

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
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HOSEA BYRD,
Plaintiff,
v.
A. LYNN,
Defendants.

No. 2:10-cv-0839 KJM DAD P

ORDER

Plaintiff is a state prisoner proceeding pro se with a civil rights action seeking relief under 42 U.S.C. § 1983.

This matter recently came before the court on defendant Lynn’s motion to dismiss this action, brought pursuant to unenumerated Rule 12(b) of the Federal Rules of Civil Procedure, due to plaintiff’s alleged failure to exhaust his administrative remedies prior to bringing suit as required. Plaintiff had filed an opposition to the motion, and defendant had filed a reply. On October 23, 2013, the undersigned issued findings and recommendations, recommending that defendant’s motion to dismiss due to plaintiff’s failure to exhaust his administrative remedies prior to filing suit be granted.

Plaintiff has filed objections to those findings and recommendations in which he argues that the court should excuse him from complying with the exhaustion requirement because the defendant thwarted his attempts to exhaust his retaliation claim. In reply, defense counsel argues,

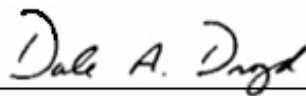
1 inter alia, that even if defendant Lynn had prevented plaintiff from receiving the documentation
2 necessary to submit his inmate appeal, plaintiff's inmate appeal nonetheless would not have
3 alerted prison officials to the alleged retaliatory conduct alleged in his complaint before this court.

4 In the objections and the response thereto the parties have now both raised entirely new
5 arguments regarding plaintiff's exhaustion of administrative remedies that are potentially
6 dispositive of the issue. The court believes that full briefing from the parties addressing these
7 entirely new arguments is required. Under these circumstances, the court will vacate its findings
8 and recommendations and deny defendant's motion to dismiss without prejudice to refiling
9 within thirty days. In any renewed motion to dismiss and briefing filed in connection with the
10 renewed motion to dismiss, the court hereby directs the parties to address the following: (1)
11 whether plaintiff's January 27, 2010, inmate appeal included sufficient detail to put prison
12 officials on notice of plaintiff's retaliation claim against defendant Lynn; and (2) whether plaintiff
13 should be excused from the exhaustion requirement based on defendant Lynn's alleged efforts to
14 thwart plaintiff from exhausting his administrative remedies. See Sapp v. Kimbrell, 623 F.3d
15 813, 822 (9th Cir. 2010); Nunez v. Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010); Griffin v.
16 Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009).

17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1. The court's October 23, 2013, findings and recommendations are vacated; and
- 19 2. Defendant's motion to dismiss (Doc. No. 63) is denied without prejudice to refiling
20 within thirty days in accordance with the instructions provided herein. Alternatively, defendant
21 Lynn may file an answer to the complaint.

22 Dated: February 6, 2014

23 

24 _____
DALE A. DROZD
25 UNITED STATES MAGISTRATE JUDGE

26 DAD:9
byrd0839.57deny