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

MORRIS MESTER,

Plaintiff,

No. 2:09-cv-3307 KJM KJN P

vs.

MILLER AND REED,

Defendants.

ORDER AND

ORDER TO SHOW CAUSE

_____ /

Plaintiff is a prisoner who is proceeding without counsel and in forma pauperis. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983. On August 8, 2011, the undersigned issued findings and recommendations recommending that plaintiff’s claims against defendant Miller be dismissed based on evidence demonstrating that plaintiff failed to exhaust his administrative remedies as to his claims raised in the instant complaint. The court turns now to defendant Reed, the only other remaining defendant. On October 28, 2010, the court ordered the United States Marshal to serve the complaint on defendants. But process directed to defendant Reed was returned unserved because “unable to locate.” (Dkt. No. 63.) However, as noted in the August 8, 2011 findings and recommendations, none of the administrative grievances filed by plaintiff challenged the claims raised in plaintiff’s complaint. Therefore, plaintiff is directed to show cause why plaintiff’s claims against defendant Reed should not be dismissed based on plaintiff’s

1 failure to exhaust administrative remedies prior to filing the instant action.

2 I. Plaintiff's Allegations as to Defendant Reed

3 On April 9, 2009, plaintiff was transferred back to the California Medical Facility
4 ("CMF"). Plaintiff alleges he was returned to administrative segregation ("ad seg") on April 15,
5 2009, based on 2000 charges that plaintiff was being over familiar with M.T.A. Reed. When
6 plaintiff asked for the paperwork stating plaintiff was locked up and transferred in 2001 for being
7 overly familiar with staff, plaintiff states he was provided "another lock-up order dated 11-25-
8 00." (Dkt. No. 1 at 3.) Plaintiff asked for confirmation of a write-up, a 115 from defendant Reed
9 in 2000, plaintiff allegedly received a 128 B Chrono in the mail that was not dated. Plaintiff
10 contends this chrono was written after plaintiff arrived at CMF. Plaintiff contends defendant A.
11 Miller was still a counselor at CMF, and alleges defendant Miller conspired with defendant Reed
12 to have plaintiff held in ad seg. It appears plaintiff contends he was wrongfully placed in ad seg
13 on April 15, 2009.

14 II. Legal Standard re Exhaustion

15 The Prison Litigation Reform Act of 1995 ("PLRA") amended 42 U.S.C. § 1997e
16 to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C.
17 § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
18 facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).
19 Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S.
20 516, 524 (2002). Exhaustion is a prerequisite for all prisoner suits regarding conditions of
21 confinement, whether they involve general circumstances or particular episodes, and whether
22 they allege excessive force or some other wrong. Porter, 534 U.S. at 532.

23 Exhaustion of all "available" remedies is mandatory; those remedies need not
24 meet federal standards, nor must they be "plain, speedy and effective." Id. at 524; Booth v.
25 Churner, 532 U.S. 731, 740 n.5 (2001). Even when the prisoner seeks relief not available in
26 grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. Booth, 532

1 U.S. at 741. A prisoner “seeking only money damages must complete a prison administrative
2 process that could provide some sort of relief on the complaint stated, but no money.” Id. at 734.
3 The fact that the administrative procedure cannot result in the particular form of relief requested
4 by the prisoner does not excuse exhaustion because some sort of relief or responsive action may
5 result from the grievance. See Booth, 532 U.S. at 737; see also Porter, 534 U.S. at 525 (purposes
6 of exhaustion requirement include allowing prison to take responsive action, filtering out
7 frivolous cases, and creating administrative records).

8 A prisoner need not exhaust further levels of review once he has either received
9 all the remedies that are “available” at an intermediate level of review, or has been reliably
10 informed by an administrator that no more remedies are available. Brown v. Valoff, 422 F.3d
11 926, 934-35 (9th Cir. 2005). Because there can be no absence of exhaustion unless some relief
12 remains available, a movant claiming lack of exhaustion must demonstrate that pertinent relief
13 remained available, whether at unexhausted levels or through awaiting the results of the relief
14 already granted as a result of that process. Brown, 422 F.3d at 936-37.

