

DEBRA HERNDON, et al.,

Defendants.

No. 2:09-cv-1878 KJM KJN P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner currently incarcerated at Ironwood State Prison in Blythe, California. Plaintiff proceeds, in forma pauperis and without counsel, in this civil rights action filed pursuant to 42 U.S.C. § 1983, in which he challenges the conditions of his confinement while incarcerated at California State Prison-Sacramento ("CSP-SAC"). The action proceeds on plaintiff's amended complaint. Presently before the court is defendants' motion for summary judgment. For the reasons set forth below, the undersigned recommends that defendants be denied summary judgment based on the law of the case.

I. Background

A. Factual Allegations

Relevant factual allegations in plaintiff's amended complaint (ECF No. 24) are summarized as follows.

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In 2003, plaintiff, a Native American, was sentenced to California state prison for a term of 55 years to life. (See ECF No. 21 at 4, ECF No. 24 at 16.)

Plaintiff alleges that, upon admittance by the California Department of Corrections and Rehabilitation ("CDCR"), he was given an incorrect mental health diagnosis and improperly placed in a mental health treatment program. (ECF No. 24 at 15-16.) He contends that he was given psychiatric medications against his will, and at one point forced to remain in a suicide watch cell until he took his medications. (Id. at 19-22.)

On June 30, 2004, plaintiff was transferred to CSP-SAC. (Id. at 16.) In 2005, plaintiff began filing administrative grievances in connection with how his alleged mental health issues had been handled. (Id. at 20-21.) He also sought legal assistance regarding the matter. (Id.) According to plaintiff, at this time he began to face reprisals from CSP-SAC personnel. (Id.)

On May 4, 2005, plaintiff was placed in administrative segregation ("Ad Seg") at CSP-SAC. (Id. at 21-22.) Plaintiff contends that there was no legitimate basis for the placement. At the time of the Ad Seg placement, plaintiff had been seeking a transfer to California State Prison-Los Angeles County ("CSP-LAC"), in Lancaster, California, in order to be closer to his mother's residence; that transfer could not take place while plaintiff was in Ad Seg. (Id. at 22.) In October 2005, plaintiff filed an administrative grievance which, according to plaintiff, challenged his placement and retention in Ad Seg, withholding of legal property, denial of law library access, and interference with his access to the courts. (Id. at 22-3.) Plaintiff contends that many of those actions were taken on a retaliatory basis. (Id. at 24-28.) While in Ad Seg, plaintiff filed several other inmate grievances, including one group grievance. (Id. at 23-4.) He also filed state tort claims against CDCR, alleging physical and mental injuries. (Id. at 24.)

On March 9, 2006, plaintiff was transferred to CSP-LAC. (Id. at 25.)

Plaintiff alleges that his commitment to CSP-SAC's Ad Seg Unit, and his prior commitment to mental health treatment programs, constituted cruel and unusual punishment. He details the allegedly oppressive physical conditions of his confinement, his inability to participate in any recreational or religious activities (alleging that, while in Ad Seg, he was permitted only two days of access to the exercise yard, and denied access to various forms of religious services,

including contact with clergy on the death of family members), deprivation of social contact and mental stimulation, and resulting physical and psychological injuries, including "vision impairment, frequent headache[s], shortness of breath, exhaustion and fatigue, insomnia and anxiety attacks, memory loss, stress and fear of correctional employee custody and staff, and mental health psychiatric personnel further reprisals and retaliations, to discredit me." (Id. at 31; see, generally, id. at 30-34.)

B. Procedural History

This action commenced on July 9, 2009. (ECF No. 1.) After screening, the court permitted plaintiff to proceed on his amended complaint. (ECF No. 21.)

