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

PATRICK L. PERRY,

Plaintiff,

No. 2:10-cv-3223 KJN P

vs.

CAPTAIN CHANDLESS, et al.,

Defendants.

ORDER TO SHOW CAUSE

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Plaintiff is a state prisoner proceeding without counsel and in forma pauperis, with an action filed pursuant to 42 U.S.C. § 1983. Plaintiff has consented to proceed before the undersigned for all purposes. See 28 U.S.C. § 636(c). On March 21, 2011, plaintiff filed a second amended complaint pursuant to this court’s March 2, 2011 order. However, plaintiff concedes he did complete the grievance process. (Dkt. No. 13 at 2.)

A. Legal Standard re Exhaustion

The Prison Litigation Reform Act of 1995 (“PLRA”) amended 42 U.S.C. § 1997e to provide that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], 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). Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S.

1 516, 524 (2002). Exhaustion is a prerequisite for all prisoner suits regarding conditions of  
2 confinement, whether they involve general circumstances or particular episodes, and whether  
3 they allege excessive force or some other wrong. Porter, 534 U.S. at 532. A prisoner is required  
4 to exhaust administrative remedies for claims contained within a complaint before the complaint  
5 is filed. Rhodes v. Robinson, 621 F.3d 1002, 1005 (9th Cir. 2010). Compliance with this  
6 requirement is not achieved by satisfying the exhaustion requirement during the course of an  
7 action. See McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002) (district court required to dismiss  
8 action without prejudice where plaintiff was in process of exhausting administrative remedies  
9 when motion to dismiss filed). However, new claims based on conduct which occurs after the  
10 filing of an original complaint may be raised in an amended pleading if the administrative  
11 exhaustion requirement is satisfied prior to the time the amended pleading is filed. See Rhodes,  
12 621 F.3d at 1004-05 (PLRA exhaustion is satisfied if Rhodes properly exhausted administrative  
13 remedies as to newly-raised claims before amended complaint tendered to federal court).

14 Exhaustion of all “available” remedies is mandatory; those remedies need not  
15 meet federal standards, nor must they be “plain, speedy and effective.” Porter, 534 U.S. at 524;  
16 Booth v. Churner, 532 U.S. 731, 740 n.5 (2001) (Congress mandated the exhaustion of  
17 administrative remedies regardless of the adequacy of the administrative procedures to satisfy the  
18 inmate’s claim.). Even when the prisoner seeks relief not available in grievance proceedings,  
19 notably money damages, exhaustion is a prerequisite to suit. Id. at 741. A prisoner “seeking  
20 only money damages must complete a prison administrative process that could provide some sort  
21 of relief on the complaint stated, but no money.” Id. at 734. The fact that the administrative  
22 procedure cannot result in the particular form of relief requested by the prisoner does not excuse  
23 exhaustion because some sort of relief or responsive action may result from the grievance. See  
24 Booth, 532 U.S. at 737; see also Porter, 534 U.S. at 525 (purposes of exhaustion requirement  
25 include allowing prison to take responsive action, filtering out frivolous cases, and creating  
26 administrative records).

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

8 The State of California provides its prisoners the right to appeal administratively  
9 “any departmental decision, action, condition or policy which they can demonstrate as having an  
10 adverse effect upon their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a) (2010). It also provides  
11 them the right to file appeals alleging misconduct by correctional officers and officials. Id. at  
12 § 3084.1(e). In order to exhaust available administrative remedies within this system, a prisoner  
13 must proceed through several levels of appeal: (1) informal resolution, (2) formal written appeal  
14 on a 602 inmate appeal form, (3) second level appeal to the institution head or designee, and  
15 (4) third level appeal to the Director of the California Department of Corrections and  
16 Rehabilitation. Barry v. Ratelle, 985 F.Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal.Code  
17 Regs. tit. 15, § 3084.5). A final decision from the Director’s level of review satisfies the  
18 exhaustion requirement under § 1997e(a). Id. at 1237-38. However, “a prisoner need not press  
19 on to exhaust further levels of review once he has either received all ‘available’ remedies at an  
20 intermediate level of review or been reliably informed by an administrator that no remedies are  
21 available.” Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005).

#### 22 B. Plaintiff’s Second Amended Complaint

23 In the second amended complaint, plaintiff raises four claims: alleged failure to  
24 protect in violation of the Eighth Amendment; alleged deliberate indifference to his serious  
25 medical needs; alleged retaliation; and alleged denial of plaintiff’s right to practice his religion.  
26 Plaintiff names five defendants. As noted above, plaintiff’s second amended complaint states

1 that plaintiff has not completed the grievance process.<sup>1</sup> (Dkt. No. 13 at 2.)

2           Where it is clear from the face of plaintiff’s complaint that he has not yet  
3 exhausted the administrative grievance procedure, the action must be dismissed. 42 U.S.C.  
4 § 1997e(a); Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (“A prisoner’s concession to  
5 nonexhaustion is a valid grounds for dismissal. . . .”); see also Bennett v. King, 293 F.3d 1096,  
6 1098 (9th Cir. 2002) (dismissal of complaint with leave to reallege only exhausted claims was  
7 proper); Davis v. Pineda, 347 Fed. Appx. 343 (9th Cir. 2009) (unpublished) (plaintiff’s  
8 concession that he failed to exhaust grievance procedure prior to filing suit warranted dismissal);  
9 Metoyer v. Post, 121 Fed. Appx. 749 (9th Cir. 2005) (unpublished) (failure to exhaust  
10 administrative remedies, evident from face of complaint, warranted dismissal without prejudice).  
11 Plaintiff is required to completely exhaust all administrative remedies available prior to bringing  
12 suit. Booth, 532 U.S. at 741; see Woodford, 548 U.S. at 93 (proper exhaustion required to  
13 enable prison officials an opportunity to resolve claims prior to federal litigation). As long as a  
14 the correctional facility has the authority to take some type of action in response to the inmate’s  
15 appeal, administrative review is “available” and exhaustion under the PLRA is required. Booth,  
16 532 U.S. 731.

17           Accordingly, plaintiff shall show cause, if any he may have, why this action  
18 should not be dismissed based on plaintiff’s failure to first exhaust administrative remedies as to  
19 each claim raised in the second amended complaint.

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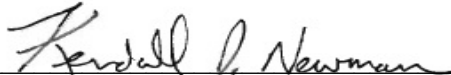
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24           <sup>1</sup> Plaintiff discusses some of his exhaustion efforts in connection with his failure to  
25 protect and retaliation claims, but not in connection with his other two claims. Plaintiff is  
26 advised that he must exhaust his administrative remedies to the third level for each and every  
claim prior to raising those claims in federal court.

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IT IS HEREBY ORDERED that within thirty days from the date of this order,  
plaintiff shall show cause why this action should not be dismissed for failure to exhaust  
administrative remedies.

DATED: June 7, 2011

  
KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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