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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LEO B. TURNER, Jr.,
Plaintiff,
v.
R. COLON, et al.,
Defendants.

No. 2:11-cv-2343 KJM AC P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, has filed an action pursuant to 42 U.S. § 1983. Pending before the court are: (1) plaintiff’s proposed third amended complaint (ECF No. 69); (2) defendants’ fully-briefed motion to dismiss the second amended complaint for non-exhaustion of administrative remedies (ECF No. 70¹); and (3) plaintiff’s motion for an order to show cause (ECF No. 80). Plaintiff has also filed a motion for summary judgment (ECF No. 83), briefing of which has been deferred pending disposition of the motion to dismiss (see ECF No. 97).

I. Procedural Background

This case was filed in the Northern District on September 9, 2010 and was initially dismissed with prejudice on September 24, 2010 for failure to state a claim. ECF No. 6. On

¹ See also ECF No. 71 (opposition), ECF No. 72 (reply). Following the close of authorized briefing, plaintiff continued to file additional and essentially duplicative arguments against the motion. See ECF Nos. 74, 75, 88, 92.

1 plaintiff's motion for reconsideration, the court reopened this case, found the proposed amended
2 complaint stated a deliberate indifference claim, and transferred the case to the Eastern District
3 because the claims arose in San Joaquin County. ECF No. 12. Plaintiff's subsequent request for
4 leave to file a second amended complaint was granted. ECF No. 19. The previously assigned
5 Magistrate Judge directed that plaintiff's second amended complaint (ECF No. 20) be served
6 upon defendants Colon, Nicholson, Richards and Casey. ECF No. 29 (order filed August 16,
7 2012). The defendants moved to revoke plaintiff's in forma pauperis status (ECF Nos. 40, 45),
8 and that motion was denied (ECF Nos. 67, 75). Plaintiff requested an extension of time to file a
9 third amended complaint, ECF No. 66, but failed to submit a proposed third amended complaint.
10 ECF No. 66. Accordingly, the undersigned denied without prejudice the motion for leave to
11 amend. ECF No. 67 at 6-7.

12 II. Third Amended Complaint

13 Following the ruling on his deficient motion for leave to amend, petitioner filed a putative
14 third amended complaint unaccompanied by a motion. ECF No. 69. In his previously-denied
15 request to file such a complaint, petitioner had stated his intention to add the warden as a
16 defendant after he had identified that individual. The proposed third amended complaint does not
17 identify the warden plaintiff seeks to sue, nor does it frame a colorable claim for damages against
18 the unnamed warden.

19 The Civil Rights Act under which this action was filed provides as follows:

20 Every person who, under color of [state law] . . . subjects, or causes
21 to be subjected, any citizen of the United States . . . to the
22 deprivation of any rights, privileges, or immunities secured by the
Constitution . . . shall be liable to the party injured in an action at
law, suit in equity, or other proper proceeding for redress.

23 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
24 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
25 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
26 (1976). "A person 'subjects' another to the deprivation of a constitutional right, within the
27 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or omits
28 to perform an act which he is legally required to do that causes the deprivation of which

1 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

2 Supervisory personnel are generally not liable under § 1983 for the actions of their
3 employees under a theory of respondeat superior and, therefore, when a named defendant holds a
4 supervisory position, the causal link between him and the claimed constitutional violation must
5 be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v.
6 Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). Vague and
7 conclusory allegations concerning the involvement of official personnel in civil rights violations
8 are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982). Plaintiff
9 does not link the unnamed warden to any of the conduct for which he sues the previously named
10 defendants. Accordingly, the allegations against the warden are inadequate to state a claim.

11 The court notes plaintiff has previously amended his complaint twice. Accordingly, he
12 may no longer amend as a matter of course under Fed. R. Civ. P. 15(a)(1) (party may amend
13 once as a matter of course within prescribed time limits). Fed. R. Civ. P. 15(a)(2) permits further
14 amendment of the pleading “only with the opposing party’s written consent or the court’s leave.”
15 While “[t]he court should freely give leave when justice so requires,” amendment is not
16 warranted here. Plaintiff’s complaint is unaccompanied by a stipulation or a motion. Even if the
17 undersigned construed the filing of the third amended complaint as a renewal of the previously-
18 denied motion for leave to amend, that motion would be denied because the additional defendant
19 is unnamed and there are no allegations against him that would support liability. Accordingly, the
20 putative third amended complaint will be stricken.