On November 19, 2010, defendants moved to dismiss the amended complaint. (ECF No. 38.) On August 24, 2011, the court filed findings and recommendations recommending that defendants' motion to dismiss be granted in part and denied in part. (ECF No. 78.) Specifically, the court recommended that plaintiff be permitted to proceed on the following claims:

- Fourteenth Amendment Due Process claims against defendants Kernan, Walker, Baxter, Baker, Sclafani, and Morrow stemming from plaintiff's placement and retention in CSP-SAC's Ad Seg unit, "either pursuant to their participation in the [Ag Seg][1] Institutional Classification Committee . . . and/or in their substantive involvement and responses to plaintiff's exhausted administrative grievance challenging such placement and retention." (Id. at 7.)
- Eighth Amendment claims against defendants Kernan, Walker, Grannis, O'Brian, Baxter, Baker, and Sclafani "based on the fact and continuation of plaintiff's [Ad Seg] detention . . . [and/or] the physical conditions of plaintiff's [Ad Seg] confinement." (Id. at 18.)
- First and Fourteenth Amendment Free Exercise claims and a Fourteenth Amendment Equal Protection claim against defendants Kernan, Walker, Grannis, O'Brian, Baker,

[1] The court's prior findings and recommendations erroneously characterized plaintiff as having alleged that he was housed in CSP-SAC's Secured Housing Unit, rather than its Administrative Segregation Unit. That error has been corrected herein.

and Sclafani due to "restrictions on plaintiff's right to exercise his religious beliefs . . . [while] housed in [Ad Seg] . . . [and/or] the denial of visitation by a spiritual advisor, particularly when members of plaintiff's family died . . . ." (Id. at 19-20.)

- First Amendment retaliation claims against O'Brian, Grannis, Morrow, Sclafani, and Baker based on the following acts allegedly taken in retaliation for plaintiff's filing of administrative grievances: "further refusing to process administrative grievances . . . refusing plaintiff access to his legal property and to the law library . . . [and/or] failing to remedy adverse conditions of confinement, [as well as] denying plaintiff access to [the] exercise yard, or to [a] religious advisor." (Id. at 22.)

The court recommended that plaintiff's remaining claims be dismissed.

On September 30, 2011, the district judge largely adopted these findings and recommendations, but referred back to the court the issue of whether defendants Grannis and O'Brian had interfered with plaintiff's submission of administrative grievances and court filings, and thereby violated plaintiff's First Amendment right of access to the courts. (ECF No. 79.) On December 7, 2012, the undersigned issued supplemental findings and recommendations recommending that plaintiff be permitted to proceed with this First Amendment claim. (ECF No. 84.) The supplemental findings and recommendations were adopted on March 26, 2013. (ECF No. 89.)

On August 1, 2013, defendants filed a motion to dismiss based on plaintiff's alleged failure to exhaust administrative remedies. (ECF No. 107.) That motion was mooted by the Ninth Circuit's subsequent opinion in Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014) (en banc) (holding that defendants may no longer raise the affirmative defense of administrative exhaustion via an unenumerated Rule 12(b) motion). On May 13, 2014, defendants filed the instant motion for summary judgment, contending that plaintiff failed to properly exhaust administrative remedies regarding all but one of his claims. (ECF No. 147.) On June 26, 2014, plaintiff filed an opposition to this motion. (ECF No. 151.) On July 7, 2014, defendants filed their reply.

In ruling on a motion for summary judgment, the court would ordinarily begin by determining which facts were undisputed by the parties for purposes of the motion. However, as

discussed in greater detail below, the court has determined that defendants' summary judgment motion must be denied as a matter of law based on the law of the case. Accordingly, the court makes no findings as to undisputed facts.

II. Legal Standards

A. Legal Standard for Exhaustion of Administrative Remedies

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions under section 1983 . . . , or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002).

Proper exhaustion of available remedies is mandatory, Booth v. Churner, 532 U.S. 731, 741 (2001), and "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules[.]" Woodford v. Ngo, 548 U.S. 81, 90 (2006). The Supreme Court has also cautioned against reading futility or other exceptions into the statutory exhaustion requirement. See Booth, 532 U.S. at 741 n.6. Moreover, because proper exhaustion is necessary, a prisoner cannot satisfy the PLRA exhaustion requirement by filing an untimely or otherwise procedurally defective administrative grievance or appeal. See Woodford, 548 U.S. at 90-93. "[T]o properly exhaust administrative remedies prisoners 'must complete the administrative review process in accordance with the applicable procedural rules,' [] - rules that are defined not by the PLRA, but by the prison grievance process itself." Jones v. Bock, 549 U.S. 199, 218 (2007) (quoting Woodford, 548 U.S. at 88). See also Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) ("The California prison system's requirements 'define the boundaries of proper exhaustion.'") (quoting Jones, 549 U.S. at 218).

