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

KENNETH EVANS,

Plaintiff,

No. CIV S-10-1969 GEB GGH P

vs.

CSP SACRAMENTO, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Introduction

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendant’s June 6, 2011, motion to dismiss for failure to exhaust administrative remedies and to dismiss the state law claim for failing to comply with the California Tort Claims Act.

This case is currently proceeding on the amended complaint filed on December 20, 2010, with allegations that the sole defendant, nurse Bakewell, was deliberately indifferent to plaintiff’s serious medical needs in violation of federal and state law, while plaintiff was at California State Prison – Sacramento (CSP-Sac.).

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1 Motion to Dismiss

2 Legal Standard

3 The Prison Litigation Reform Act of 1995 (PLRA) amended 42 U.S.C. § 1997e to  
4 provide that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. §  
5 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional  
6 facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).  
7 Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S.  
8 516, 524 (2002). Exhaustion is a prerequisite for all prisoner suits regarding the conditions of  
9 their confinement, whether they involve general circumstances or particular episodes, and  
10 whether they allege excessive force or some other wrong. Porter, 534 U.S. at 532.

11 Exhaustion of all “available” remedies is mandatory; those remedies need not  
12 meet federal standards, nor must they be “plain, speedy and effective.” Id. at 524; Booth v.  
13 Churner, 532 U.S. 731, 740, n. 5 (2001). Even when the prisoner seeks relief not available in  
14 grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. Booth, 532  
15 U.S. at 741. A prisoner “seeking only money damages must complete a prison administrative  
16 process that could provide some sort of relief on the complaint stated, but no money.” Id. at  
17 734.<sup>1</sup>

18 A prisoner need not exhaust further levels of review once he has either received  
19 all the remedies that are “available” at an intermediate level of review, or has been reliably  
20 informed by an administrator that no more remedies are available. Brown v. Valoff, 422 F.3d  
21 926, 934-35 (9th Cir. 2005). As there can be no absence of exhaustion unless some relief  
22 remains available, a movant claiming lack of exhaustion must demonstrate that pertinent relief

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24 <sup>1</sup> That the administrative procedure cannot result in the particular form of relief requested  
25 by the prisoner does not excuse exhaustion because some sort of relief or responsive action may  
26 result from the grievance. See Booth, 532 U.S. at 737; see also Porter, 534 U.S. at 525 (purposes  
of exhaustion requirement include allowing prison to take responsive action, filtering out  
frivolous cases, and creating administrative records).

1 remained available, whether at unexhausted levels or through awaiting the results of the relief  
2 already granted as a result of that process. Brown, 422 F.3d at 936-37.

3           The PLRA requires proper exhaustion of administrative remedies. Woodford v.  
4 Ngo, 548 U.S. 81, 83-84 (2006). “Proper exhaustion demands compliance with an agency’s  
5 deadlines and other critical procedural rules because no adjudicative system can function  
6 effectively without imposing some orderly structure on the course of its proceedings.” Id. at  
7 90-91. Thus, compliance with prison grievance procedures is required by the PLRA to properly  
8 exhaust. Id. The PLRA’s exhaustion requirement cannot be satisfied “by filing an untimely or  
9 otherwise procedurally defective administrative grievance or appeal.” Id. at 83-84.

10           At the time relevant to this action, the State of California provided its prisoners  
11 the right to appeal administratively “any departmental decision, action, condition or policy which  
12 they can demonstrate as having an adverse effect upon their welfare.” Cal. Code Regs. tit. 15, §  
13 3084.1(a). It also provides them the right to file appeals alleging misconduct by correctional  
14 officers and officials. Id. § 3084.1(e). In order to exhaust available administrative remedies  
15 within this system, a prisoner must proceed through several levels of appeal: (1) informal  
16 resolution, (2) formal written appeal on a 602 inmate appeal form, (3) second level appeal to the  
17 institution head or designee, and (4) third level appeal to the Director of the CDCR. Barry v.  
18 Ratelle, 985 F.Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A  
19 final decision from the Director’s level of review satisfies the exhaustion requirement under §  
20 1997e(a). Id. at 1237-38.

21           Failure to exhaust administrative remedies is an affirmative defense properly  
22 raised by a defendant in an unenumerated Fed. R. Civ. P. Rule 12(b) motion. Jones v. Bock, 549  
23 U.S. 199, 216 (2007). If the court concludes the prisoner has not exhausted non-judicial  
24 remedies, the proper remedy is dismissal of the claim without prejudice. Wyatt v. Terhune, 315  
25 F.3d 1108, 1119-1120 (9th Cir. 2003). Defendants bear the burden of raising and proving  
26 non-exhaustion. Id. at 1119. The court may resolve any disputed material facts on the

1 exhaustion issue by looking beyond the pleadings in deciding a motion to dismiss for failure to  
2 exhaust. Id. at 1119-20. No presumption of truthfulness attaches to a plaintiff's assertions  
3 associated with the exhaustion requirement. See Ritza v. Int'l Longshoremen's and  
4 Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1988).

5 Discussion

6 On January 6, 2009, defendant Bakewell conducted a follow up examination of  
7 plaintiff's left knee which had undergone surgical repair on December 2, 2008. Defendant  
8 denied plaintiff's request to continue on morphine and instead prescribed Motrin, noting that the  
9 surgery had occurred more than a month prior. Plaintiff alleges this demonstrates deliberate  
10 indifference.

11 On January 6, 2009, plaintiff filed a grievance regarding Bakewell that was  
12 received by prison officials on January 14, 2009, and identified as SAC-10-09-10193. The  
13 grievance alleged that Bakewell was rude and discontinued plaintiff's pain medication, when  
14 plaintiff sought to continue with the morphine. MTD: Exh. A, Attachment 2. On January 20,  
15 2009, the appeal was screened out at the Informal Level and returned to plaintiff as it was  
16 deemed not to meet the criteria for a staff complaint. Plaintiff resubmitted the appeal at the First  
17 Level of review on February 5, 2009. MTD: Exh. A, Attachment 3. In response to this  
18 resubmission an appointment was scheduled for plaintiff to meet with the Chief Medical Officer  
19 on March 10, 2009. However, plaintiff was transferred from CSP-Sac to the Substance Abuse  
20 Treatment Facility (SATF) on February 25, 2009.<sup>2</sup> Nevertheless, a telephone interview was  
21 conducted on March 18, 2009, between prison officials from CSP-Sac and plaintiff. Plaintiff  
22 was informed that his grievance did not meet the criteria for a staff complaint, therefore he would  
23 not be speaking with the Chief Medical Officer, and as plaintiff had been transferred he should

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24 <sup>2</sup> Plaintiff has filed additional grievances requesting morphine or methadone, but those  
25 grievances involve medical staff at SATF who apparently chose not to provide narcotic pain  
26 medication to plaintiff. While these have been included as exhibits, they are irrelevant with  
respect to the defendant in this action and what occurred at CSP-Sac.

1 address his medication requests to medical staff at this new facility.<sup>3</sup> MTD: Exh. A, Attachment  
2 5. The appeal was therefore denied on March 23, 2009. Id.

3           Seven months later, on October 22, 2009, plaintiff proceeded to the second level  
4 of review. MTD: Exh. A, Attachment 3. This appeal was screened out and returned to plaintiff  
5 on October 28, 2009. Id. While the second level appeal screen out was not provided, a summary  
6 of the third level appeal history indicates that this second level appeal was screened out due to  
7 the time lapse. MTD: Exh. B, Attachment 1 at 5.

8           Several months later on January 4, 2010, plaintiff appealed the Bakewell  
9 grievance to the third level. This appeal was rejected and returned to plaintiff on January 28,  
10 2010, also for time lapse. MTD: Exh. B, Attachment 1 at 5. Plaintiff never resubmitted it.

11           Defendant argues that plaintiff failed to pursue the grievance system through to its  
12 completion, and notes that the final appeal was rejected as untimely. Plaintiff filed an opposition  
13 to the motion to dismiss and a separate reply, however in both those filings, plaintiff failed to  
14 discuss the time lapses that caused his second and third level appeals to be screened out. Plaintiff  
15 simply includes his appeal history that has been recounted above and stated he filed appeals at all  
16 levels. While this is accurate, the vital issue in this motion is that the appeals were not properly  
17 and timely filed and plaintiff therefore failed to properly exhaust.

18           In Woodford v. Ngo, 548 U.S. 81, 83-84 (2006), the Supreme Court was clear that  
19 procedural rules must be met and appeals must be timely filed. In the instant case, it is clear that  
20 plaintiff has failed to follow the procedural rules. It does not appear, nor are there any arguments  
21 that plaintiff's second and third level appeals were improperly or untimely screened out by prison  
22 officials. The record before the undersigned indicates that plaintiff waited several months to file  
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25           <sup>3</sup> It is possible that defendant would argue that as this was not a proper staff complaint it  
26 could not be exhausted, yet as set forth below, plaintiff failed to timely appeal the issue, so the  
undersigned need not address if this was a proper staff complaint.

