

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

JAMES L. JEFFERSON,

Plaintiff,

No. 2: 09-cv-3008 GEB CKD P

vs.

A. PEREZ, et al.,

Defendants.

ORDER AND AMENDED FINDINGS AND  
RECOMMENDATIONS

\_\_\_\_\_ /

I. INTRODUCTION

Plaintiff is a state prisoner proceeding with a civil rights complaint filed pursuant to 42 U.S.C. § 1983. This action is proceeding on plaintiff’s complaint against defendants A. Perez, Providence and Pompey, who are correctional officers. Plaintiff alleges that defendant Perez violated his Eighth Amendment right to be free from cruel and unusual punishment when she spread a rumor that plaintiff was a “snitch.” Plaintiff’s claims against defendant Providence are that he falsified an interview with plaintiff and that he was placed in administrative segregation by Providence because he failed to drop a complaint against Pompey. Finally, plaintiff claims that Pompey roughed him up. Defendants have filed a motion for summary judgment arguing that plaintiff failed to exhaust his administrative remedies. Additionally,

1 defendants argue that there is no evidence to support the claims made against the defendants  
2 and/or the defendants are entitled to qualified immunity. For the following reasons, it will be  
3 recommended that this action be dismissed without prejudice due to plaintiff's failure to exhaust  
4 administrative remedies.

## 5 II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

6 The Prison Litigation Reform Act ("PLRA") provides that, "[n]o action shall be  
7 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by  
8 a prisoner confined in any jail, prison, or other correctional facility until such administrative  
9 remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Pursuant to this rule, prisoners  
10 must exhaust their administrative remedies regardless of the relief they seek, i.e., whether  
11 injunctive relief or money damages, even though the latter is unavailable pursuant to the  
12 administrative grievance process. See *Booth v. Churner*, 532 U.S. 731, 741 (2001). Exhaustion  
13 also requires that the prisoner complete the administrative review process in accordance with all  
14 applicable procedural rules. See *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006).

15 The PLRA requires that administrative remedies be exhausted prior to filing suit.  
16 See *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002). However, the exhaustion  
17 requirement is not jurisdictional, but an affirmative defense that may be raised by a defendant in  
18 a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b). See *Jones v. Bock*, 549  
19 U.S. 199, 216 (2007) ("inmates are not required to specially plead or demonstrate exhaustion in  
20 their complaints"); *Wyatt v. Terhune*, 315 F.3d 1108, 1117-19 (9th Cir. 2003) (failure to exhaust  
21 is an affirmative defense). Defendants bear the burden of raising and proving the absence of  
22 exhaustion, and their failure to do so waives the defense. See *id.* at 1119.

23 "In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the  
24 court may look beyond the pleadings and decide disputed issues of fact." *Id.* at 1119-20 "[I]f the  
25 district court looks beyond the pleadings to a factual record in deciding the motion to dismiss for  
26 failure to exhaust – a procedure closely analogous to summary judgment – then the court must

1 assure that [the prisoner] has fair notice of his opportunity to develop a record.” Id. at 1120 n.14.  
2 When the district court concludes that the prisoner has not exhausted administrative remedies on  
3 a claim, “the proper remedy is dismissal of the claim without prejudice.” Id. at 1120; see also  
4 *Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005) (“mixed” complaints may proceed on  
5 exhausted claims). Thus, “if a complaint contains both good and bad claims, the court proceeds  
6 with the good and leaves the bad.” *Jones*, 549 U.S. at 221.

7           “The level of detail in an administrative grievance necessary to properly exhaust a  
8 claim is determined by the prison’s applicable grievance procedures.” Id. at 218. In California,  
9 prisoners are required to lodge their administrative complaint on a CDC Form 602, which  
10 requires only that the prisoner “describe the problem and action requested.” CAL.CODE REGS. tit.  
11 15, § 3084.2(a). In *Griffin v. Arpaio*, 557 F.3d 1117 (9th Cir. 2009), the Ninth Circuit adopted  
12 the standard enunciated by the Seventh Circuit, which provides that “when a prison’s grievance  
13 procedures are silent or incomplete as to factual specificity, a grievance suffices if it alerts the  
14 prison to the nature of the wrong for which redress is sought.” Id. at 1120 (reviewing Arizona  
15 procedures) (internal quotation marks and citation omitted). Thus, in California, “[a] grievance  
16 need not include legal terminology or legal theories unless they are in some way needed to  
17 provide notice of the harm being grieved. A grievance also need not contain every fact necessary  
18 to prove each element of an eventual legal claim. The primary purpose of a grievance is to alert  
19 the prison to a problem and facilitate its resolution, not to lay groundwork for litigation.” Id.; see  
20 also *Morton v. Hall*, 599 F.3d 942, 946 (9th Cir. 2010).