The administrative grievances at issue in this matter were filed prior to January 28, 2011, the date on which CDCR issued revised regulations governing administrative complaints by prisoners. See Cal. Code Regs. tit. 15, § 3084.7. Under the previously-effective regulations,

prisoners were provided the right to appeal administratively "any departmental decision, action, condition or policy which they can demonstrate as having an adverse effect upon their welfare." Cal.Code Regs. tit. 15, § 3084.1(a) (2010). Prisoners were also provided the right to file appeals alleging misconduct by correctional officers and officials. Id. § 3084.1(e). In order to exhaust available administrative remedies within this system, a prisoner was required to proceed through four levels of appeal: (1) informal resolution, (2) formal written appeal on a 602 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level appeal to the Director of CDCR. Barry v. Ratelle, 985 F.Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final decision at the Director's level of review satisfied the exhaustion requirement.

In order to "lodge [a]n administrative complaint on CDC Form 602, prisoners were required 'to describe the problem and action requested.'" Morton v. Hall, 599 F.3d 942, 946 (9th Cir. 2010) (quoting Cal. Code Regs. tit. 15, § 3084.2(a) (2010)). The content of a grievance was sufficient if it "alert[ed] the prison to the nature of the wrong for which redress [wa]s sought." Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). "A grievance need not include legal terminology or legal theories unless they are in some way needed to provide notice of the harm being grieved. A grievance also need not contain every fact necessary to prove each element of an eventual legal claim. The primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution, not to lay groundwork for litigation." Griffin, 557 F.3d at 1120.

Failure to exhaust is "an affirmative defense the defendant must plead and prove." Bock, 549 U.S. at 204, 216. In Albino, the Ninth Circuit agreed with the underlying panel's decision[2] "that the burdens outlined in Hilao [v. Estate of Marcos, 103 F.3d 767, 778 n.5 (9th Cir. 1996),] should provide the template for the burdens here." Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014) (en banc). A defendant need only show "that there was an available administrative remedy, and that the prisoner did not exhaust that available remedy." Albino, 747 F.3d at 1172. Once the

[2] See Albino v. Baca, 697 F.3d 1023, 1031 (9th Cir. 2012). The three judge panel noted that "[a] defendant's burden of establishing an inmate's failure to exhaust is very low." Id. at 1031. Relevant evidence includes statutes, regulations, and other official directives that explain the scope of the administrative review process. Id. at 1032.

defense meets its burden, the burden shifts to the plaintiff to show that the administrative remedies were unavailable. See Albino, 697 F.3d at 1030-31.

A prisoner may be excused from complying with the PLRA's exhaustion requirement if he establishes that the existing administrative remedies were effectively unavailable to him. See Albino, 747 F.3d at 1172-73. When an inmate's administrative grievance is improperly rejected on procedural grounds, exhaustion may be excused as effectively unavailable. Sapp v. Kimbrell, 623 F.3d 813, 823 (9th Cir. 2010); see also Nunez v. Duncan, 591 F.3d 1217, 1224-26 (9th Cir. 2010) (warden's mistake rendered prisoner's administrative remedies "effectively unavailable"); Ward v. Chavez, 678 F.3d 1042, 1045 (9th Cir. 2012) (exhaustion excused where futile); Brown v. Valoff, 422 F.3d 926, 940 (9th Cir. 2005) (plaintiff not required to proceed to third level where appeal granted at second level and no further relief was available).

If under the Rule 56 summary judgment standard, the court concludes that plaintiff has failed to exhaust administrative remedies, the proper remedy is dismissal without prejudice. Wyatt v. Terhune, 315 F.3d 1108, 1120, overruled on other grounds by Albino, 747 F.3d 1162.

B. Legal Standard for Summary Judgment

Summary judgment is appropriate when it is demonstrated that the standard set forth in Federal Rule of Civil procedure 56 is met. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

> Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P. 56(c)). "Where the nonmoving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 advisory

committee's notes to 2010 amendments (recognizing that "a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact"). Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

Consequently, if the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of such a factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material in support of its contention that such a dispute exists. See Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987), overruled in part on other grounds, Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1575 (9th Cir. 1990).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 630. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963

amendments).

In resolving a summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586 (citation omitted).