21 III. Motion for Order to Show Cause/Requests for Entry of Default

22 Plaintiff seeks an order requiring defendants to file an answer (ECF No. 80), and requests
23 entry of default in light of their failure to answer (ECF Nos. 81, 82). Defendants filed a response
24 to the second amended complaint in the form of a motion to dismiss on June 7, 2013 (ECF No.
25 70). That motion was timely filed 21 days after issuance of the Findings and Recommendations
26 regarding plaintiff’s in forma pauperis status and related matters. The undersigned had
27 recommended that the district court direct defendants to respond to the complaint within 21 days
28 of adoption of the Findings and Recommendations. ECF No. 67 at 7. Defendants’ motion was

1 filed prior to adoption of the Findings and Recommendations and was thus, if anything, early.
2 Defendants are permitted to file a motion to dismiss in lieu of an answer. Fed. R. Civ. P. 12
3 (a)(4), (b). Because defendants have complied with the rules and with the order of this court, the
4 motion for an order to show cause will be denied and the requests for entry of default will be
5 disregarded.

6 IV. Motion to Dismiss

7 Defendants seek dismissal of this action under Rule 12(b) on grounds that plaintiff failed
8 to exhaust administrative remedies. ECF No. 70.

9 A. *The Exhaustion Requirement*

10 The Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), provides that
11 “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any
12 other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
13 such administrative remedies as are available are exhausted.” Regardless of the relief sought,
14 whether injunctive relief or money damages, inmates must exhaust administrative remedies.
15 Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999); Booth v. Churner, 532 U.S. 731 (2001).
16 Administrative remedies must be exhausted before the complaint is filed. McKinney v. Carey,
17 311 F.3d 1198 (9th Cir. 2002), but see Rhodes v. Robinson, 621 F.3d 1002 (9th Cir. 2010)
18 (PLRA exhaustion requirement satisfied with respect to new claims within an amended or
19 supplemental complaint so long as administrative remedies are exhausted prior to the filing of the
20 amended or supplemental complaint).

21 Exhaustion of administrative remedies under the PLRA requires that the prisoner
22 complete the administrative review process in accordance with the applicable procedural rules.
23 Woodford v. Ngo, 548 U.S. 81 (2006). An untimely or otherwise procedurally defective appeal
24 will not satisfy the exhaustion requirement. Id. at 84. When an inmate’s administrative grievance
25 is improperly rejected on procedural grounds, however, exhaustion may be excused as
26 “effectively unavailable.” Sapp v. Kimbrell, 623 F. 3d 813, 823 (9th Cir. 2010); see also, Nunez
27 v. Duncan, 591 F.3d 1217, 1224-26 (9th Cir. 2010) (finding plaintiff’s failure to timely exhaust
28 excused because “he took reasonable and appropriate steps to exhaust . . .” but was precluded

1 from doing so by warden's mistake); Ward v. Chavez, 678 F.3d 1042, 1045-46 (9th Cir. 2012)
2 (federal prison inmate entitled to waiver of exhaustion requirement where exhaustion would be
3 futile).

4 Although CDCR's administrative exhaustion procedure has been modified since the
5 events at issue here, the prison appeal system in place at the time of plaintiff's segregation
6 included four levels. See Motion to Dismiss, Declaration of DVI Appeals Coordinator, R. den
7 Dulk (ECF No. 70-2) at ¶¶ 1, 3. In order to exhaust, an inmate must proceed through the
8 following levels of review: (1) informal resolution, (2) formal written appeal at the first
9 institutional level, (3) second level appeal to the institution head or designee, and (4) third level
10 appeal to the Director of the California Department of Corrections. Barry v. Ratelle, 985 F. Supp.
11 1235, 1237 (S.D. Cal. 1997) (citing 15 Cal. Code Regs. § 3084.5). A final decision from the
12 Director's level of review satisfies the exhaustion requirement. Id. at 1237-38.

13 B. *Standards Governing the Motion*

14 In a motion to dismiss for failure to exhaust administrative remedies under non-
15 enumerated Rule 12(b) of the Federal Rules of Civil Procedure, defendants "have the burden of
16 raising and proving the absence of exhaustion." Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th
17 Cir.), cert. denied, 540 U.S. 810 (2003). The parties may go outside the pleadings, submitting
18 affidavits or declarations under penalty of perjury, and plaintiff must be provided with notice of
19 his opportunity to develop a record. Id. at 1120 n.14.² The court may decide disputed issues of
20 fact. If the court determines that plaintiff has failed to exhaust, dismissal without prejudice is the
21 appropriate remedy. Id. at 1120.

22 C. *Plaintiff's Allegations*

23 The operative second amended complaint alleges that on April 20, 2010 at Deuel
24 Vocational Institution, at the direction of defendants Sergeant Colon and Lieutenant Casey,
25 defendant Correctional Officers Nicholson and Richards ordered all the J-wing Building inmates
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27 ² This court provided plaintiff with Wyatt notice on August 29, 2012. (ECF No. 29).
28 Defendants provided, with their motion, the concurrent Wyatt notice required by Woods v. Carey,
684 F.3d 934 (9th Cir. 2012). ECF No. 70 at 2.

1 out to yard although “it was raining and storming outside.” ECF No. 20 at 3. The inmates,
2 including plaintiff, were made to stand out in the rain without jackets. Id. Plaintiff claims that, as
3 a result, he contracted a respiratory infection and is on two different kinds of inhalers to allow
4 him to breathe. Id. Plaintiff seeks money damages from each defendant. Id. at 2-3.

5 *D. Chronology of Plaintiff’s Administrative Appeal*

6 Plaintiff filed an initial 602 grievance on April 25, 2010, to which he received an informal
7 response dated April 29, 2010. ECF No. 20 at 5-6; ECF No. 71 at 3-4. Plaintiff next appealed
8 directly to the Director of the Department, bypassing the first and second levels of review.
9 Plaintiff’s exhibit demonstrates that on April 29, 2010, he completed the portion of the 602 form
10 intended for a request of first level formal institutional review, but submitted that form to the
11 Inmate Appeals Branch rather than to the institution’s appeal coordinator. ECF No. 71 at 3-4.
12 The request for review was received at the Director’s Level on May 4, 2010. ECF No. 70-3
13 (Decl. of J.D. Lozano, Chief of Inmate Appeals) at 6 (Exh. A); ECF No. 71 at 3-4, 7. The request
14 was rejected on May 28, 2010, because plaintiff had not completed the first and second levels of
15 review before seeking third level review. ECF No. 70-3 at 6.

16 On June 5, 2010, presumably having received the third level rejection, plaintiff completed
17 the portion of the form intended for requesting second level review. ECF No. 71 at 4. This was
18 the first request for review submitted to the institution, which treated it accordingly as a first level
19 request. The request was screened out as untimely on June 22, 2010. ECF No. 70-2 (Decl. of R.
20 den Dulk, DVI Appeals Coordinator) at 6 (Exh. B).³ No appeal of the April 20, 2010 incident
21 was ever accepted for review at the first or second (institutional) levels. Id. at 2.

22 On June 29, 2010, plaintiff signed and dated another appeal to the Director’s Level,
23 explaining that he was not responsible for the time lapse. Inmate Appeal Branch (IAB) records
24 show receipt on July 21, 2010 of an appeal with the same IAB number as plaintiff’s May 4

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26 ³ “The enclosed documents are being returned to you for the following reasons: There has been
27 too great a TIME LAPSE between when the action or decision occurred, with no reasonable
28 circumstances justifying the delay. Time limits have expired per CCR 3084.6(c).” Id. At the
time, inmates were required to seek formal review within 15 days of the informal response. ECF
No. 70- at 2. This time limit is specified on the form used by plaintiff. ECF No. 71 at 3-4.

1 submission. ECF No. 70-3 at 6.⁴ That appeal was rejected on August 20, 2010. Id. No appeal of
2 the April 20, 2010 DVI incident was ever accepted for review at the third level.

3 E. *Discussion*

4 It is undisputed that plaintiff's various attempts to grieve the April 20, 2010 incident were
5 rejected on procedural grounds. Plaintiff concedes here, as he did in his final submission to the
6 Inmate Appeals Branch, that he sent his initial request for formal review to Sacramento rather
7 than submitting it within the institution. See ECF No. 71 at 1-2, 4. As a result of this failure to
8 follow protocol, plaintiff's subsequent attempt to seek institutional review was untimely. Plaintiff
9 contends that administrative exhaustion should be excused because the untimeliness was caused
10 by prison official's interference with his appeals. The question is whether exhaustion was
11 "effectively unavailable." Sapp, 623 F.3d at 823.

12 In opposition to the motion, plaintiff contends (1) that prison staff at DVI kept returning
13 his grievance unanswered in an effort to circumvent the applicable appeal deadlines, thereby
14 forcing him to bypass the first and second levels of review and appeal directly to Sacramento, and
15 (2) that his third level appeal was maintained at the director's level for months to stymie his
16 appeal process, and/or (3) that the DVI appeal coordinator kept the 602 for over two months in
17 order to ensure that it could be rejected as untimely. ECF No. 71 at 1-2. These allegations are
18 refuted by the record, including plaintiff's own exhibits.

19 Plaintiff received a response to his 602 at the informal level four days after filing it and
20 two days after it was dated as received. His dissatisfaction with that response was signed and
21 dated on April 29, 2010, the same day that the informal response was delivered to him. The
22 Inmate Appeals Branch stamped that appeal as received on May 4, 2010. Plaintiff's appeal was
23 not delayed "for months" at DVI before he sent it, out of order, for third level review. On the
24 contrary, plaintiff sent the appeal to Sacramento almost as soon as he received the informal
25 response to the 602.

26 The documentary record also does not support plaintiff's contention that the DVI appeals
27

28 ⁴ The undersigned assumes that this was the request for review dated June 29, 2010.

1 coordinator retained his first level appeal “for over 2 months” before it was rejected, or that the
2 Director (or Inmate Appeals Branch) held the appeal for “months.” The chronology outlined
3 above contains no such gaps, and plaintiff has presented no evidence of obstruction.

4 The only unexplained gap in the chronology is the three week gap between June 29, 2010,
5 when plaintiff signed and dated his second request for review directed to the Inmate Appeals
6 Brach, and July 21, 2010, when the IAB reports receipt of that request. Compare, ECF No. 71 at
7 4 with ECF No. 70-3 at 6.⁵ Even if plaintiff could demonstrate that his appeal was deliberately
8 delayed by prison officials during that period, however, it would not excuse exhaustion because
9 plaintiff’s own actions had already defeated exhaustion prior to that point. Plaintiff forfeited his
10 ability to administratively exhaust at the very beginning of his appeals process, by failing to seek
11 first level formal review within 15 days of April 29, 2010. The subsequent rejection of his appeal
12 at the first level for untimeliness therefore compels a finding that he failed to exhaust his
13 administrative remedies. See Woodford v. Ngo, 548 U.S. at 90-91 (“Proper exhaustion demands
14 compliance with an agency’s deadlines and other critical procedural rules because no adjudicative
15 system can function effectively without imposing some orderly structure on the course of its
16 proceedings.”).

17 V. Motion for Summary Judgment

18 Because the complaint must be dismissed for failure to exhaust administrative remedies,
19 plaintiff’s pending motion for summary judgment should be vacated as moot.

20 Accordingly, IT IS ORDERED that:

- 21 1. Plaintiff’s third amended complaint (ECF No. 69) is stricken; and
22 2. Plaintiff’s motion for an order to show cause (ECF No. 80) and requests for entry of
23 default (ECF Nos. 81, 82) are denied.

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28 ⁵ To add to the confusion, the 602 form itself indicates receipt at the Director’s Level on August
18, 2010. ECF No. 71 at 4.

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IT IS RECOMMENDED that:

1. Defendants’ motion to dismiss (ECF No. 70) be granted and this case be dismissed without prejudice; and
2. Plaintiff’s motion for summary judgment (ECF No. 83) be vacated as moot.

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

DATED: December 13, 2013



ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE