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

MARIO A. WILLIAMS,

Plaintiff,

No. CIV S-09-2665 GEB EFB P

vs.

J.W. HAVILAND, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Pending before the court are the parties’ motions for summary judgment. Dckt. Nos. 30, 38. For the reasons stated below, the court recommends that defendants’ motion be granted on the ground that plaintiff failed to exhaust administrative remedies and that plaintiff’s motion be denied.

I. Background

This action proceeds on plaintiff’s September 23, 2009 complaint on his claim that defendants Palwick, Peel, and Rosario were deliberately indifferent to his medical needs in violation of the Eighth Amendment. Dckt. Nos. 1, 6. Plaintiff alleges that from January 22, 2009 through May 2009, defendants refused to assign plaintiff to a lower bunk despite their knowledge of plaintiff’s serious back injury and a physician’s chrono indicating that plaintiff should be assigned to a lower bunk. Dckt. Nos. 1, 6.

1 Plaintiff moved for summary judgment on the ground that there is no triable issue of fact
2 as to liability and that he is therefore entitled to judgment as a matter of law. Dckt. No. 30.
3 Defendants opposed the motion, Dckt. Nos. 31, and also moved separately for summary
4 judgment on the grounds that: (1) there is no evidence defendants were deliberately indifferent to
5 plaintiff's medical needs; (2) plaintiff failed to exhaust his administrative remedies; and (3)
6 defendants are entitled to qualified immunity. Dckt. No. 38.

7 **II. Exhaustion Under The PLRA**

8 The court considers the exhaustion issue first, as exhaustion is a prerequisite to filing
9 suit. The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought
10 with respect to prison conditions [under section 1983 of this title] until such administrative
11 remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "Prison conditions" subject to
12 the exhaustion requirement have been defined broadly as "the effects of actions by government
13 officials on the lives of persons confined in prison" 18 U.S.C. § 3626(g)(2); *Smith v.*
14 *Zachary*, 255 F.3d 446, 449 (7th Cir. 2001); *see also Lawrence v. Goord*, 304 F.3d 198, 200 (2d
15 Cir. 2002). To satisfy the exhaustion requirement, a grievance must alert prison officials to the
16 claims the plaintiff has included in the complaint, but need only provide the level of detail
17 required by the grievance system itself. *Jones v. Bock*, 549 U.S. 199, 218-19 (2007); *Porter v.*
18 *Nussle*, 534 U.S. 516, 524-25 (2002) (purpose of exhaustion requirement is to give officials
19 "time and opportunity to address complaints internally before allowing the initiation of a federal
20 case").

21 Prisoners who file grievances must use a form provided by the California Department of
22 Corrections and Rehabilitation, which instructs the inmate to describe the problem and outline
23 the action requested. The grievance process, as defined by California regulations, has three
24 levels of review to address an inmate's claims, subject to certain exceptions. *See* Cal. Code
25 Regs. tit. 15, § 3084.7. Administrative procedures generally are exhausted once a plaintiff has
26 received a "Director's Level Decision," or third level review, with respect to his issues or claims.

1 *Id.* § 3084.1(b).

2 Proper exhaustion of available remedies is mandatory, *Booth v. Churner*, 532 U.S. 731,
3 741 (2001), and “[p]roper exhaustion demands compliance with an agency’s deadlines and other
4 critical procedural rules[.]” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). For a remedy to be
5 “available,” there must be the “possibility of some relief. . . .” *Booth*, 532 U.S. at 738. Relying
6 on *Booth*, the Ninth Circuit has held:

7 [A] prisoner need not press on to exhaust further levels of review once he has
8 received all “available” remedies at an intermediate level of review or has been
reliably informed by an administrator that no remedies are available.

9 *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005).

10 Although motions to dismiss for failure to exhaust administrative remedies prior to filing
11 suit are typically brought under Rule 12(b) of the Federal Rules of Civil Procedure, when ruling
12 on such a motion requires the court to look beyond the pleadings in the context of disputed
13 issues of fact the court must do so under “a procedure closely analogous to summary judgment.”
14 *Wyatt*, 315 F.3d at 1119, n.14. Because care must be taken not to resolve credibility on paper as
15 it pertains to disputed issues of material fact, the undersigned applies the Rule 56 standards to
16 exhaustion motions that require consideration of materials extrinsic to the complaint. *See*
17 *Chatman v. Felker*, No. Civ. S-06-2912 LKK EFB, 2010 WL 3431806, at *2-3 (E.D. Cal. Aug.
18 31, 2010).

19 Defendants bear the burden of proving plaintiff’s failure to exhaust. *Wyatt*, 315 F.3d at
20 1119. To bear this burden:

21 a defendant must demonstrate that pertinent relief remained available, whether at
22 unexhausted levels of the grievance process or through awaiting the results of the
relief already granted as a result of that process. Relevant evidence in so
23 demonstrating would include statutes, regulations, and other official directives
that explain the scope of the administrative review process; documentary or
24 testimonial evidence from prison officials who administer the review process; and
information provided to the prisoner concerning the operation of the grievance
25 procedure in this case With regard to the latter category of evidence,
information provided [to] the prisoner is pertinent because it informs our
26 determination of whether relief was, as a practical matter, “available.”

1 *Brown*, 422 F.3d at 936-37 (citations omitted).

2 On March 18, 2010, the court informed plaintiff of the requirements for opposing a
3 motion to dismiss for failure to exhaust available administrative remedies as well as a motion
4 pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland*, 154 F.3d
5 952, 957 (9th Cir. 1998) (en banc), *cert. denied*, 527 U.S. 1035 (1999); *Klinge v. Eikenberry*,
6 849 F.2d 409 (9th Cir. 1988); *Wyatt*, 315 F.3d at 1120, n.14.

7 **III. Discussion**

8 In support of their failure to exhaust argument, defendants submit: 1) the declaration of
9 Rebecca Fleischmann, Health Care Appeals Coordinator for the California Department of
10 Corrections and Rehabilitation (“CDCR”) at California State Prison, Solano (“Fleischmann
11 Decl.”); and 2) the declaration of Santos Cervantes, Appeals Coordinator for CDCR at California
12 State Prison, Solano (“Cervantes Decl.”).

13 Fleischmann and Cervantes testify that from December 31, 2008 and June 14, 2010,
14 plaintiff submitted four inmate appeals that were accepted for review by the inmate appeal
15 system. Fleischmann Decl. ¶ 4, Ex. A; Cervantes Decl. ¶ 4, Ex. A. These are (1) Log. No. SOL-
16 24-09-10890, (2) Log. No. SOL-24-09-12773, (3) Log. No. SOL-24-09-13330, and (4) Log. No.
17 CSP-S-09-1725. Fleischmann Decl. ¶ 5; Cervantes Decl. ¶ 5. None of these appeals mentioned
18 plaintiff’s need for, or denial of, a lower bunk. *See* Fleischmann Decl. ¶¶ 4-5, Ex. B (copy of
19 Log. No. SOL-24-09-10890) (wherein plaintiff complained of back pain and requested surgery),
20 Ex. C (copy of appeal Log. No. SOL-24-09-12773) (wherein plaintiff complained of back
21 spasms and requested a cane and mobility vest), Ex. D (copy of appeal Log. No. SOL-24-09-
22 13330) (wherein plaintiff complained of an injury to his hand and requested medical care);
23 Cervantes Decl. ¶¶ 4-5, Ex. B (copy of appeal Log. No. CSP-S-09-1725) (wherein plaintiff
24 complained of insomnia, mood swings and back spasms, and requested a back brace and the
25 right to file late inmate appeals because of his mental and health disabilities). Since none of
26 these appeals alerted prison officials of plaintiff’s claimed need for a lower bunk, they did not

1 exhaust plaintiff's administrative remedies as to that claim. *See Griffin v. Arpaio*, 557 F.3d
2 1117, 1120 (9th Cir. 2009) ("a grievance suffices if it alerts the prison to the nature of the wrong
3 for which redress is sought").

