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

IRA DON PARTHEMORE,

Plaintiff,

No. 2:09-cv-2330-WBS-JFM (PC)

vs.

M. MARTEL, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims that he was transferred in retaliation for filing a request for cataract surgery and that he has been improperly denied this necessary surgery. This action is proceeding on plaintiff’s amended complaint, filed December 9, 2009. Defendants have moved to dismiss this action for failure to exhaust administrative remedies prior to suit. On October 9, 2009, the court advised plaintiff of the requirements for opposing a motion to dismiss for failure to exhaust administrative remedies. See Wyatt v. Terhune, 305 F.3d 1033 (9th Cir. 2002). On August 25, 2010, this court issued findings and recommendations recommending defendants’ motion be granted. By order filed October 7, 2010, the findings and recommendations were vacated and the parties were directed to brief the application of Rhodes v. Robinson, 621 F.3d 1002 (9th Cir. Sept. 8, 2010) and Sapp v. Kimbrell, 623 F.3d 813 (9th Cir.

1 Sept. 27, 2010) to the issues raised in defendants' motion. The parties have now filed their
2 supplemental briefs.

3 ANALYSIS

4 I. Legal Standards

5 The exhaustion of administrative remedies prior to bringing a prisoner civil rights
6 action is required by 42 U.S.C. § 1997e(a). The statute provides:

7 No action shall be brought with respect to prison conditions under
8 [42 U.S.C. § 1983], or any other Federal law, by a prisoner
9 confined in any jail, prison, or other correctional facility until such
administrative remedies as are available are exhausted.

10 42 U.S.C. § 1997e(a). The exhaustion requirement that it imposes is mandatory. Booth v.
11 Churner, 532 U.S. 731, 741 (2001). A prisoner is required to exhaust administrative remedies
12 for claims contained within a complaint before the complaint is filed. Rhodes v. Robinson, 621
13 F.3d at 1005. Compliance with this requirement is not achieved by satisfying the exhaustion
14 requirement during the course of an action. See McKinney v. Carey, 311 F.3d 1198 (9th Cir.
15 2002). However, new claims based on conduct which occurs after the filing of an original
16 complaint may be raised in an amended pleading if the administrative exhaustion requirement is
17 satisfied prior to the time the amended pleading is filed. See Rhodes at 1004-05.

18 California's Department of Corrections provides a four-step
19 grievance process for prisoners who seek review of an
20 administrative decision or perceived mistreatment. Within fifteen
21 working days of "the event or decision being appealed," the inmate
22 must ordinarily file an "informal" appeal, through which "the
23 appellant and staff involved in the action or decision attempt to
24 resolve the grievance informally." Cal.Code Regs., tit. 15, §§
25 3084.5(a), 3084.6(c). [Footnote omitted.] If the issue is not
resolved during the informal appeal, the grievant next proceeds to
the first formal appeal level, usually conducted by the prison's
Appeals Coordinator. Id. §§ 3084.5(b), 3084.6(c). Next are the
second level, providing review by the institution's head or a
regional parole administrator, and the third level, in which review
is conducted by a designee of the Director of the Department of
Corrections. [Footnote omitted.] Id. § 3084.5(e)(1)-(2).

26 Brown v. Valoff, 422 F.3d 926, 929-30 (9th Cir. 2005). As a general rule, inmates must proceed

1 through the Director’s Level of Review to satisfy the exhaustion requirement and regardless of
2 the relief sought. See Booth v. Churner, 532 U.S. 731, 741 (2001) (inmates must satisfy
3 exhaustion requirement “regardless of the relief offered through administrative procedures” as
4 long as some relief is available). However, “a prisoner need not press on to exhaust further
5 levels of review once he has either received all ‘available’ remedies at an intermediate level of
6 review or been reliably informed by an administrator that no remedies are available.” Brown at
7 935.

8 Finally, claims dismissed for failure to exhaust administrative remedies should be
9 dismissed without prejudice. Id. at 1200.