1 these appeals.<sup>4</sup> While defendant has failed to state or provide any exhibits outlining the time  
2 limit for appealing these denials, it is sufficient that the appeal records indicate they were  
3 untimely. The undersigned notes that at the time of plaintiff's appeal a prisoner was required to  
4 submit the initial appeal within fifteen working days "of the event or decision being appealed"  
5 and resubmit the appeal to each level of review within fifteen working days of receiving a denial  
6 from the previous level. Cal. Code Regs. tit. 15 § 3084.6.<sup>5</sup> The multiple month delays of  
7 plaintiff's appeal are well beyond the normal time period. Thus, defendant's motion to dismiss is  
8 granted as plaintiff did not properly exhaust this claim.

9 State Claim

10 Defendant also moves to dismiss plaintiff's state law claim, arguing that the claim  
11 should be dismissed because plaintiff did not plead compliance with the California Torts Claims  
12 Act ("GCA").<sup>6</sup> The GCA requires that a party seeking to recover money damages from a public  
13 entity or its employees must submit a claim to the entity before filing suit in court, generally no  
14 later than six months after the cause of action accrues. Cal. Gov't Code §§ 905, 911.2, 945,  
15 950.2; see also Shirk v. Vista Unified Sch. Dist., 42 Cal. 4th 201, 208 (2007) ("Before suing a  
16 public entity, the plaintiff must present a timely written claim. . ."). "The legislature's intent to  
17 require the presentation of claims before suit is filed could not be clearer." City of Stockton v.  
18 Super. Ct., 42 Cal. 4th 730, 746 (2007) ("The purpose of providing public entities with sufficient  
19 information to investigate claims without the expense of litigation is not served if the entity must  
20 file a responsive pleading alerting its opponent to the claim requirements."). Timely claim  
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22 <sup>4</sup> Part of the appeal records indicate that plaintiff attempted to explain why the second  
23 level appeal was late, but the description in the records is brief and unclear and ultimately  
24 plaintiff has failed to provide a reason. MTD: Exh. B, Attachment 1 at 5.

25 <sup>5</sup> It is now 30 days.

26 <sup>6</sup> In 2007, the California Supreme Court adopted the practice of using the title  
"Government Claims Act" instead of "California Tort Claims Act." See City of Stockton v.  
Superior Court, 42 Cal. 4th 730, 741-42 (2007).

1 presentation is not merely a procedural requirement of the GCA but is an element of a plaintiff's  
2 cause of action. Shirk, 42 Cal. 4th at 209. Thus, when a plaintiff asserts a claim subject to the  
3 GCA, he must affirmatively allege compliance with the claim presentation procedure, or  
4 circumstances excusing such compliance, in his complaint. Id. The requirement that a plaintiff  
5 asserting claims subject to the GCA must affirmatively allege compliance with the claims filing  
6 requirement applies in federal court as well. Karim-Panahi v. Los Angeles Police Dep't, 839  
7 F.2d 621, 627 (9th Cir. 1988).

8 Plaintiff has failed to provide any information that he complied with the GCA.  
9 Defendant also requests that the undersigned take judicial notice of a declaration from the  
10 custodian of records for the California Victim Compensation and Government Claims Board that  
11 plaintiff has not filed a claim. This record is susceptible of judicial notice and the undersigned  
12 grants defendant's request in this regard. See Smith v. Duncan, 297 F.3d 809, 815 (9th Cir.  
13 2002) *abrogated on other grounds*, see Moreno v. Harris, 245 Fed. Appx. 606 (9th Cir. 2007).  
14 Therefore, to the extent this action contains a state law claim, any such claim is dismissed.

15 Accordingly, IT IS HEREBY RECOMMENDED that defendant's motion to  
16 dismiss, filed on June 6, 2011, (Doc. 31), be granted and this case be dismissed.

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

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1 advised that failure to file objections within the specified time may waive the right to appeal the  
2 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: October 4, 2011

4 /s/ Gregory G. Hollows  
5 UNITED STATES MAGISTRATE JUDGE

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7 evan1969.mtd

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