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

LYLE ERIC NORBERT,
Plaintiff,

No. CIV S-09-3500-GEB-CMK-P

vs.

FINDINGS AND RECOMMENDATIONS

MIKE McDONALD, et al.,
Defendants.

_____ /

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendant Wilcox’s unopposed motion to dismiss (Doc. 18).

I. BACKGROUND

This action proceeds on plaintiff’s original complaint (Doc. 1), against defendant Wilcox only.¹ Plaintiff alleges defendant Wilcox was deliberately indifferent to his serious

¹ Plaintiff also named Mike McDonald as a defendant in his complaint. However, upon screening the complaint, the court found plaintiff did not state a claim against defendant McDonald and provided plaintiff an opportunity to file an amended complaint. Plaintiff chose to proceed on his original complaint against defendant Wilcox only and voluntarily dismissed defendant McDonald.

1 medical needs. In his complaint plaintiff alleges that defendant Wilcox overrode a doctor's
2 prescribed CDC-128-C medical chrono, allowing plaintiff a lower tier cell. He states that after
3 speaking with defendant Wilcox, correctional officers required him to move to a top tier cell. He
4 claims defendant Wilcox acted with conscious disregard of the risk of causing plaintiff serious
5 bodily harm by disregarding his need for a lower tier cell.

6 **II. MOTION TO DISMISS**

7 Defendant Wilcox filed the pending motion to dismiss on the basis that plaintiff
8 failed to exhaust his administrative remedies prior to filing this action. Plaintiff did not file an
9 opposition to the motion.

10 A motion to dismiss based on a prisoner's failure to exhaust administrative
11 remedies is properly the subject of an unenumerated motion under Federal Rule of Civil
12 Procedure 12(b). See Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). "In deciding a
13 motion to dismiss for failure to exhaust non-judicial remedies, the court may look beyond the
14 pleadings and decide disputed issues of fact." Id. at 1119-20. Where the court looks beyond the
15 pleadings to a factual record in deciding the motion to dismiss, which is "a procedure closely
16 analogous to summary judgment," the court must assure that the plaintiff has fair notice of his
17 opportunity to develop a record. Id. at 1120 n.14 (referencing the notice requirements outlined in
18 Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (en banc), and Klinge v. Eikenberry, 849 F.2d
19 409 (9th Cir. 1988). Defendants bear the burden of establishing that the plaintiff failed to
20 exhaust administrative remedies prior to filing suit. See Wyatt, 315 F.3d at 1120. If the court
21 concludes that administrative remedies have not been exhausted, the unexhausted claim should
22 be dismissed without prejudice. See id. at 1120; see also Jones v. Bock, 127 S. Ct. 910 (2007).

23 Prisoners seeking relief under § 1983 must exhaust all available administrative
24 remedies prior to bringing suit. See 42 U.S.C. § 1997e(a). This requirement is mandatory
25 regardless of the relief sought. See Booth v. Churner, 532 U.S. 731, 741 (2001) (overruling
26 Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999)). Because exhaustion must precede the filing of

1 the complaint, compliance with § 1997e(a) is not achieved by exhausting administrative remedies
2 while the lawsuit is pending. See McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). The
3 Supreme Court recently addressed the exhaustion requirement in Jones v. Bock, 549 U.S. 199
4 (2007), and held: (1) prisoners are not required to specially plead or demonstrate exhaustion in
5 the complaint because lack of exhaustion is an affirmative defense which must be pleaded and
6 proved by the defendants; (2) an individual named as a defendant does not necessarily need to be
7 named in the grievance process for exhaustion to be considered adequate because the applicable
8 procedural rules that a prisoner must follow are defined by the particular grievance process, not
9 by the PLRA; and (3) the PLRA does not require dismissal of the entire complaint if only some,
10 but not all, claims are unexhausted.

11 The Supreme Court also held in Woodford v. Ngo that, in order to exhaust
12 administrative remedies, the prisoner must comply with all of the prison system's procedural
13 rules so that the agency addresses the issues on the merits. 548 U.S. 81, 89-96 (2006). Thus,
14 exhaustion requires compliance with "deadlines and other critical procedural rules." Id. at 90.
15 Partial compliance is not enough. See id. Substantively, the prisoner must submit a grievance
16 which affords prison officials a full and fair opportunity to address the prisoner's claims. See id.
17 at 90, 93. The Supreme Court noted that one of the results of proper exhaustion is to reduce the
18 quantity of prisoner suits "because some prisoners are successful in the administrative process,
19 and others are persuaded by the proceedings not to file an action in federal court." Id. at 94.

20 A prison inmate in California satisfies the administrative exhaustion requirement
21 by following the procedures set forth in §§ 3084.1-3084.7 of Title 15 of the California Code of
22 Regulations. In California, inmates "may appeal any departmental decision, action, condition, or
23 policy which they can demonstrate as having an adverse effect upon their welfare." Cal. Code
24 Regs. tit. 15, § 3084.1(a). These regulations require the prisoner to proceed through several
25 levels of appeal: (1) informal resolution; (2) formal appeal; (3) second level appeal to institution
26 head; (4) third level appeal to the director of the California Department of Corrections and

1 Rehabilitation. A decision at the third formal level, which is also referred to as the director's
2 level, is not appealable and concludes a prisoner's departmental administrative remedy. See Cal.
3 Code Regs. tit. 15, §§ 3084.1(a) and 3084.5(e)(2). Departmental appeals coordinators may
4 summarily reject a prisoner's untimely administrative appeal. See Cal. Code Regs. tit. 15, §§
5 3084.3(c)(6) and 3084.6(c). If a group of inmates intend to appeal the same decision or action,
6 one grievance form is used and a list of the participating inmates must be attached. The list must
7 be legible and state the inmates' names, departmental identification numbers, and housing
8 assignment. The form must also be signed by all participating inmates. Currently, California
9 regulations do not contain any provision specifying who must be named in the grievance.

10 In certain circumstances, the regulations make it impossible for the inmate to
11 pursue a grievance through the entire grievance process. See Brown v. Valoff, 422 F.3d 926, 939
12 n. 11 (9th Cir. 2005). Where a claim contained in an inmate's grievance is characterized by
13 prison officials as a "staff complaint" and processed through a separate confidential process,
14 prison officials lose any authority to act on the subject of the grievance. See id. at 937 (citing
15 Booth, 532 U.S. at 736 n. 4). Thus, the claim is exhausted when it is characterized as a "staff
16 complaint." See id. at 940. If there are separate claims in the same grievance for which further
17 administrative review could provide relief, prison regulations require that the prisoner be notified
18 that such claims must be appealed separately. See id. at 939. The court may presume that the
19 absence of such a notice indicates that the grievance did not present any claims which could be
20 appealed separate from the confidential "staff complaint" process. See id.

21 Here, defendant Wilcox argues plaintiff failed to exhaust his administrative
22 remedies. Defendant cites to plaintiff complaint wherein he acknowledged that the grievances
23 process was not complete. In fact, the form complaint plaintiff utilized specifically asks the
24 question: "Have you filed a grievance concerning the facts relating to this complaint?" Plaintiff
25 check the "No" box. As plaintiff admits in his complaint that he did not file a grievance, that the
26 grievance process is not complete, he does not attach to the complaint any inmate grievance

1 form, and plaintiff's lack of opposition to this motion, the undersigned finds plaintiff failed to
2 exhaust his administrative remedies prior to filing this action. Therefore, the motion to dismiss
3 should be granted.

4 **III. CONCLUSION**

5 Based on the foregoing, the undersigned recommends that defendant Wilcox's
6 motion to dismissed (Doc. 18) be granted and this action be dismissed without prejudice.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
9 after being served with these findings and recommendations, any party may file written
10 objections with the court. Responses to objections shall be filed within 14 days after service of
11 objections. Failure to file objections within the specified time may waive the right to appeal.

12 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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14 DATED: July 14, 2011

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16 **CRAIG M. KELLISON**
17 UNITED STATES MAGISTRATE JUDGE
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