15 As noted above, the PLRA requires proper exhaustion of administrative remedies.
16 Woodford v. Ngo, 548 U.S. 81, 83-84 (2006). “Proper exhaustion demands compliance with an
17 agency’s deadlines and other critical procedural rules because no adjudicative system can
18 function effectively without imposing some orderly structure on the course of its proceedings.”
19 Id. at 90-91. Thus, compliance with prison grievance procedures is required by the PLRA to
20 properly exhaust. Id. The PLRA’s exhaustion requirement cannot be satisfied “by filing an
21 untimely or otherwise procedurally defective administrative grievance or appeal.” Id. at 83-84.

22 The State of California provides its prisoners the right to appeal administratively
23 “any departmental decision, action, condition or policy which they can demonstrate as having an
24 adverse effect upon their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a) (2010). It also provides
25 them the right to file appeals alleging misconduct by correctional officers and officials. Id. at
26 § 3084.1(e). In order to exhaust available administrative remedies within this system, a prisoner

1 must proceed through several levels of appeal: (1) informal resolution, (2) formal written appeal
2 on a 602 inmate appeal form, (3) second level appeal to the institution head or designee, and
3 (4) third level appeal to the Director of the California Department of Corrections and
4 Rehabilitation. Barry v. Ratelle, 985 F.Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal.Code
5 Regs. tit. 15, § 3084.5). A final decision from the Director’s level of review satisfies the
6 exhaustion requirement under § 1997e(a). Id. at 1237-38.

7 Non-exhaustion under § 1997e(a) is an affirmative defense which should be
8 brought by defendants in an unenumerated motion to dismiss under Federal Rule of Civil
9 Procedure 12(b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). However, where it is
10 clear from the face of Plaintiff’s complaint that he has not yet exhausted the administrative
11 grievance procedure, this action must be dismissed. 42 U.S.C. § 1997e(a); Wyatt, 315 F.3d at
12 1120 (“A prisoner’s concession to nonexhaustion is a valid grounds for dismissal. . . .”); see also
13 Bennett v. King, 293 F.3d 1096, 1098 (9th Cir. 2002); Metoyer v. Post, 121 Fed.Appx. 749 (9th
14 Cir. 2005). Finally, the court may look beyond the pleadings to determine whether a plaintiff
15 exhausted his administrative remedies. Wyatt, 315 F.3d at 1119-20.

16 III. Analysis

17 The instant complaint was filed on August 17, 2009. Therefore, plaintiff was
18 required to exhaust his administrative remedies as to his claims against defendant Reed on or
19 before August 16, 2009. Booth, 532 U.S. at 741. D. Foston, Chief of the Inmate Appeals
20 Branch, provided a log of any appeals by plaintiff that were “accepted and/or received and
21 screened out at the Directors’ level between January 1, 1997, and September 17, 2010.” (Dkt.
22 No. 53-1 at 2-3.) The court will address the pertinent grievances below.

23 1. Log No. CMF-09-00982

24 Grievance CMF-09-00982 addressed plaintiff’s request for an Americans with
25 Disabilities Act (“ADA”)-compliant cell. (Dkt. No. 53-1 at 10.) Plaintiff exhausted this
26 grievance to the Director’s Level of review, but there is no mention of plaintiff’s claims

1 concerning the alleged wrongful placement in administrative segregation (“ad seg”), or of
2 plaintiff’s claims against defendant Reed in grievance CMF-09-00982.

3 2. Log No. CMF-09-01537

4 Grievance CMF-09-01537 challenged plaintiff’s loss of his single cell status (“S”
5 suffix) resulting from the April 22, 2009 classification committee hearing. (Dkt. No. 53-1 at 12.)
6 This grievance was exhausted to the Director’s Level of review on October 6, 2009, but makes
7 no reference to the alleged wrongful placement in ad seg or any of the instant claims lodged
8 against defendant Reed. (Dkt. No. 53-1 at 42.) But even if this court were to liberally construe
9 this grievance as exhausting any of plaintiff’s claims against defendant Reed, the Director’s
10 Level decision was rendered on October 6, 2009, after the August 7, 2009 filing of the instant
11 complaint. Therefore, this grievance cannot serve to exhaust plaintiff’s administrative remedies
12 against defendant Reed prior to the filing of the instant action, as required under Booth, 532 U.S.
13 at 741.