21           “[E]xhaustion is not per se inadequate simply because an individual later sued was  
22 not named in the grievances.” *Jones*, 549 U.S. at 219. It is nonetheless appropriate to require  
23 that a prisoner demonstrate, through the administrative grievance process and consistent with the  
24 PLRA, that he has standing to pursue his claims against a particular defendant. “[A]t an  
25 irreducible minimum, Art[icle] III [of the United States Constitution] requires the party who  
26 invokes the court’s authority to ‘show that he personally has suffered some actual or threatened

1 injury as a result of the putatively illegal conduct of the defendant.’ ” Valley Forge Christian  
2 Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

### 3 III. DISCUSSION

#### 4 A. Perez

5 Plaintiff’s claim against defendant Perez is that she told other inmates that  
6 plaintiff was a snitch which endangered his life. (See Third Am. Compl. at p. 2-3; Pl.’s Opp’n  
7 Defs.’ Mot. Summ. J. at p. 6 (“Mr. Jefferson’s complaint alleges that Defendant Perez informed  
8 other inmates that he was a snitch which endangered Mr. Jefferson’s life.”).) The prison had an  
9 inmate grievance system in place whereby the inmate appeal had to be submitted within fifteen  
10 working days of the event or decision that was the subject of the appeal. During the applicable  
11 time period of plaintiff’s claim against Perez, plaintiff submitted five inmate appeals. (See  
12 Defs.’ Statement Undisputed Facts (“DUP”) ¶ 11 (“A review of Jefferson’s inmate appeal  
13 records found that in June through August 2009, Jefferson submitted five inmate appeals that  
14 were processed for further review.”).) In an appeal that was received for second level review on  
15 June 18, 2009 (log number CMF-M-0901607), Jefferson complained that an Officer Desouza  
16 took his copy of Jet Magazine. (See DUP ¶ 12.) In an appeal that was received for second level  
17 review on July 21, 2009 (log number CMF-M-09-01853), Jefferson complained about elections  
18 to the Men’s Advisory Council. (See id. ¶ 13.) In an appeal that was received for second level  
19 review on August 5, 2009 (log number CMF-M-02017), Jefferson complained that Perez had  
20 told him about her lawsuits, that she practiced favoritism towards inmates, and that Perez called  
21 him a “trouble maker faggot.” (See id. ¶ 14.) In an appeal received for first level review on  
22 August 20, 2009 (log number CMF-M-09-02133), Jefferson complained that he had wrongly  
23 been placed into administrative segregation. (See id. ¶ 15.) Additionally, in an appeal received  
24 for first level review on August 24, 2009 (log number CMF-M-09-02158), Jefferson again  
25 complained that he had been wrongly placed in administrative segregation and that it was due to  
26 discrimination. (See id. ¶ 16.)

1           The grievances that petitioner filed did not alert the prison to the nature of the  
2 wrong for which redress is sought with respect to Perez purportedly telling inmates that plaintiff  
3 was a snitch. See Griffin, 557 F.3d at 1120 (standard for specificity required for prison grievance  
4 is “if it alerts the prison to the nature of the wrong for which redress is sought”). Accordingly,  
5 plaintiff did not exhaust his administrative remedies with respect to his claim against Perez.

#### 6           B. Providence

7           Plaintiff asserts that his constitutional rights were violated when Providence  
8 falsified documents related to an interview and investigation and kept plaintiff in administrative  
9 segregation because he would not dismiss a grievance against defendant Pompey. (See Third  
10 Am. Compl. at p. 3; Pl.’s Opp’n Defs.’ Mot. Summ. J. at p. 6.) On August 11, 2009, plaintiff  
11 was placed into administrative segregation by Correctional Lieutenant Providence. (See DUP ¶  
12 19.) The basis for this was that information had been received by Providence that Jefferson was  
13 causing unrest between the inmate population and Perez. (See id. ¶ 20.) Specifically, Jefferson  
14 had been identified as the source of rumors and false allegations involving the Crips, the Bloods,  
15 and Perez. (See id. ¶ 21.) The information was contained in a memorandum written that day by  
16 Perez. (See id. ¶ 22.) Though confidential, Jefferson obtained a copy of the memorandum and  
17 later attached a heavily marked-up copy of it to an inmate appeal. (See id. ¶ 23.) The placement  
18 into administrative segregation was reviewed and approved the following day by Facility Captain  
19 Flores. (See id. ¶ 26.) Jefferson’s placement in administrative segregation was then reviewed by  
20 the Institutional Classification Committee (ICC) on August 18, 2009. (See id. ¶ 27.) It was  
21 noted that an investigation into staff safety concerns was then pending. (See id. ¶ 28.)  
22 Providence was not a member of this ICC. (See id. ¶ 30.) The ICC reviewed plaintiff’s  
23 placement into administrative segregation again on September 1, 2009 and although the  
24 information that Jefferson was the source of rumors and false allegations involving the Crips, the  
25 Bloods, and Perez, was not deemed reliable, there were safety concerns and it was recommended  
26 that Jefferson be transferred to another institution. (See id. ¶ 31, 33.) Providence was not a

1 member of this ICC. (See *id.* ¶ 35.) Jefferson submitted two inmate appeals regarding this  
2 decision to place him into administrative segregation. (See *id.* ¶ 36.) In appeal log number  
3 CMF-M-09-02133, Jefferson complained that Perez falsified safety concerns in retaliation for an  
4 earlier appeal filed against Perez so that Jefferson would be placed into administrative  
5 segregation. (See *id.* ¶ 37.) In appeal log number CMF-M-09-02158, Jefferson complained that  
6 he was wrongly placed into administrative segregation based upon false rumors and  
7 discrimination. (See *id.* ¶ 39.) He alleges in the appeal that it was in retaliation for filing an  
8 earlier appeal against Perez. (See *id.* ¶ 40.) The appeal does not allege that Providence placed  
9 plaintiff into administrative segregation in retaliation for an appeal filed against Pompey. (See  
10 *id.* ¶ 41.)

11           The grievances that plaintiff filed as outlined above did not alert the prison to the  
12 nature of the wrongs for which redress is sought with respect to Providence. See *Griffin*, 557  
13 F.3d at 1120 (setting forth level of specificity required when filing a prison grievance). They did  
14 not alert the prison to the fact that plaintiff asserted that Providence falsified interviews or that he  
15 placed plaintiff in administrative segregation due to an appeal plaintiff filed against Pompey.  
16 Accordingly, plaintiff did not exhaust his administrative remedies with respect to his claims  
17 against Providence.

### 18           C. Pompey

19           Plaintiff alleges in his third amended complaint that defendant Pompey physically  
20 assaulted him. (See Third Am. Compl. at p. 3; Pl.’s Opp’n Defs.’ Mot. Summ. J. at p. 6 (“The  
21 complaint alleges that Defendant Pompey physically assaulted Mr. Jefferson.”).) During his  
22 deposition, plaintiff alleged that Pompey beat him up in the first week of October 2009. (See  
23 DUP ¶ 42.) Plaintiff stated that he was in his cell, on the top bunk, when Pompey entered the  
24 cell pulled the mattress and plaintiff onto the floor, kicked plaintiff in the stomach and breasts,  
25 smacked plaintiff in the face, and kicked him in the back. (See *id.* ¶ 43.) A review of Jefferson’s  
26 inmate appeal records found that in 2009 plaintiff submitted two inmate appeals complaining

1 about Pompey or making reference to him. (See id. ¶ 49.) In an appeal received for second level  
2 review on September 16, 2009 (log number CMF-M-09-02412), Jefferson complained that  
3 Pompey and others were sabotaging his food. (See id. ¶ 50.) In an appeal received for informal  
4 level review on October 19, 2009 (log number CMF-M-09-02851), Jefferson complained that  
5 Captain Flores had not provided him with a copy of his administrative order and he wished for  
6 Flores to interview him “on the C/O Pompey situation.” (See id. ¶ 51.) In addition to the appeal  
7 received for informal level review on October 19, 2009, a review of Jefferson’s inmate appeal  
8 records found that in October and November 2009, Jefferson submitted five other inmate  
9 appeals. (See id. ¶ 52.) In appeal received for first level review on October 12, 2009 (log  
10 number CMF-M-09-02591), Jefferson complained he was not getting his meals. (See id. ¶ 53.)  
11 In an appeal received for second level review on October 21, 2009 (log number CMF-M-09-  
12 02680), Jefferson complained that his personal property has been misplaced. (See id. ¶ 54.) In  
13 an appeal received for first formal level review on October 29, 2009 (log number CMF-M-09-  
14 02732), Jefferson complained about his placement into administrative segregation and not being  
15 given an opportunity to speak to the ICC. (See id. ¶ 55.) In an appeal received for second level  
16 review on November 3, 2009 (log number CMF-M-09-02789), Jefferson complained that Sgt.  
17 Gibson was preventing him from moving to another unit and insulting Jefferson’s sexual  
18 orientation. (See id. ¶ 56.) In an appeal for informal level review on November 19, 2009 (log  
19 number CMF-M-09-3064), Jefferson complained that the mail room was holding his Jet  
20 Magazine. (See id. ¶ 58.) None of these inmate appeals submitted by Jefferson concern  
21 allegations that Pompey subjected plaintiff to excessive force in October 2009. (See id. ¶ 58.)

22           The grievances that plaintiff filed as outlined above did not alert the prison to the  
23 nature of the wrong with respect to Pompey purportedly physically assaulting plaintiff. See  
24 Griffin, 557 F.3d 1120 (setting forth requisite standard of specificity needed when filing a prison  
25 grievance). Accordingly, plaintiff did not exhaust his administrative remedies with respect to his  
26 claim against Pompey.

1           As plaintiff failed to exhaust his administrative remedies with respect to his  
2 claims against the defendants, it is unnecessary to analyze defendants' alternative arguments that  
3 there is no evidence to support the claims made against them and/or that they are entitled to  
4 qualified immunity on plaintiff's claims.

5           D. Exceptions to Exhaustion

6           Plaintiff contends that even if his claims are unexhausted, he qualifies for an  
7 exception to the PLRA exhaustion requirement. The Ninth Circuit has held that an inmate's  
8 failure to exhaust administrative remedies may be excused where "circumstances render  
9 administrative remedies effectively unavailable." Nunez v. Duncan, 591 F.3d 1217, 1226 (9th  
10 Cir. 2010) (holding that inmate's failure to exhaust his administrative remedies was excused  
11 because he took reasonable steps to exhaust his claim and was precluded from exhausting, not  
12 through fault of his own but by the Warden's mistake); see also Ngo v. Woodford, 539 F.3d  
13 1108, 1110 (9th Cir. 2008) (explaining that even if exceptions apply to PLRA's exhaustion  
14 requirement, plaintiff had not shown "that administrative procedures were unavailable, that  
15 prison officials obstructed his attempt to exhaust or that he was prevented from exhausting  
16 because procedures for processing grievances weren't followed."). Petitioner asserts that he  
17 should be excused from exhaustion because "prison officials obstructed his attempts to exhaust  
18 his grievances through threats of retaliation and intimidation." (Dkt. No. 86 at p. 17.) He also  
19 claims that he "faced several instances of physical attacks and threats, as well as verbal abuse,  
20 threats of retaliation and obstruction of his attempts to file grievances, rendering him eligible for  
21 exceptions to the PLRA[.]" (Dkt. No. 91 at p. 6.) It is worth noting that affirmative actions by  
22 jail staff preventing proper exhaustion, even if done innocently, make administrative remedies  
23 effectively unavailable. See, e.g., Albino v. Baca, No. 10-55702, – F.3d –, 2012 WL 4215918, at  
24 \*8 (9th Cir. Sept. 21, 2012). However, in this case, plaintiff fails to show that administrative  
25 remedies were made effectively unavailable by prison staff. Plaintiff filed numerous grievances  
26 during the relevant time period that the purported actions of the defendants giving rise to



1 plaintiff's claims took place. In fact, many of those grievances specifically involved alleged  
2 improper conduct of the defendants as outlined above, albeit not the conduct that plaintiff alleges  
3 in his third amended complaint. Under these circumstances, plaintiff is not entitled to an  
4 exception to the PLRA exhaustion requirement. Contrary to plaintiff's argument, grievance  
5 procedures were clearly available to plaintiff and were in fact readily used by him during the  
6 relevant time frame that the circumstances underlying the claims within the third amended  
7 complaint took place. Exhaustion should not be excused.

8 IV. CONCLUSION

9 Accordingly, IT IS HEREBY ORDERED that the September 28, 2012 findings  
10 and recommendations (Dkt. No. 90.) are VACATED.

11 Furthermore, IT IS HEREBY RECOMMENDED that defendants motion for  
12 summary judgment (Dkt. No. 81), is construed in part as an unenumerated Rule 12(b) motion to  
13 dismiss, and that the motion be granted on the ground that plaintiff failed to exhaust  
14 administrative remedies such that this action should be dismissed without prejudice.

15 These amended findings and recommendations are submitted to the United States  
16 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
17 fourteen days after being served with these findings and recommendations, any party may file  
18 written objections with the court and serve a copy on all parties. Such a document should be  
19 captioned "Objections to Magistrate Judge's Amended Findings and Recommendations." Any  
20 reply to the objections shall be served and filed within fourteen days after service of the  
21 objections. The parties are advised that failure to file objections within the specified time may

22 \\\

23 \\\

24 \\\

25 \\\

26 \\\

1 waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.  
2 1991).

3 Dated: November 14, 2012

4   
5 CAROLYN K. DELANEY  
6 UNITED STATES MAGISTRATE JUDGE

7  
8  
9  
10  
11  
12 <sup>7</sup>  
13 jeff3008.57.amend

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26