10 II. Allegations of the Amended Complaint

11 The amended complaint contains the following allegations relevant to the motion
12 at bar. Plaintiff has had cataracts in both eyes and glaucoma primarily in his right eye for several
13 years while in prison. Over a year before plaintiff’s amended complaint, defendant Col advised
14 plaintiff to have cataract/lens replacement surgery “which he said would greatly improve
15 [plaintiff’s] vision.” Amended Complaint, filed December 9, 2009, at 3. In late July 2009,
16 plaintiff filed an ADA request seeking cataract surgery. Plaintiff heard nothing for several
17 weeks, and then he received notice that he would receive a bright green vest with the words
18 “Visually Impaired” on the outside. On August 5, 2009, defendant Col agreed to request cataract
19 surgery for plaintiff. Later the same day, plaintiff was informed that Associate Warden Jackson
20 had directed plaintiff to pick up the vest. On August 6, 2009, defendant Col completed a form
21 stating that plaintiff was legally blind. On August 10, 2009, defendant Kissel called plaintiff to
22 her office and told plaintiff that she was transferring him out of Mule Creek State Prison (Mule
23 Creek) because he was wearing a visually impaired vest, which meant he was legally blind, and
24 Mule Creek did not have facilities for legally blind people. She also told plaintiff that the
25 decision was “unappealable” and that defendant Kaplan would be “‘on [plaintiff’s] case’ at [his]
26 impending classification committee appearance for ‘manipulating staff.’” Id. at 5. She told

1 plaintiff he would be sent to the California Substance Abuse Facility (SATF) in Corcoran,
2 California.

3 On August 12, 2009, plaintiff was brought to a classification committee meeting
4 led by defendant Kaplan. As a result of the hearing, plaintiff was endorsed for transfer to SATF
5 and placed on the “speedy transfer” list. On September 8, 2009, plaintiff was examined by
6 defendant Col. Plaintiff asked defendant Col to re-evaluate his vision. A vision test was
7 performed, and plaintiff’s vision was 20/50. Plaintiff asked how he could be rated “legally
8 blind.” Defendant Col told plaintiff “CDCR has its own standards and the 20/50 reading was
9 irrelevant.” Amended Complaint at 3D. Defendant Col refused plaintiff’s request for a full
10 examination for new eyeglasses, “saying ‘it won’t do any good.’” Id. at 3E. Plaintiff alleges that
11 defendant Col fabricated the form stating that plaintiff was legally blind “in order to prevent any
12 state expenditure on eye surgery or skin cancer surgery.” Id.

13 On September 17, 2009, plaintiff was sent to an outside ophthalmologist. The
14 ophthalmologist told plaintiff cataract surgery “was in order.” Id. at 3F. He told plaintiff he
15 wanted to see him in two weeks, and he measured plaintiff’s lens for the lens replacement
16 surgery. He told plaintiff that his “corrected central vision was 20/70, far from ‘legally blind’”.
17 Id.

18 Plaintiff was transferred to SATF on September 22, 2009. On October 23, 2009,
19 he was given a complete eye examination and a prescription for new glasses by an optometrist at
20 SATF. The optometrist diagnosed plaintiff’s corrected vision as 20/100 in his right eye and
21 20/60 in his left eye. On November 18, 2009, plaintiff was issued a new Form 1845 removing
22 him from “Disabled Person Visual” (DPV) status permanently. At SATF, plaintiff was assigned
23 to two different jobs, neither of which he could perform due to his physical condition. Plaintiff
24 received skin cancer surgery and was awaiting biopsy results. The surgeon opined that the cancer
25 was probably malignant melanoma. On December 1, 2009, plaintiff was seen by the contract
26 ophthalmologist at SATF, who “expressed concern that plaintiff’s cataract surgery had not been

1 previously performed and informed plaintiff that it should be accomplished without delay.” Id. at
2 3G. Plaintiff was still at SATF when he filed his amended complaint.