14 3. Log No. CMF-09-01483

15 On May 28, 2009, plaintiff filed an appeal claiming that defendant Miller had
16 again tampered with plaintiff’s central file by changing plaintiff’s conviction from statutory rape
17 to forcible rape, which was the same allegation plaintiff had raised in a lawsuit filed in 2000.
18 (Dkt. No. 53-1 at 28.) Plaintiff submitted his third level appeal on August 24, 2009, but it was
19 cancelled as untimely because appeals were due within fifteen working days. (Dkt. No. 53-1 at
20 7.) Thus, Grievance CMF-09-01483 was not exhausted through the third level of review.
21 Grievance CMF-09-01483 does not mention plaintiff’s claims concerning the alleged wrongful
22 placement in ad seg, or defendant Reed, or any alleged conspiracy between defendants Miller and
23 Reed. Therefore, grievance CMF-09-01483 does not exhaust plaintiff’s claims against defendant
24 Reed.

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1 4. Log No. HDSP-A-10-0294

2 On January 18, 2010, while housed at High Desert State Prison, plaintiff filed an
3 appeal requesting a copy of the June 19, 2009 classification chrono so that plaintiff could ensure
4 that any reference to forcible rape was blotted out. (Dkt. No. 53-1 at 49.) However, because this
5 grievance was filed after the August 17, 2009 complaint was filed herein, it cannot serve to
6 exhaust administrative remedies prior to suit as required by Booth, 532 U.S. at 741.

7 5. Documents Appended to Plaintiff's Complaint

8 In Exhibit H, plaintiff provided copies of documents demonstrating his efforts to
9 exhaust administrative remedies, which were screened out as duplicate or untimely. (Dkt. No. 1
10 at 38-52.)

11 In one document challenging the screening out of plaintiff's appeal as a duplicate,
12 plaintiff mentions Log No. CMF-09-1053, which plaintiff claims was an ADA appeal. (Dkt. No.
13 1 at 39.) Plaintiff states that the "issues transfer and 'S' suffix, single cell status, is a non ADA
14 issue and cannot be raised on a 1824 form." (Id.) The next page refers to plaintiff's attempt to
15 challenge the error in his conviction, and alleges defendant Miller allegedly tampered with
16 plaintiff's record. (Dkt. No. 1 at 40.) A copy of the June 2, 2009 grievance marked "duplicate
17 issue" reflects plaintiff challenged defendant Miller's alleged falsification of documents and
18 claims plaintiff was placed in ad seg twice because of defendant Miller. (Dkt. No. 1 at 41.) The
19 attachment to the June 2, 2009 grievance refers to plaintiff's prior lawsuit against defendant
20 Miller, and claims plaintiff was "put in ad-set on made up fabrications" and that plaintiff's
21 conviction was changed again from statutory to forcible rape. (Dkt. No. 1 at 42.) Plaintiff then
22 alleges his ingoing and outgoing mail were stopped and alleges his legal mail is opened and read
23 before its delivery. (Id.)

24 On May 20, 2009, plaintiff signed another grievance, which was marked "non-
25 emergency" and "duplicate issue." (Dkt. No. 1 at 43.) In this grievance, plaintiff states he was
26 placed in ad seg on April 15, 2009, due to the claim of being transferred from CMF in 2000 due

1 to plaintiff's being overly familiar with staff. Plaintiff states he was really placed in ad seg in
2 2000 because plaintiff would not agree to dismiss a lawsuit against a counselor for tampering
3 with plaintiff's central file, who still works at CMF, which plaintiff alleges is actually why
4 plaintiff was placed in ad seg on April 15, 2009. (Dkt. No. 1 at 43-44.) Plaintiff then states:
5 "But, used Nurse Reed, who supposedly wrote the 128-B, overfamiliar in 2000, to say [illegible]
6 a threat in 2009." (Id. at 44.) Plaintiff goes on to state he suffers severe incontinence requiring
7 diapers, and alleges all medical records documenting plaintiff's incontinence have been removed
8 from plaintiff's medical chart, allegedly because of lawsuits plaintiff filed, but doctors have
9 prescribed plaintiff medical supplies of diapers, bags and gloves to address this problem. It
10 appears plaintiff raised these health issues to bolster his claim that he requires single cell status
11 because inmates don't want to live with plaintiff's bowel incontinence problem. (Dkt. No. 1 at
12 45.) This is confirmed by the action plaintiff requests in this grievance:

13 Request due to the serious nature of my medical condition of
14 incontinence in foreseeing the future that this be answered as an
15 emergency and "S" Suffix restored until the prison I'm housed at
HDSP or PVSP makes the decision after examination by a doctor.

