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

NICOLAS DAVID ANDREAS,

Plaintiff,

No. CIV S-10-2189 LKK EFB P

vs.

MATTHEW CATE, et al.,

Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. In addition to filing a complaint, plaintiff has filed an application to proceed in forma pauperis. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

I. Request to Proceed In Forma Pauperis

Plaintiff has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Dckt. No. 10. Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

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1 **II. Screening Order**

2 Pursuant to 28 U.S.C. § 1915A, the court shall review “a complaint in a civil action in
3 which a prisoner seeks redress from a governmental entity or officer or employee of a
4 governmental entity.” 28 U.S.C. § 1915A(a). “On review, the court shall identify cognizable
5 claims or dismiss the complaint, or any portion of the complaint, if the complaint (1) is frivolous,
6 malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief
7 from a defendant who is immune from such relief.” *Id.* § 1915A(b).

8 The court has reviewed plaintiff’s August 10, 2010 complaint pursuant to 28 U.S.C. §
9 1915A and finds that it must be dismissed because it is clear from the complaint that plaintiff has
10 not exhausted his administrative remedies. *See Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir.
11 2003) (stating that a prisoner’s concession to nonexhaustion is a valid ground for dismissal of an
12 action).

13 The Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e was amended to provide
14 that “[n]o action shall be brought with respect to prison conditions under section 1983 of this
15 title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
16 facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).
17 This requirement is mandatory and unequivocal. *Booth v. Churner*, 532 U.S. 731, 741 (2001);
18 *McKinney v. Carey*, 311 F.3d 1198, 1200 (9th Cir. 2002) (“Congress could have written a statute
19 making exhaustion a precondition to judgment, but it did not. The actual statute makes
20 exhaustion a precondition to *suit*.”). A prisoner seeking leave to proceed in forma pauperis in an
21 action challenging the conditions of his confinement brings an action for purposes of 42 U.S.C. §
22 1997e when he submits his complaint to the court. *Vaden v. Summerhill*, 449 F.3d 1047, 1050
23 (9th Cir. 2006). Therefore, a prisoner must exhaust available administrative remedies before
24 filing any papers in federal court and is not entitled to a stay of judicial proceedings in order to
25 exhaust. *Id.* at 1051; *McKinney*, 311 F.3d 1198.

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1 California prisoners may appeal “any departmental decision, action, condition, or policy
2 which they can demonstrate as having an adverse effect upon their welfare.” Cal. Code Regs. tit.
3 15, § 3084.1(a). The regulations require the use of specific forms but contain no guidelines for
4 grievance content. *Id.* at §§ 3084.2, 3085. Prisoners ordinarily must present their allegations on
5 one informal and three formal levels of review, although the informal and the first formal levels
6 may be bypassed. *Id.* at § 3084.5. A division head reviews appeals on the first formal level, *see*
7 *id.* at § 3084.5(b)(3) (authorizing bypass of the first formal level when the division head cannot
8 resolve it), and the warden or a designee thereof reviews appeals on the second formal level. *See*
9 *id.* at § 3084.5(e)(1). Generally, completion of the third level, the Director’s Level of Review,
10 exhausts the remedy. *Id.* at § 3084.1(a).

11 Plaintiff’s complaint is dated August 5, 2010. He alleges that on July 30, 2010,
12 defendant Collins accosted and verbally assaulted plaintiff because plaintiff is not the same race
13 as Collins. Plaintiff claims defendant Andres witnessed Collins’ actions and did nothing.
14 Plaintiff further alleges that on August 2, 2010, defendants Collins and Purcell retaliated against
15 plaintiff by “trashing” plaintiff’s property and cell. Compl. at 2. According to plaintiff, he “is
16 under no obligation whatsoever to file and exhaust a [] 602 inmate grievance per court rules
17” *Id.* As explained above, however, exhaustion is mandatory.

18 Given plaintiff’s mistaken belief that he was not obligated to exhaust his administrative
19 remedies, coupled with the unlikelihood of proper exhaustion given the close proximity between
20 when the alleged violations occurred and when plaintiff filed the complaint, it appears that
21 plaintiff did not exhaust his administrative remedies prior to filing suit. Consequently, this
22 action should be dismissed.¹ *See Wyatt*, 315 F.3d at 1120. Plaintiff is hereby informed that if he
23 decides to file a new action, he should not include this case number on the new complaint. In
24 addition, the new complaint should be accompanied by a properly completed, updated

25
26 ¹ Dismissal without prejudice may permit plaintiff to file a new action upon exhaustion
of the prison grievance process.

1 application to proceed in forma pauperis.

2 Accordingly, IT IS HEREBY ORDERED that:

3 1. Plaintiff's request to proceed in forma pauperis is granted.

4 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in
5 accordance with the notice to the Director of the California Department of Corrections and
6 Rehabilitation filed concurrently herewith.

7 Further, IT IS HEREBY RECOMMENDED that this action be dismissed without
8 prejudice for failure to exhaust administrative remedies.

9 These findings and recommendations are submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
11 after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
14 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
15 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

16 Dated: November 1, 2010.

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18 EDMUND F. BRENNAN
19 UNITED STATES MAGISTRATE JUDGE
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