3 III. Defendants’ Motion to Dismiss

4 Defendants contend that this action must be dismissed because plaintiff failed to
5 seek administrative review of any issues presented in this action through the final level of such
6 review, and because plaintiff filed his amended complaint before a second level administrative
7 decision was reached on plaintiff’s request for cataract surgery. In support of their motion to
8 dismiss, defendants present evidence that on July 7, 2009, plaintiff submitted an Americans with
9 Disabilities Act (ADA) accommodation request seeking cataract surgery. Declaration of Joseph
10 Prudh’omme in Support of Defendants’ Motion to Dismiss, filed March 8, 2010, at ¶ 5. ADA
11 accommodation requests are screened and processed like other inmate appeals. Id. Plaintiff’s
12 ADA accommodation request was denied at the first level review on October 16, 2009. On
13 December 23, 2009, the appeal was partially granted at the second level review based on,
14 inter alia, a finding that plaintiff was scheduled for cataract surgery on January 27, 2010.
15 Plaintiff did not pursue this grievance to the final level of administrative review. Id.

16 On September 9, 2009, plaintiff filed another grievance requesting that he no
17 longer be required to wear the visually impaired vest. Id. at ¶ 6. In that grievance, plaintiff
18 alleged that defendant Col had falsified a medical report describing plaintiff as legally blind. Id.
19 This appeal was denied at the first level of review and plaintiff did not seek further
20 administrative review. Id.

21 Associate Warden Prudh’omme also avers that plaintiff “has not submitted a
22 request for director’s level review for any matter concerning cataract surgery, skin cancer
23 surgery, fabrication of medical reports declaring him legally blind, or Mule Creek State Prison
24 staff knowingly denying him skin cancer surgery and cataract surgery in order to transfer him to
25 another institution to avoid the cost of surgery.” Id. at ¶ 7.

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1 In opposition to the motion, plaintiff directs the court’s attention to exhibits
2 appended to plaintiff’s amended complaint. Among those exhibits is an appeal dated August 27,
3 2009, in which plaintiff alleged that he had received a chrono from the medical department
4 stating that he had been screened for Valley fever and approved for transfer. Plaintiff asserted
5 that this was “one more example of the concerted effort to remove [him] from Mule Creek for
6 asserting [his] federal rights under ADA.” Ex. 4 to Amended Complaint. On September 3,
7 2009, the appeal was screened out for failure to provide supporting documentation. Id. Also
8 included is a grievance dated August 31, 2009, in which plaintiff complained about the
9 endorsement for transfer to SATF and requested that the transfer be rescinded and he be given
10 cataract surgery. Ex. 5 to Amended Complaint. On September 4, 2009, that appeal was returned
11 to plaintiff for supporting documentation. Id.

12 Plaintiff contends that he was not required to appeal to the Director’s Level
13 because (1) he obtained most of the relief he sought concerning the cataract surgery, DPV status,
14 and wearing the visually impaired vest at the second level of administrative review; and (2) some
15 of his appeals concerning the transfer were improperly screened out for lack of documentation
16 that plaintiff was unable to obtain.

17 The claims raised in the amended complaint are substantially the same as those
18 raised in plaintiff’s original complaint: in both, plaintiff claims that he was subject to a
19 retaliatory transfer following his submission of an ADA accommodation request seeking cataract
20 surgery, and that he was not receiving the necessary cataract surgery or necessary skin cancer
21 surgery.¹ While plaintiff’s amended complaint contains allegations of additional related events
22 that occurred after he filed his original complaint, the amended complaint does not raise new
23 claims. Thus, the operative date for plaintiff to have satisfied the exhaustion requirement is

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26 ¹ Plaintiff was still at Mule Creek when he filed his original complaint.

1 August 20, 2009, the date on which plaintiff signed and dated his original complaint. See
2 Rhodes, at 1003.

3 It is clear from the record before this court that plaintiff had not satisfied the
4 administrative exhaustion requirement at the time he commenced this action. The only relevant
5 grievance plaintiff filed before he commenced this lawsuit was the July 7, 2009 ADA
6 accommodation request seeking cataract surgery, and plaintiff filed this action approximately six
7 weeks after he submitted that request. That request was suspended on August 3, 2009, pending
8 an appointment with defendant Col, which took place on August 6, 2009. See Ex. A to
9 Prudh'omme Declaration. Plaintiff filed this action fourteen days after that appointment, without
10 waiting for or seeking further administrative review. Ultimately, as plaintiff notes, by December
11 23, 2009, he had obtained most of the relief he sought concerning cataract surgery and his
12 complaints about DPV status and wearing the vest through the administrative review process.²
13 Plaintiff contends the fact that he obtained this administrative relief should excuse his failure to
14 pursue administrative remedies to the Director's Level of Review. However, even if the fact that
15 plaintiff obtained relief through the administrative process might have satisfied the exhaustion
16 requirement, he filed this action well before he pursued the administrative review process to the
17 level at which he was afforded relief. He did not, therefore, satisfy his obligation to exhaust
18 administrative remedies prior to bringing this action.³

19 Plaintiff also argues that there was no administrative remedy available to him to
20 stop his transfer to SATF. In the amended complaint, plaintiff alleges that he was told by

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22 ² Plaintiff was also returned to Mule Creek State Prison in April 2010. See Docket # 40.
23 It is not clear from the record, however, that this was a result of the administrative grievance
24 process.

25 ³ It is also true that the administrative review process had not been completed by the time
26 plaintiff filed his amended complaint, which is dated November 25, 2009. It is not clear whether
defendants satisfied the regulatory timelines for responding to plaintiff's July 7, 2009 ADA
accommodation request. See tit. 15 C.C.R. § 3084.6. However, the court need not reach that
issue because, as noted above, the amended complaint does not raise "new claims" within the
meaning of the court's analysis in Rhodes v. Robinson, supra.

1 defendant Kissel that the “situation was unappealable and not to bother.” Amended Complaint,
2 filed December 9, 2009, at 2. As discussed above, plaintiff did, however, file a grievance on
3 August 31, 2009, and the response to the grievance demonstrated not that there was no
4 administrative remedy available but that plaintiff was required to provide more information to
5 support the grievance. In Sapp v. Kimbrell, the United States Court of Appeals for the Ninth
6 Circuit held that in order to establish that administrative remedies are unavailable due to
7 improper screening of a grievance, an “inmate must establish (1) that he actually filed a
8 grievance or grievances that, if pursued through all levels of administrative appeals, would have
9 sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) the prison officials
10 screened his grievance or grievances for reasons inconsistent with or unsupported by applicable
11 regulations.” Sapp, 623 F.3d at 823-824. Plaintiff has not demonstrated that the screening of
12 certain grievances, pursuant to which he was required to provide more documentation, was either
13 inconsistent with or unsupported by governing regulations. He has not, therefore, demonstrated
14 that the screening process rendered administrative remedies unavailable.

15 For all of the foregoing reasons, this court finds that plaintiff did not exhaust
16 available administrative remedies prior to filing this lawsuit. Accordingly, defendants’ motion to
17 dismiss should be granted and this action should be dismissed without prejudice.

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

- 19 1. Defendants’ March 8, 2010 motion to dismiss be granted; and
- 20 2. This action be dismissed without prejudice.

21 These findings and recommendations are submitted to the United States District
22 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
23 days after being served with these findings and recommendations, any party may file written
24 objections with the court and serve a copy on all parties. Such a document should be captioned
25 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
26 objections shall be filed and served within fourteen days after service of the objections. The

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

3 DATED: February 17, 2011.

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6 UNITED STATES MAGISTRATE JUDGE

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