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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HOSEA BYRD,

 Plaintiff,

 v.

A. FLYNN,

 Defendants.

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

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action seeking relief under 42 U.S.C. § 1983. Pending before the court is defendant’s motion for summary judgment based on plaintiff’s alleged failure to exhaust available administrative remedies prior to filing suit as required. Plaintiff has filed an opposition to the motion, and defendant has filed a reply.

BACKGROUND

Plaintiff is proceeding on his amended complaint against defendant Lynn. In that amended complaint, plaintiff alleges that defendant Lynn recommended to High Desert State Prison’s (“HDSP”) Classification Committee that plaintiff be assigned to privilege group C. Plaintiff alleges that defendant Lynn falsified disciplinary records in his central file to support that classification decision in retaliation for plaintiff filing an inmate appeal and a petition for writ of mandate in state court. (Am. Compl. at 8, 10-12 & 25.)

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PROCEDURAL HISTORY

1
2 On April 10, 2013, defendant Lynn filed motion to dismiss brought pursuant to
3 unenumerated Rule 12(b) of the Federal Rules of Civil Procedure arguing that plaintiff failed to
4 exhaust his administrative remedies prior to filing suit as required. (Doc. No. 63) Plaintiff filed
5 an opposition to the motion, and defendant filed a reply. (Doc. Nos. 68 & 69) On October 23,
6 2013, the undersigned issued findings and recommendations, recommending that defendant's
7 motion to dismiss due to plaintiff's failure to exhaust his administrative remedies be granted.
8 (Doc. No. 71)

9 Plaintiff filed objections to those findings and recommendations in which he argued that
10 the court should excuse him from complying with the exhaustion requirement because the
11 defendant thwarted his attempts to exhaust his administrative remedies with respect to his
12 retaliation claim. Specifically, plaintiff argued that prison officials twice screened out an inmate
13 appeal dated January 27, 2010, in which he complained of defendant Lynn's conduct, because he
14 failed to attach CDC Form 128-G to the inmate appeal. According to plaintiff, he repeatedly
15 requested a copy of the appropriate CDC Form 128-G from defendant Lynn, but the defendant
16 refused to provide it to him. Plaintiff attached to his objections a declaration signed under penalty
17 of perjury to this effect and a copy of an inmate appeal in which he complained to prison officials
18 that his counselor was refusing to provide him with a copy of the CDC Form 128-G necessary to
19 pursue his inmate appeal. (Doc. No. 72)

20 On December 23, 2013, the court ordered defendant Lynn to file a reply to plaintiff's
21 objections and show cause as to why plaintiff should not be excused from complying with the
22 exhaustion requirement in light of his objections, sworn declaration, and exhibits. (Doc. No. 73)
23 In defendant's reply, defense counsel argued that: (1) the evidence presented in support of
24 defendant's motion to dismiss showed that plaintiff failed to bring any inmate appeals to the third
25 and final level of the appeals process concerning defendant Lynn; (2) plaintiff is not permitted
26 raise new theories for the first time in his objections to the court's findings and recommendations;
27 and (3) even if defendant Lynn had prevented plaintiff from receiving the documentation
28 necessary to submit his inmate appeal dated January 27, 2010, plaintiff's allegations in that

1 appeal nonetheless would not have alerted prison officials to the wrongdoing alleged in his
2 complaint. (Doc. No. 76)

3 In light of the new and potentially dispositive arguments raised by both parties during the
4 objection period, the court determined that further briefing from the parties on the issue of
5 exhaustion was warranted. Accordingly, the court vacated its findings and recommendations and
6 denied defendant's motion to dismiss without prejudice. The court instructed the parties to
7 address the following issues in any renewed motion based upon plaintiff's failure to exhaust
8 administrative remedies prior to filing suit: (1) whether plaintiff's inmate appeal dated January
9 27, 2010, included sufficient detail to put prison officials on notice of his retaliation claim against
10 defendant Lynn; and (2) whether plaintiff should be excused from the exhaustion requirement
11 based on defendant Lynn's alleged efforts to thwart plaintiff's attempts to exhaust his
12 administrative remedies. (Doc. No. 77)