16 (Dkt. No. 1 at 43.) Plaintiff asked that since this is a nonadverse transfer, plaintiff be given the
17 choice of R.J. Donovan, which is closer to plaintiff's family. (Dkt. No. 1 at 45.)

18 Plaintiff also provides a copy of a June 29, 2009 grievance, which challenge the
19 placement of the "R" suffix on plaintiff's file, which plaintiff alleged was based on the alteration
20 of plaintiff's "statutory" rape conviction to read "forcible" rape. (Dkt. No. 1 at 47.) This appeal
21 was marked "Cancel." (Id.)

22 Plaintiff then provides a series of Appeal Screening forms which contend
23 plaintiff's appeals were untimely submitted, but because these appeals were screened out, there is
24 no log number to connect the screening form with the grievance plaintiff submitted. (Dkt. No. 1
25 at 48, 50, 52.) However, plaintiff was informed that he needed to provide a valid explanation for
26 submission of a late appeal on at least two occasions. (Dkt. No. 1 at 48, 52.)

1 Out of all the documents appended to plaintiff's complaint, only the grievance
2 signed May 20, 2009, mentions defendant Reed, and references plaintiff's alleged wrongful
3 placement in ad seg on April 15, 2009. (Dkt. No. 1 at 43-44.) However, although plaintiff
4 mentions the alleged wrongful housing in ad seg, plaintiff claims defendant Miller was the reason
5 plaintiff was wrongfully placed in ad seg on April 15, 2009, and alleges defendant Miller used
6 defendant Reed to have plaintiff placed in ad seg. (Dkt. No. 1 at 44.) Moreover, the emphasis of
7 this grievance appears to be plaintiff's effort to retain single cell status and to request the prison
8 to which he would be transferred. This was the action requested; plaintiff did not seek to have
9 his placement in ad seg overturned, or seek any other remedy against defendant Miller or Reed.

10 In any event, as evidenced by D. Foston's declaration, plaintiff failed to exhaust
11 his claims against defendant Reed to the Director's Level of Review. Plaintiff was able to grieve
12 his single cell status to the Director's Level of Review. (Dkt. No. 53-1 at 42.) The record
13 demonstrates that plaintiff is familiar with the grievance process and knows how to obtain third
14 level reviews of his grievances.

15 Accordingly, it appears plaintiff's claims against defendant Reed should be
16 dismissed without prejudice based on plaintiff's failure to exhaust administrative remedies prior
17 to filing in federal court. Plaintiff will be ordered to show cause, within thirty days, why
18 plaintiff's claims against defendant Reed should not be dismissed.

19 IV. Motion to Amend

20 Finally, on July 29, 2011, plaintiff filed a motion to amend the complaint.
21 Plaintiff's motion was not, however, accompanied by a proposed amended complaint. Rather,
22 plaintiff merged his motion with his new complaint in one document. Normally, plaintiff's
23 motion would be denied, and plaintiff would be granted leave to renew his motion if
24 accompanied by a separate, proposed amended complaint. However, as discussed more fully
25 below, allowing plaintiff to amend would be futile.

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1 A. Proposed Amended Complaint

2 Plaintiff claims that in April of 2009, when plaintiff returned to CMF, defendants
3 K. Allen, Flores, F.C. [illegible], and B. Reed conspired with Warden Dickinson to lock plaintiff
4 up in ad seg “out of reprisals/discriminatory actions.” (Dkt. No. 97 at 2.) Plaintiff alleges
5 various defects with the paperwork placing plaintiff in ad seg on April 15, 2009. Plaintiff
6 contends an unidentified one of these defendants also altered plaintiff’s conviction for “statutory”
7 rape to “forcible” rape, which resulted in the placement of an “R” suffix on plaintiff’s file. It
8 appears plaintiff contends defendants Allen, Flores, “F.C.,” Reed, and Dickinson conspired to
9 place plaintiff in ad seg in retaliation. In support of his allegations, plaintiff presents the same
10 documentary evidence provided with his original complaint.

11 There is no “K. Allen” or “F.C. [illegible]” named as defendants in plaintiff’s
12 original complaint, so it appears plaintiff seeks leave to add two new defendants. In the original
13 complaint, plaintiff named Flores and Dickinson as defendants, claiming they were co-
14 conspirators with the other named defendants. However, plaintiff does not claim these
15 defendants acted “out of reprisals/discriminatory actions,” or in retaliation in the original
16 complaint.

17 B. Legal Standards

18 Federal Rule of Civil Procedure 15(a) is to be applied liberally in favor of
19 amendments and, in general, leave shall be freely given when justice so requires. See Janicki
20 Logging Co. v. Mateer, 42 F.3d 561, 566 (9th Cir. 1994). Motions under Rule 12 are not
21 “responsive pleadings.” Therefore, filing such a motion, by itself, does not bar plaintiff from
22 amending the complaint once as a matter of right. See St. Michael's Convalescent Hosp. v. State
23 of California, 643 F.2d 1369, 1374 (9th Cir. 1980) (Fed. R. Civ. P. 12 motion). Some courts,
24 including the Ninth Circuit, allow plaintiffs to amend once as a matter of right even after a
25 motion to dismiss the complaint has been granted, provided the action has not been dismissed
26 and the amended complaint is otherwise timely (i.e., not barred by the statute of limitations).

1 See Doe v. United States, 58 F.3d 494, 496-97 (9th Cir. 1995) (tort claims should have been
2 dismissed with leave to amend). Courts generally consider four factors in determining the
3 propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party,
4 and futility of amendment. Roth v. Garcia Marquez, 942 F.2d 617, 628 (9th Cir. 1991).

5 C. Application

6 Here, while the court finds no evidence that plaintiff seeks leave to file his first
7 amended complaint in bad faith or for purposes of undue delay, it appears that it would be futile
8 to add reprisal or retaliation or conspiracy claims to this action or to add new defendants because
9 plaintiff has failed to first exhaust his administrative remedies.

10 In his motion, plaintiff wishes to add reprisal or retaliation and conspiracy claims
11 against some of the defendants named in the original complaint as well as against two newly-
12 named defendants. However, as set forth in the findings and recommendations filed August 8,
13 2011, and in the order to show cause above, it is clear that plaintiff has not exhausted his
14 administrative remedies in connection with these claims. Therefore, the court finds it is futile for
15 plaintiff to add the new reprisal or retaliation and conspiracy claims or the newly-named
16 defendants to this action.

17 To the extent plaintiff is attempting to renew his original claims against
18 defendants Flores and Dickinson from the original complaint, plaintiff's effort is unavailing.
19 Plaintiff's claims against defendants Flores and Dickinson were dismissed on October 6, 2010,
20 based on plaintiff's failure to state a cognizable civil rights claim against them. (Dkt. No. 36.)
21 Indeed, on July 26, 2010, plaintiff was granted leave to amend his complaint to attempt to state a
22 cognizable claim against these defendants (dkt. no. 24), but plaintiff failed to do so. Moreover,
23 the evidence plaintiff provides is not new evidence demonstrating a conspiracy or retaliation by
24 these defendants. Rather, it is the same evidence plaintiff presented with his original complaint
25 on August 17, 2009. Accordingly, plaintiff's motion to amend his complaint to renew his
26 original claims against defendants Dickinson and Flores is denied.

1 Therefore, plaintiff's July 29, 2011 motion to amend is denied without prejudice.

2 V. Conclusion

3 Accordingly, IT IS HEREBY ORDERED that:

4 1. Within thirty days from the date of this order, plaintiff shall show cause, if any
5 he may have, why plaintiff's claims against defendant Reed should not be dismissed based on
6 plaintiff's failure to exhaust his administrative remedies before filing the instant action; and

7 2. Plaintiff's July 29, 2011 motion to amend (dkt. no. 97) is denied without
8 prejudice.

9 DATED: August 9, 2011

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11 
12 KENDALL J. NEWMAN
13 UNITED STATES MAGISTRATE JUDGE

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