By contemporaneous notice served on May 13, 2014 (see ECF Nos. 147 at 3, 147-1 at 1-3), plaintiff was advised of the requirements for opposing a motion brought pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (*en banc*); Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

III. Analysis

Defendants move for summary judgment on the grounds that, prior to bringing this lawsuit, plaintiff failed to exhaust administrative remedies as to all but one of his claims. Defendants (i) concede that plaintiff properly exhausted administrative remedies with regards to his grievance Log. No. SAC–05–2084, and (ii) concede that, in so doing, plaintiff properly exhausted administrative remedies as to his Fourteenth Amendment due process claim. (See ECF No. 147-2 at 2.) The parties disagree, however, on what other claims, if any, plaintiff exhausted by filing this grievance.

The court begins by noting that it has addressed the question of exhaustion in prior orders in this case. On November 19, 2010, defendants moved to dismiss all but one of the claims in plaintiff's amended complaint on statute of limitations grounds. (See ECF No. 38.) In order to

determine whether plaintiff had met the applicable statutes of limitations, the court was required to assess whether, and when, plaintiff had administratively exhausted his claims.

In its findings and recommendations filed August 24, 2011, the court carefully considered the contents of grievance Log No. SAC-05-2084 and determined, first, that the grievance was fully-exhausted, and second, that it "challenge[d] plaintiff's confinement in CSP-SAC's [Ad Seg], both intrinsically, and based on the conditions of confinement therein." (ECF No. 78 at 8.) In other words, the court determined that plaintiff had exhausted administrative remedies with respect to his First Amendment Free Exercise claim, his Fourteenth Amendment Due Process, Free Exercise, and Equal Protection claims, and his Eighth Amendment claim, each of which challenged the basis for plaintiff's confinement in Ad Seg and/or the conditions of his confinement therein. The court then found that plaintiff had met the applicable statutes of limitations, and recommended that plaintiff be permitted to proceed on these claims. (Id. at 23.) The portion of the findings and recommendations in which the exhaustion determination appeared were adopted by the district court. (See ECF No. 79). And, as plaintiff points out in his opposition, defendants at no point objected to or sought reconsideration of this determination. (ECF No. 151 at 24.)

Thereafter, in its supplemental findings and recommendations filed December 7, 2012, the court determined as follows: "As set forth in plaintiff's exhausted administrative grievance initiated on October 24, 2005 (Log No. CA 05–02084), plaintiff alleged in part that, during his continued placement in [Ad Seg], his legal materials were improperly withheld and officials failed to respond to plaintiff's prior administrative grievances, causing plaintiff 'irreparable harm (my appeals case in Supreme/Federal Court)[.]'" (ECF No. 84 at 8.) These allegations are the basis of plaintiff's claim under the First Amendment for interference with his right of access to the courts, as well as his First Amendment retaliation claim. Again, the district court adopted the supplemental findings and recommendations (ECF No. 89), and defendants neither objected to nor sought reconsideration of this determination.

Under the doctrine of the law of the case, "a court will not reexamine an issue previously decided by the same or higher court in the same case." Lucas Auto Eng'g, Inc. v.

Bridgestone/Firestone, Inc., 275 F.3d 762, 766 (9th Cir. 2001). The court may exercise its discretion to depart from the law of the case only if one of these five circumstances is present: (1) the first decision was clearly erroneous; (2) there has been an intervening change of law; (3) the evidence is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result. United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997). It is an abuse of discretion for a court to depart from the law of the case without one of these five requisite conditions. Thomas v. Bible, 983 F.2d 152, 155 (9th Cir. 1993).

The court's prior determinations regarding grievance Log No. SAC-05-2084 now constitute the law of the case, and will not be revisited. Defendants' briefing in support of their motion for summary judgment does not demonstrate that the court's prior decisions were clearly erroneous; in fact, defendants have altogether failed to address the court's prior determinations regarding exhaustion. No new evidence has been presented to the court. There has been no intervening change of law. Defendants have neither shown the presence of changed circumstances nor demonstrated that a manifest injustice would occur if the court failed to revisit its previous determination.

Accordingly, it is the law of the case that plaintiff exhausted administrative remedies with respect to the claims on which he has been permitted to proceed. Defendants are therefore not entitled to summary judgment on this basis.

IV. Conclusion

In light of the foregoing, IT IS RECOMMENDED that defendant's motion for summary judgment (ECF No. 147) be denied in its entirety.

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

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

Dated: February 6, 2015

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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