13 On March 10, 2014, defendant Lynn filed a renewed motion to dismiss brought pursuant
14 to unenumerated Rule 12(b) of the Federal Rules of Civil Procedure based on plaintiff's alleged
15 failure to exhaust his administrative remedies prior to bringing suit as required. (Doc. No. 78)
16 Plaintiff filed an opposition to the motion, and defendant filed a reply. (Doc. Nos. 81 & 82)
17 While defendant's motion was pending, the Ninth Circuit decided Albino v. Baca, 747 F.3d 1162,
18 1168 (9th Cir. 2014), which held that a defendant may raise the issue of proper exhaustion in
19 either (1) a motion to dismiss brought pursuant to Rule 12(b)(6), in the rare event the failure to
20 exhaust is clear on the face of the complaint, or (2) a motion for summary judgment. The Ninth
21 Circuit made clear that an unenumerated Rule 12(b) motion is no longer a proper procedural
22 device for raising the issue of exhaustion in this context. See id. at 1169. Pursuant to the
23 decision in Albino, on April 22, 2014, the court denied defendant's renewed motion to dismiss
24 brought pursuant to unenumerated Rule 12(b) without prejudice to the filing of a motion for
25 summary judgment. (Doc. No. 85)

26 As noted above, now pending before court is defendant Lynn's motion for summary
27 judgment based on plaintiff's failure to exhaust administrative remedies prior to filing suit as
28 required.

THE EXHAUSTION REQUIREMENT

By the Prison Litigation Reform Act of 1995 (“PLRA”), Congress amended 42 U.S.C. § 1997e to provide that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The exhaustion requirement “applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” Porter v. Nussle, 534 U.S. 516, 532 (2002).

The United States Supreme Court has ruled that exhaustion of prison administrative procedures is mandated regardless of the relief offered through such procedures. See Booth v. Churner, 532 U.S. 731, 741 (2001). The Supreme Court has also cautioned against reading futility or other exceptions into the statutory exhaustion requirement. See id. at 741 n.6. Moreover, because proper exhaustion is necessary, a prisoner cannot satisfy the PLRA exhaustion requirement by filing an untimely or otherwise procedurally defective administrative grievance or appeal. See Woodford v. Ngo, 548 U.S. 81, 90-93 (2006). “[T]o properly exhaust administrative remedies prisoners ‘must complete the administrative review process in accordance with the applicable procedural rules,’ [] - rules that are defined not by the PLRA, but by the prison grievance process itself.” Jones v. Bock, 549 U.S. 199, 218 (2007) (quoting Woodford, 548 U.S. at 88). See also Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (“The California prison system’s requirements ‘define the boundaries of proper exhaustion.’”).

In California, prisoners may appeal “any policy, decision, action, condition, or omission by the department or its staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). Most appeals progress through three levels of review. See id. § 3084.7. The third level of review constitutes the decision of the Secretary of the California Department of Corrections and Rehabilitation and exhausts a prisoner’s administrative remedies. See id. § 3084.7(d)(3). A California prisoner is required to submit an inmate appeal at the appropriate level and proceed to the highest level of review available to him. Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir.

1 2005); Bennett v. King, 293 F.3d 1096, 1098 (9th Cir. 2002).

2 A prisoner may be excused from complying with the PLRA's exhaustion requirement if
3 he establishes that the existing administrative remedies were effectively unavailable to him. See
4 Albino, 747 F.3d at 1172-73. For example, where prison officials improperly screen out inmate
5 grievances, they render administrative remedies effectively unavailable. See Sapp v. Kimbrell,
6 623 F.3d 813, 823 (9th Cir. 2010). In such a case, "the inmate cannot pursue the necessary
7 sequence of appeals" Id. See also Nunez v. Duncan, 591 F.3d 1217, 1226 (9th Cir. 2010)
8 (excusing an inmate's failure to exhaust because he was precluded from exhausting
9 administrative remedies by a warden's mistaken instruction to him that a particular unavailable
10 document was needed for him to pursue his inmate appeal); Marella, 568 F.3d 1024 (excusing an
11 inmate's failure to exhaust because he did not have access to the necessary grievance forms to
12 timely file his grievance).