4 While defendants concede that three of the four appeals were pursued through the final
5 level of review, those appeals had not been addressed at the final level of review at the time
6 plaintiff commenced this lawsuit on September 23, 2009. *See* Defs.' Mot. for Summ. J., Mem.
7 of P. & A. in Supp. Thereof at 10; *see also* Fleischmann Decl. ¶ 5(B)-(C), Ex. C (Director's
8 Level decision regarding Log. No. SOL-24-09-12773 dated March 15, 2010), Ex. D (Director's
9 Level decision regarding Log. No. SOL-24-09-13330 dated March 29, 2010); Cervantes Decl.
10 ¶ 5, Ex. A, Ex. B (Director's Level decision regarding Log. No. CSP-S-09-1725 dated
11 November 6, 2009). For this reason too, these appeals did not exhaust plaintiff's administrative
12 remedies as to the claim raised in this action. *See Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th
13 Cir. 2010) ("PLRA's exhaustion requirement does not allow a prisoner to file a complaint
14 addressing non-exhausted claims, even if the prisoner exhausts his administrative remedies while
15 his case is pending." (citing *McKinney*, 311 F.3d at 1199)).

16 Based on the foregoing, the court finds that defendants have satisfied their initial burden
17 of proving plaintiff's failure to exhaust. In his opposition, plaintiff argues he should be excused
18 from the exhaustion requirement because (1) he sought money damages, which are beyond the
19 scope of the administrative appeal process, and (2) he submitted an inmate appeal regarding his
20 need for a lower bunk but it was screened out as untimely. Dckt. No. 43 at 9; Dckt. No. 44 at 8,
21 25-31.¹

22 Plaintiff's arguments lack merit. "Even when the prisoner seeks relief not available in
23 grievance proceedings, notably money damages, exhaustion is a prerequisite to suit." *Porter v.*
24 *Nussle*, 534 U.S. 516, 524 (2002). Moreover, "proper exhaustion of administrative remedies is

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26 ¹ These and subsequent page number citations to plaintiff's filings are to the page number
reflected on the court's CM/ECF system and not to page numbers assigned by plaintiff.

1 necessary,” and “[p]roper exhaustion demands compliance with an agency’s deadlines and other
2 critical procedural rules” *Woodford*, 548 U.S. at 84, 90; *see also Marella v. Terhune*, 568
3 F.3d 1024, 1026 (9th Cir. 2009) (“If a prisoner had full opportunity and ability to file a grievance
4 timely, but failed to do so, he has not properly exhausted his administrative remedies.”).

5 Plaintiff’s own evidence shows that he waited until July 18, 2009 to submit an inmate
6 appeal complaining that from February 2009 through May 23, 2009, defendants had not honored
7 his lower bunk chrono. *See* Dckt. No. 44 at 27-30. Plaintiff failed to file this appeal “within 15
8 working days” of the event being appealed, as required by then existing regulations. *See* Dckt
9 No. 44 at 27 (citing Cal. Code Regs. tit. 15, § 3084.6(c)).² Thus, the appeals coordinator
10 properly screened out the July 18 appeal. *See* Dckt. No. 44 at 27. In doing so, the appeals
11 coordinator also gave plaintiff an opportunity to resubmit the appeal with an explanation as to
12 why it was filed late. *Id.* In accordance with those instructions, plaintiff resubmitted the July 18
13 appeal on July 29, explaining that he was “unaware of the 602 appeal procedure,” feared
14 retaliation, and “was not thinking correctly because of the continued pain and suffering
15 [plaintiff] was experiencing.” *Id.* at 31. Plaintiff added that he was “unable to provide
16 supporting documentation at this time,” although it is unclear what documentation plaintiff
17 would have provided. *See id.* The appeals coordinator screened out plaintiff’s resubmitted
18 appeal on the ground that plaintiff’s reasons for the untimely appeal were “not credible.” *Id.* at
19 28.

20 The appeals coordinator properly screened out plaintiff’s resubmitted appeal. Plaintiff’s
21 excuses for filing a late appeal are undermined by both defendants’ evidence and plaintiff’s
22 complaint. During the time in which plaintiff could have timely submitted an appeal regarding
23 his need for a lower bunk, plaintiff submitted administrative appeals at various levels of review
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25 ² Section 3084.6(c) has since been amended and section 3084.8(b), effective January 28,
26 2011, now provides that an appeal must be submitted within “30 calendar days” of the event or
decision being appealed.

1 regarding other issues relating to his conditions of confinement. *See* Fleischmann Decl., Ex. A
2 (noting plaintiff’s appeals filed from March 2009 through May 2009). Further, plaintiff alleged
3 in his complaint that he filled out health care services request forms on June 1, 2009 and June 3,
4 2009.³ *See* Dckt. No. 1 at 9-10. Plaintiff’s own actions discredit his claimed ignorance of the
5 inmate appeal process, fear of retaliation, and inability to think. Nor does plaintiff submit any
6 evidence showing he was unable to timely appeal his lower bunk issue.

7 In screening out the July 29 appeal, the appeals coordinator again informed plaintiff that
8 if he believed the screen out was in error, he could submit another explanation with supporting
9 documents within fifteen days. Dckt. No. 44 at 28. There is no evidence that plaintiff ever re-
10 submitted this appeal as directed. Rather, it appears that plaintiff attempted to improperly bypass
11 this step by directly requesting a “final decision” at the third level of review. *Id.* at 25-26.

12 In light of the above, the court finds that plaintiff has failed to show that there is a
13 genuine dispute as to whether he properly exhausted his available administrative remedies or
14 should be excused from the exhaustion requirement.

15 **IV. Conclusion**

16 Plaintiff failed to comply with regulations that required him to file his administrative
17 appeal within 15 working days of the alleged incident giving rise to his complaint. Accordingly,
18 the court finds that plaintiff failed to exhaust available administrative remedies and that
19 defendants are entitled to dismissal of this action on that ground. *See Wyatt*, 315 F.3d at 1120
20 (explaining that if the court concludes that a prisoner has failed to exhaust, the proper remedy is
21 dismissal without prejudice).

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23 ³ In his opposition to defendants’ motion for summary judgment, plaintiff notes that he
24 filed a health care services request form relating to his need for a lower bunk in January of 2009.
25 Dckt. No. 43 at 7; Dckt. No. 44 at 24. To the extent plaintiff argues this satisfied the exhaustion
26 requirement, the argument fails. *See Chatman v. Felker*, No. Civ. S-03-2415 JAM EFB, 2011
U.S. Dist. LEXIS 10660, at *25 (E.D. Cal. Feb. 2, 2011) (“Under the PLRA, plaintiff must use
the grievance system to put prison officials on notice: giving notice through other channels is not
adequate.”).

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

2 1. Defendants' December 3, 2010 motion for summary judgment, construed in part as an
3 unenumerated Rule 12(b) motion to dismiss, be granted without prejudice on the ground that
4 plaintiff failed to exhaust administrative remedies;

5 2. Plaintiff's September 17, 2010 motion for summary judgment be denied as moot; and

6 3. The Clerk be directed to close this case.

7 These findings and recommendations are submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
9 after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Such a document should be captioned
11 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
12 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
13 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

14 Dated: August 31, 2011.

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16 EDMUND F. BRENNAN
17 UNITED STATES MAGISTRATE JUDGE
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