13 The PLRA exhaustion requirement is not jurisdictional but rather creates an affirmative
14 defense that defendants must plead and prove. See Jones, 549 U.S. at 216 ("[I]nmates are not
15 required to specially plead or demonstrate exhaustion in their complaints."); Albino, 747 F.3d at
16 1168. A defendant may move for dismissal under Federal Rule of Civil Procedure 12(b)(6) "[i]n
17 the rare event" that a prisoner's failure to exhaust is clear on the face of the complaint. Albino,
18 747 F.3d at 1168 & 1169. More typically, defendants may move for summary judgment under
19 Federal Rule of Civil Procedure 56 and produce probative evidence that proves a prisoner's
20 failure to exhaust. See id. at 1166. If the undisputed evidence viewed in the light most favorable
21 to the prisoner demonstrates a failure to exhaust, the court should grant defendant's motion for
22 summary judgment. On the other hand, if there are material facts in dispute, the court should
23 deny defendant's motion summary judgment. See id.

24 **DEFENDANTS' STATEMENT OF UNDISPUTED FACTS AND EVIDENCE**

25 Defense counsel has submitted a statement of undisputed facts supported by citations to
26 various materials in the record. The evidence submitted by defendant Lynn in support of the
27 pending motion for summary judgment establishes the following. On July 23, 2009, plaintiff
28 transferred from Calipatria State Prison to HDSP. Plaintiff appeared before HDSP's Facility D

1 Unit Classification Committee for his initial review. The committee consisted of members of
2 HDSP staff, including defendant Lynn. At the classification committee hearing, plaintiff was
3 assigned to privilege group C because prison officials had previously found him guilty of two
4 serious rules violations. (Def.'s SUDF 1-3, Doc. No. 16 at 25.)

5 On October 25, 2009, plaintiff submitted an inmate appeal challenging his assignment to
6 privilege group C. In the appeal, plaintiff complained that on September 23, 2009, he asked
7 defendant Lynn to remove him from privilege group C because his rules violations took place
8 more than 180 days before his classification hearing, and his assignment to privilege group C was
9 therefore contrary to state regulations. On November 5, 2009, at the informal level of review,
10 defendant Lynn denied plaintiff's request and told him that he did not meet the requirements for
11 removal from privilege group C and that he would be scheduled for a classification hearing.
12 Plaintiff also filed a writ of mandamus in the Lassen County Superior Court to compel defendant
13 Lynn to schedule a classification hearing. That court denied his petition as moot, finding that
14 defendant Lynn had scheduled plaintiff for a classification hearing on December 8, 2009, but that
15 the hearing was postponed by the committee until January 27, 2010. (Def.'s SUDF 4-8, Doc. No.
16 16 at 6, 23, 26 & 34.)

17 At plaintiff's classification committee hearing on January 27, 2010, defendant Lynn
18 submitted several secured housing unit term assessments to the committee to justify plaintiff's
19 placement in privilege group C. According to plaintiff, defendant Lynn altered the
20 documentation provided to the committee to make it appear as though plaintiff had been
21 convicted of numerous secured housing unit terms to warrant privilege group C status in
22 retaliation for plaintiff having filed his inmate appeal on October 25 2009, and his writ of
23 mandamus in the Lassen County Superior Court. (Def.'s SUDF 9-10, Doc. No. 16 at 8 & 11.)

24 After July 23, 2009, when plaintiff transferred to HDSP, but before April 8, 2010, when
25 he filed his complaint in this action, plaintiff submitted one inmate appeal to the third level of
26 review that was accepted and denied (HDSP-09-01939). Plaintiff alleges that on January 27,
27 2010, he attempted to submit another appeal, but defendant Lynn prevented him from pursuing it.
28 In the appeal dated January 27, 2010, plaintiff requested to have allegedly false information

1 corrected on state forms. (Def.'s SUDF 11-13, Doc. No. 78-3, Doc. No. 72 at 2, Doc. No. 71 at
2 4-5, Doc. No. 68 at 2-3 & 7-9, Doc. No. 16 at 25, Doc. No. 1.)

3 ANALYSIS

4 Based on the evidence presented by both parties in connection with the pending motion
5 for summary judgment, the court finds that plaintiff failed to properly exhaust his administrative
6 remedies prior to bringing suit as required. See Woodford, 548 U.S. at 83-84 (prisoner does not
7 satisfy the PLRA exhaustion requirement "by filing an untimely or otherwise procedurally
8 defective administrative grievance or appeal.").

9 First, the parties do not dispute that plaintiff filed only one inmate appeal, HDSP-09-
10 01939, which he pursued through the third level of review after he transferred to HDSP and
11 before he filed his complaint in this civil action. As defense counsel contends, and as plaintiff
12 appears to concede, inmate appeal HDSP-09-01939 did not put prison officials on notice of
13 plaintiff's claims that defendant Lynn had retaliated against plaintiff for exercising his First
14 Amendment rights. (Def.'s Mem. of P. & A. at 5, Pl.'s Opp'n Mem. of P. & A. at 9.) Rather, the
15 complaint that plaintiff expressed in that inmate appeal concerned Lieutenant Dharlingue's
16 disciplinary sanctions imposed against plaintiff for purportedly refusing to accept a cellmate. The
17 Ninth Circuit has made clear that the primary purpose of an inmate appeal is "to notify the prison
18 of a problem." Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). Plaintiff's allegations set
19 forth in inmate appeal HDSP-09-01939 could not have alerted prison officials to any problem he
20 allegedly experienced with defendant Lynn or with plaintiff's placement in privilege group C and
21 therefore did not give prison officials a fair opportunity to respond to the claims he has now
22 presented against the moving defendant in this civil rights action.

23 The court now turns to the issue of whether plaintiff should be excused from complying
24 with the exhaustion requirement. Construing the facts in the light most favorable to plaintiff, on
25 January 27, 2010, plaintiff attempted to submit an appeal concerning defendant Lynn's alleged
26 falsification of information on a state document. On the inmate appeal form where plaintiff is
27 instructed to "Describe Problem", he stated in that inmate appeal as follows:

28 ////

1 I am writing this 602 against Correctional Counselor A. Lynn CCI
2 for falsification of information on a state document. She wrote a
3 CDC 629 SHU Term Assessment against me for a SHU wich [sic]
4 never occurred. See Attached CDC 629. Also see attached CDC
5 114D lock up order for 6-30-08 and assessment of the Rule
6 Conduct Violation which was a Division (E) offense non Shuable
7 Offense. CCI A. Lynn has altered my file to make it appear as
8 something that did not happen on 6-30 wich [sic] constitutes
9 falsification of information of a state document 3021 Title 15[.]

6 On the form where plaintiff is instructed to state the “Action Requested”, he wrote:

7 I would like this false information corrected. This 602 regarding
8 3021 CCR Title 15 falsification of information, not classification.
9 See attached sheet.

10 (Doc. No. 60 at 7.) As noted above, prison officials twice screened out plaintiff’s inmate appeal
11 because he failed to attach CDC Form 128-G to it. Plaintiff contends that defendant Lynn refused
12 to provide him with the appropriate CDC Form 128-G and thereby prevented him from pursuing
13 this inmate appeal. (Pl.’s Opp’n Mem. of P. & A. at 2-8.)

14 A court may excuse a prisoner from complying with the exhaustion requirement when
15 prison officials render administrative remedies effectively unavailable. See Sapp, 623 F.3d at
16 822; Nunez, 591 F.3d at 1224. Cf. Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (“The
17 obligation to exhaust ‘available’ remedies persists as long as *some* remedy remains ‘available.’
18 Once that is no longer the case, then there are no ‘remedies . . . available,’ and the prisoner need
19 not further pursue the grievance.”). Here, however, even if defendant Lynn had provided plaintiff
20 with the appropriate CDC Form 128-G and/or prison officials had not screened out plaintiff’s
21 inmate appeal, and plaintiff pursued the inmate appeal in question through the third level of
22 review, plaintiff’s allegations therein would not have exhausted the constitutional claims he raises
23 in this civil rights action. See, e.g., Sapp, 623 F.3d at 823-24 (“inmate must establish . . . that he
24 actually filed a grievance or grievances that, if pursued through all levels of administrative
25 appeals, would have sufficed to exhaust the claim he seeks to pursue in federal court.”); Nunez,
26 591 F.3d at 1225 (“Nunez’s grievance sufficed to state his Fourth Amendment claim by “‘alerting
27 the prison to the nature of the wrong for which redress [was] sought.’”).

28 ////

1 Specifically, plaintiff's inmate appeal of January 27, 2010, would not have put prison
2 officials on notice of his claim that defendant Lynn falsified plaintiff's classification committee
3 documents in retaliation for plaintiff's filing of a prior inmate appeal and a petition for writ of
4 mandamus in the Lassen County Superior Court. For example, plaintiff's January 27, 2010,
5 inmate appeal included no allegations with regard to his constitutionally protected conduct. Nor
6 did that inmate appeal mention or suggest any retaliatory motive on defendant Lynn's part. See,
7 e.g., Walton v. Hixson, No. CIV S-09-1246 GEB CKD, 2011 WL 6002919 at *2 (E.D. Cal. Nov.
8 30, 2011) (finding that a prisoner's inmate grievance complaining about prison official's
9 interference with his praying was not sufficient to alert prison to plaintiff's claim that the alleged
10 interference was in retaliation for plaintiff submitting a grievance against the official); Simpson v.
11 Feltsen, No. 2:09-cv-00302 MSB, 2010 WL 5288181 at *5 (E.D. Cal. Dec. 17, 2010) (assuming
12 that a prisoner's grievance was improperly screened out, even if it had been accepted and pursued
13 it would not have sufficed to exhaust a retaliation claim because it made no mention of the
14 prisoner's exercise of his First Amendment rights that allegedly precipitated the prisoner's
15 retaliatory transfer); Martinez v. Adams, No. 1:09cv00899 LJO DLB, 2010 WL 3912359 at *5
16 (E.D. Cal. Oct. 5, 2010) (finding a failure to exhaust a retaliation claim because plaintiff's
17 grievances did not "mention retaliation or set forth facts that would alert a prison official to
18 retaliatory conduct for protected conduct"); Gonzalez v. Doe, No. 07-CV-1962 W (POR), 2010
19 WL 3718873 at *5 (S.D. Cal. Sept. 20, 2010) ("Even construed liberally, Plaintiff's comments in
20 his Director's level appeal cannot be read as anything more than claims regarding the seriousness
21 of having false confidential information in a prison file, which does not provide notice that the
22 grievances included retaliation."); Trevino v. McBride, No. 1:08-cv-1649 AWI DLB PC, 2010
23 WL 2089660 at *3 (E.D. Cal. May 21, 2010) (finding plaintiff had "not sufficiently alerted the
24 prison officials to a problem regarding retaliatory acts by correctional officers . . . as there is no
25 linkage mentioned between previously filed lawsuits and the Defendants' deprivation of his
26 property."); Thomas v. Sheppard-Brooks, No. 1:06-cv-01332 LJO YNP PC, 2009 WL 3365872 at
27 *5 (E.D. Cal. Oct. 16, 2009) (prisoner's inmate grievance did not provide prison officials with
28 notice of retaliation claim because he failed to notify prison officials that his cell housing without

1 light was retaliatory). This case is no different than those which resulted in the decisions cited
2 above.

3 In sum, even viewing the undisputed evidence in the light most favorable to plaintiff that
4 evidence establishes that plaintiff failed to exhaust administrative remedies prior to filing suit as
5 required. The court further finds that in light of the evidence produced on summary judgment
6 plaintiff has failed to establish that the court should excuse him from complying with the
7 exhaustion requirement. Accordingly, defendants' motion for summary judgment should be
8 granted.

9 CONCLUSION

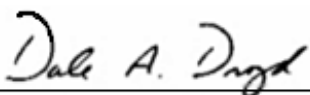
10 Accordingly, IT IS HEREBY RECOMMENDED that:

- 11 1. Defendant's motion for summary judgment (Doc. No. 86) be granted;
- 12 2. Plaintiff's retaliation claim against defendant Lynn be dismissed without prejudice for
13 failure to exhaust administrative remedies prior to filing suit; and
- 14 3. This action be closed.

15 These findings and recommendations are submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
17 after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
20 objections shall be filed and served within seven days after service of the objections. The parties
21 are advised that failure to file objections within the specified time may waive the right to appeal
22 the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 Dated: October 28, 2014

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25 DAD:9
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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE