UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MILTON DEXTER HARRIS,

Plaintiff,

v.

HAWKINS, et al.,

Defendants.

No. 2:12-cv-3067-EFB P

ORDER AND FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner, proceeding without counsel and in forma pauperis, with an action filed pursuant to 42 U.S.C. § 1983. He initiated this action on December 20, 2012, alleging that the named defendants were indifferent to his serious medical needs in violation of the Eighth Amendment. ECF No. 1. The case is proceeding on his second amended complaint, filed July 9, 2013, against the sole remaining defendant in this action, Paul Osterlie, Jr. ("defendant") for alleged violation of plaintiff's Eighth Amendment rights. ECF No. 18. He alleges in that complaint that he sustained an injury on January 12, 2009, while working under defendant's supervision at Mule Creek State Prison ("Mule Creek"), and that defendant required him to continue working under painful conditions. *Id.*

Osterlie moves to dismiss the action for failure to exhaust administrative remedies. ECF No. 29. For the following reasons, defendant's motion, construed as a motion for summary judgment, must be granted.

II. Background

On January 12, 2009, plaintiff injured his back while working as a butcher boner for the C.A.L.P.I.A. meat factory at Mule Creek. Second Amended Complaint ("SAC"), ECF No. 18, at 2. Plaintiff says he did not immediately report the injury to his supervisor, Osterlie, because plaintiff did not feel pain at that time or realize the magnitude of his injury. *Id.* On February 23, 2009, five weeks after first suffering the injury, plaintiff reported the injury to his supervisors, defendant and Ms. Kim Yarbrough.[1] *Id.* Defendant sent plaintiff to the medical clinic where he was examined by a doctor. *Id.*

Plaintiff returned to work in a "chronically painful condition." *Id.* Upon his return to the meat factory, plaintiff explained to Osterlie that the doctor who examined him "did nothing but look at Plaintiff's low back area and did not administer anything by way of any type of diagnosis or examination." *Id.* at 3. Plaintiff's remaining allegations with regard to Osterlie are as follows:

> Defendant Paul Osterlie Jr. then instructed the Plaintiff be moved to a less strenuous position to continue working despite observing the chronically painful condition this Plaintiff was suffering from and the need for further medical attention . . . .
>
> During the period of 2/23/2009 through 3/3/2009, Plaintiff was made to work and suffer under a chronically painful condition that no human being should ever have to endure due to the reckless conduct of industrial supervisor Paul Osterlie Jr. . . . for intentionally or recklessly not summoning the appropriate medical treatment [he] should have summoned in [his] professional capacity upon observing Plaintiff's chronically painful condition . . . .

Id. Plaintiff also alleged that on March 3, 2009 he sought "the help of a qualified medical evaluator . . . offered through the workman's compensation program to assess the true nature of Plaintiff's lower back injury Plaintiff was made to chronically suffer due to the deliberate indifference and wonton misconduct of [defendant] . . . ." *Id.* at 4.

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[1] Although Ms. Yarbrough was initially named by plaintiff as a defendant, upon screening of his second amended complaint, the court did not authorize service of the complaint on Ms. Yarbrough. ECF No. 21; *see* 28 U.S.C. § 1915A (requiring the court to review a complaint in a civil action in which a prisoner seeks redress from a governmental entity, officer, or employee).

In his motion to dismiss, defendant argues that plaintiff's second amended complaint should be dismissed because he failed to exhaust administrative remedies with regard to allegations involving defendant. ECF No. 29.

In support of his motion, defendant provided the declaration of A. Altschuler, the Health Care Appeals Coordinator at Mule Creek. ECF No. 29-3. Altschuler maintains records of the medical appeals at Mule Creek in a database called the Health Care Appeals and Risk Tracking System. *Id.* ¶ 2. Altschuler described the process for receipt of inmate appeals involving health care issues, and provided a copy of plaintiff's appeal history which shows that plaintiff filed three separate health care appeals. *Id.* ¶¶ 3-6. Of the three appeals, only one appeal was processed through all three levels of review; the remaining two appeals were rejected for failure to comply with appeal regulations. *Id.* ¶ 6. The one health care appeal that was denied at the third level of review addressed a grievance initiated by plaintiff on April 6, 2012 involving a complaint regarding medical treatment plaintiff received for his January 12, 2009 injury (the "April 2012 grievance"). *Id.* ¶ 6, Ex. B.

Defendant also provided the declaration of L. Zamora, Chief of the Inmate Correspondence and Appeals Branch. ECF No. 29-6. Chief Zamora's office is responsible for reviewing inmate medical appeals, including medical staff complaints, at the third level of review. *Id.* ¶¶ 2-3. Chief Zamora provided plaintiff's appeal history which shows that plaintiff filed only one medical appeal at the third level. *Id.* ¶ 6, Ex. A. The third level appeal, which addresses the April 2012 grievance, was denied on October 25, 2012.[2] *Id.*

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[2] Defendant also provided the declarations of M. Elorza, Correctional Counselor II/Appeals Coordinator at Mule Creek, and J. Zamora, Acting Chief of the Office of Appeals for the California Department of Corrections and Rehabilitation ("CDCR"). ECF Nos. 29-4, -5. Elorza's office receives inmate appeals not related to health care issues. ECF No. 29-4 ¶ 2. Elorza described the grievance procedure for inmates, and indicated that plaintiff has not filed any inmate appeals at the first or second level. *Id.* ¶¶ 3-8. Acting Chief Zamora described the grievance procedure for inmates submitting an appeal for third level review, and submitted a copy of plaintiff's appeal history indicating one appeal involving plaintiff that was decided at the third level of review. ECF No. 29-5 ¶¶ 4-9. The grievance addressed a group appeal submitted by plaintiff and other inmates on or about December 21, 2007, and involved a complaint about inmate living conditions. *Id.* Ex. A. The third level appeal record was closed on June 2, 2008, approximately six months before plaintiff's alleged injury. *Id.*

A copy of the entire April 2012 grievance (which includes the reasons for plaintiff's dissatisfaction with the response at the second level) and the third level decision were provided by plaintiff with his second amended complaint as well as his opposition. *See* Pl.'s Opp'n, ECF No. 30, at 58-62; SAC at 53-57.

In his April 2012 grievance, plaintiff described the subject/purpose of his appeal as follows: "preexisting work related injury performing job assignment." Altschuler Decl. Ex. B. The court provides at length plaintiff's explanation of his grievance:

> On 1/12/2009 while performing my job assignment as a boner/butcher on Facility C yard in the P.I.A. Meat Factory I injured or tore a ligament in the lower section of my right hip while lefting [sic] several 90 lb rounds (cow-legs) from a cardboard container. I did not report this said injury to my supervisor . . . because I didn't feel any pain at that specific instance – (nor) – did I realize that I would suffer this injury this present 4/1/2012 day. After a continuance [sic] attempt from 2/23/2009 thur [sic] 7/09 at getting the proper medical treatment to no avail . . . I was transferred to B yard on 6/16/2010 where after realizing that the injury wasn't just a minor sprained hip I once again tried getting treatment. On 5/18/2011 I submitted a 7362 health request to B yard clinic. On 5/27/2011 I was issued a medical lay-in . . . . On 7/15/2011 Dr. Hawkins schedule [sic] me for several x-ray of my hip, spine, pelvic area etc. All x-rays came inconclusive of injury in question . . . . On 1/27/2012 again Dr. Hawkins schedule [sic] me for several sessions with the physical therapist here at Mule Creek . . . . On 3/27/2012 Dr. Hawkins said that he would bring me back in 45 days leaving me to endure further pain [and] more suffering until next visit.

Id. Plaintiff requested the following action in his grievance:

> Due to the continual [and] very server [sic] pain I'm currently experiencing this very day [and] from the mediocre – manner in which facility B yard's clinic has responded to my 7362 health care request of 5/18/2011 thur [sic] 3/27/2012 I need to have an M.R.I. done to assess the seriousness of the injury I sustained, perhaps surgery, or I'll 602 to the next level.

Id. In denying plaintiff's grievance at the first level on May 16, 2012, the Health Care Appeals Office construed plaintiff's grievance as an "allegation of deliberate indifference by Dr. Hawkins" and determined that it did not meet the criteria for the appeal to be processed as a staff

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complaint because "[t]he evidence supports Dr. Hawkins appears to have acted professionally, was not indifferent to [plaintiff's] pain and was not denying [plaintiff] proper medical treatment." *Id.*

Plaintiff filed his appeal with the second level on June 4, 2012. *Id.* Therein, plaintiff explained his dissatisfaction with the first level response as follows:

> On 4/18/2012 I was interviewed by Dr. Hawkins involving a medical 602 I filed on behalf of Facility B yard medical clinic and the very unexceptional manner they'[ve] responded to my medical request form of 5/18/2011 thur [sic] 3/27/2012 . . . . First of all I am dissatisfied with the first level decision because of the pain stricken lower right hip I still endure [and] suffer as I respond to my second level of requested relief.

Id. Plaintiff took issue with Dr. Hawkins' denial of his request for an MRI, arguing generally that the "medical services provided to the inmate population" are "below the standard governed by the Eighth Amendment." *Id.* Plaintiff's appeal to the second level was denied on June 25, 2012 for the same reason it was denied at the first level. *Id.* Specifically, the decision found that the evidence provided in support of plaintiff's allegations of deliberate indifference by Dr. Hawkins did not suggest staff misconduct. *Id.* The decision also found that "[t]here is no evidence to suggest below standard medical care resulting in cruel and unusual punishment and [plaintiff] did not present any evidence to verify [his] claim. [Plaintiff has] full access to health care; [plaintiff] just do[es] not have the authority to pick and choose what medications and accommodations [his] physicians feel is [sic] medically necessary." *Id.*

Plaintiff filed an appeal with the third level on July 10, 2012. *Id.* Ex. A. Therein, plaintiff reiterated his dissatisfaction as stated in his prior grievances, adding that "[b]ased on seriousness of injury in question [and] supporting documents attach [sic] . . . I truly fill [sic] medical treatment is warranted per every rule" cited in the second level decision. SAC at 56. Plaintiff's appeal was denied at the third level on October 25, 2012. SAC at 57. The decision denying plaintiff's grievance summarized plaintiff's appeal file and documents obtained from his Unit Health Record and found, in part, as follows:

> Your contention that you have not received adequate medical care is refuted by professional health care staff familiar with your medical history, as well as a review of your medical records.

> After review, there is no compelling evidence that warrants intervention at the [Director's Level Review] as your medical condition has been evaluated and you are receiving treatment deemed medically necessary.

Id. at 58.

After a careful review of the record, the court finds that defendant's motion to dismiss should be granted.

III. Exhaustion under the PLRA

The issue presented here is whether the administrative grievance submitted by plaintiff sufficiently raised the claim that he now presents against Osterlie in the current amended complaint. Defendant argues that plaintiff submitted a grievance raising a claim that the medical treatment he received was not adequate but did not raise the claim that Osterlie violated the Eighth Amendment by requiring plaintiff to work under painful conditions or failed to summon needed medical help.

The Prison Litigation Reform Act ("PLRA") provides that "[n]o action shall be brought with respect to prison conditions [under section 1983 of this title] until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "Prison conditions" subject to the exhaustion requirement have been defined broadly as "the effects of actions by government officials on the lives of persons confined in prison . . . ." 18 U.S.C. § 3626(g)(2); *Smith v. Zachary*, 255 F.3d 446, 449 (7th Cir. 2001); *see also Lawrence v. Goord*, 304 F.3d 198, 200 (2d Cir. 2002). To satisfy the exhaustion requirement, a grievance must alert prison officials to the claims the plaintiff has included in the complaint, but need only provide the level of detail required by the grievance system itself. *Jones v. Bock*, 549 U.S. 199, 218-19 (2007); *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002) (purpose of exhaustion requirement is to give officials "time and opportunity to address complaints internally before allowing the initiation of a federal case").

Prisoners who file grievances must use a form provided by the California Department of Corrections and Rehabilitation, which instructs the inmate to describe the problem and outline the action requested. The grievance process, as defined by California regulations, has three levels of review to address an inmate's claims, subject to certain exceptions. *See* Cal. Code Regs. tit. 15,

§ 3084.7. Administrative procedures generally are exhausted once a plaintiff has received a "Director's Level Decision," or third level review, with respect to his issues or claims. *Id.* § 3084.1(b).

Proper exhaustion of available remedies is mandatory, *Booth v. Churner*, 532 U.S. 731, 741 (2001), and "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules[.]" *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). For a remedy to be "available," there must be the "possibility of some relief . . . ." *Booth*, 532 U.S. at 738. Relying on *Booth*, the Ninth Circuit has held:

> [A] prisoner need not press on to exhaust further levels of review once he has received all "available" remedies at an intermediate level of review or has been reliably informed by an administrator that no remedies are available.

Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005).

Failure to exhaust is "an affirmative defense the defendant must plead and prove." *Jones v. Bock*, 549 U.S. 199, 204, 216 (2007). To bear this burden:

> a defendant must demonstrate that pertinent relief remained available, whether at unexhausted levels of the grievance process or through awaiting the results of the relief already granted as a result of that process. Relevant evidence in so demonstrating would include statutes, regulations, and other official directives that explain the scope of the administrative review process; documentary or testimonial evidence from prison officials who administer the review process; and information provided to the prisoner concerning the operation of the grievance procedure in this case . . . . With regard to the latter category of evidence, information provided [to] the prisoner is pertinent because it informs our determination of whether relief was, as a practical matter, "available."

Brown, 422 F.3d at 936-37 (citations omitted).

A motion asserting an affirmative defense such as failure to exhaust may be brought under Rule 12(b)(6) or Rule 56 depending on whether the factual predicate for the motion is based on the text of the pleading or instead depends upon evidence submitted with the motion. *See Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc); *Jones*, 549 U.S. at 215 ("A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief."). Here, defendant has included with his motion to dismiss certain affidavits and exhibits to establish the factual predicate for the motion. Resolution of the motion necessarily requires the court to consider those affidavits and exhibits for the purpose of

determining whether plaintiff has, in fact, failed to exhaust his administrative remedies. Such a motion must be treated as a motion for summary judgment. Fed. R Civ. P. 12(d). The court therefore construes defendant's motion as a motion for summary judgment. If under the Rule 56 summary judgment standard, the court concludes that plaintiff has failed to exhaust administrative remedies, the proper remedy is dismissal without prejudice. *Wyatt v. Terhune*, 315 F.3d 1108, 1120, *overruled on other grounds by Albino*, 747 F.3d 1162.

IV. Summary Judgment Standard

Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment avoids unnecessary trials in cases in which the parties do not dispute the facts relevant to the determination of the issues in the case, or in which there is insufficient evidence for a jury to determine those facts in favor of the nonmovant. *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). At bottom, a summary judgment motion asks whether the evidence presents a sufficient disagreement to require submission to a jury.

The principal purpose of Rule 56 is to isolate and dispose of factually unsupported claims or defenses. *Celotex Cop. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thus, the rule functions to "'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments). Procedurally, under summary judgment practice, the moving party bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323; *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). If the moving party meets its burden with a properly supported motion, the burden then shifts to the opposing party to present specific facts that show there is a genuine issue for trial. *Anderson*, 477 U.S. at 248; *Auvil v. CBS "60 Minutes"*, 67 F.3d 816, 819 (9th Cir. 1995).

A clear focus on where the burden of proof lies as to the factual issue in question is crucial to summary judgment procedures. Depending on which party bears that burden, the party seeking summary judgment does not necessarily need to submit any evidence of its own. When the opposing party would have the burden of proof on a dispositive issue at trial, the moving party need not produce evidence which negates the opponent's claim. *See e.g., Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990). Rather, the moving party need only point to matters which demonstrate the absence of a genuine material factual issue. *See Celotex*, 477 U.S. at 323-24 ("[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'"). Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See id.* at 322. In such a circumstance, summary judgment must be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment . . . is satisfied." *Id.* at 323.

To defeat summary judgment the opposing party must establish a genuine dispute as to a material issue of fact. This entails two requirements. First, the dispute must be over a fact(s) that is material, i.e., one that makes a difference in the outcome of the case. *Anderson*, 477 U.S. at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."). Whether a factual dispute is material is determined by the substantive law applicable for the claim in question. *Id.* If the opposing party is unable to produce evidence sufficient to establish a required element of its claim that party fails in opposing summary judgment. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322.

Second, the dispute must be genuine. In determining whether a factual dispute is genuine the court must again focus on which party bears the burden of proof on the factual issue in question. Where the party opposing summary judgment would bear the burden of proof at trial on

the factual issue in dispute, that party must produce evidence sufficient to support its factual claim. Conclusory allegations, unsupported by evidence are insufficient to defeat the motion. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts that show there is a genuine issue for trial. *Anderson*, 477 U.S. at 249; *Devereaux*, 263 F.3d at 1076. More significantly, to demonstrate a genuine factual dispute the evidence relied on by the opposing party must be such that a fair-minded jury "could return a verdict for [him] on the evidence presented." *Anderson*, 477 U.S. at 248, 252. Absent any such evidence there simply is no reason for trial.

The court does not determine witness credibility. It believes the opposing party's evidence, and draws inferences most favorably for the opposing party. *See id.* at 249, 255; *Matsushita*, 475 U.S. at 587. Inferences, however, are not drawn out of "thin air," and the proponent must adduce evidence of a factual predicate from which to draw inferences. *American Int'l Group, Inc. v. American Int'l Bank*, 926 F.2d 829, 836 (9th Cir. 1991) (Kozinski, J., dissenting) (citing *Celotex*, 477 U.S. at 322). If reasonable minds could differ on material facts at issue, summary judgment is inappropriate. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). On the other hand, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted); *Celotex*, 477 U.S. at 323 (if the evidence presented and any reasonable inferences that might be drawn from it could not support a judgment in favor of the opposing party, there is no genuine issue). Thus, Rule 56 serves to screen cases lacking any genuine dispute over an issue that is determinative of the outcome of the case.

Both Rule 12(d) and Ninth Circuit case law pertaining to in-custody pro se plaintiffs require that adequate and timely notice be provided to the plaintiff which reasonably apprises him of his burden to oppose defendant's motion. *See Woods v. Carey*, 684 F.3d 934, 938 (9th Cir. 2012) (requiring such notice for summary judgment motions, citing *Rand v. Rowland*, 154 F.3d 952, 961 (1998)); *Stratton v. Buck*, 697 F.3d 1004, 1006 (9th Cir. 2012) (requiring such notice for motions to dismiss for failure to exhaust administrative remedies where evidence extrinsic to the complaint is submitted); *see also Albino*, 747 F.3d at 1166 (providing that a motion for summary

judgment, and not a motion to dismiss, is the proper means of asserting the defense of failure to exhaust, where evidence extrinsic to the complaint is submitted). Defendant's motion included notice to plaintiff informing him of the requirements for opposing a motion predicated on his alleged failure to exhaust available administrative remedies, including the warning that if plaintiff failed to submit evidence in opposition (such as declarations or other documents), his case (or any unexhausted claims) could be dismissed and there would be no trial.[3]

V. Analysis

As noted, defendant argues that, while plaintiff exhausted an administrative appeal involving his January 2009 injury, the grievance did not allege that Osterlie was indifferent to plaintiff's serious medical needs by making him continue to work after he suffered his injury and by failing to summon proper medical treatment. ECF No. 29. Plaintiff does not dispute the exhaustion requirements outlined by defendant, or the "record allegations" as stated in defendant's motion. Pl.'s Opp'n at 2:4-6, 3:21-25. Instead, plaintiff argues that a general "chrono" filled out by defendant on March 5, 2009 establishes that Osterlie was indifferent to plaintiffs serious medical needs by failing to summon "proper medical treatment." *Id.* at 2-3, 17. Plaintiff requests denial of defendant's motion on this basis. The problem with plaintiff's argument is its failure to recognized that the claim raised in his grievance and administrative appeal is separate and distinct form the claim that he asserts here, in his second amended complaint, against Osterlie. The claim now raised here should have been, but was not raised in the grievance and administrative appeal.

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[3] The notice served with defendant's motion (ECF No. 29-2) provided plaintiff adequate information apprising him of the requirements for a response to a motion for summary judgment for failure to exhaust administrative remedies, including the crucial information that he could submit evidence including declarations bearing on his assertions of exhaustion and that the failure to do so could result in his case ending. Because that notice reasonably apprised plaintiff of his burden and his right to submit a declaration or other evidence, it satisfies the requirements of *Rand*, 154 F.3d at 961. *See Stratton v. Buck*, 697 F.3d 1004, 1006 (9th Cir. 2012) (requiring that the notice accompanying a failure to exhaust motion explain "the requirements for a response . . . and the consequence if the district court granted the motion"); *Woods v. Carey*, 684 F.3d 934, 938 (9th Cir. 2012) (citing *Rand*, 154 F.3d at 960-61, and requiring that the notice accompanying a summary judgment motion notify plaintiff of "his right to file counter-affidavits or other evidentiary material, that his failure to do so may result in summary judgment against him, and that his loss on summary judgment would terminate the litigation").

Exhaustion of all "available" administrative remedies is mandatory. *Porter*, 534 U.S. at 532. The Supreme Court held in *Jones v. Bock*, 549 U.S. 199, 219 (2007), that that a prison's own grievance process, not the PLRA, determines how detailed a grievance must be to satisfy the PLRA exhaustion requirement. *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009). In *Jones*, the Court held that a prisoner did not fail to properly exhaust an administrative remedy because of the lack of specifics in the initial grievance form. *Jones*, 549 U.S. at 219. In so doing, the Court focused on the lack of guidelines requiring more formality in the federal legislation that mandates exhaustion, as well as the prison's own lack of guidance as to what specifics need to be included in the initial grievance. *Id.* at 218.

Here, however, at the time plaintiff submitted his grievance, the regulations governing the CDCR's grievance process gave specific guidance as to the specificity required in appeals. Effective January 28, 2011, the regulations were significantly revised and now require an inmate to identify by name and title or position each staff member alleged to be involved in the action or decision being appealed, along with the dates each staff member was involved in the issue being appealed. Cal. Code Regs. tit. 15, § 3084.2(a)(3). If the inmate does not have this information, he must provide any other available information that would assist the appeals coordinator in identifying the staff member. *Id.* These revised regulations were in effect when plaintiff submitted his grievance to the first level of review on April 6, 2012, and therefore govern the court's analysis of plaintiff's efforts to exhaust his administrative remedies. Altschuler Decl. Ex. B.

Osterlie was not named in plaintiff's administrative appeal, but rather mentioned generally in plaintiff's description of how he sustained his injury and the fact that he did not immediately report it to his supervisor. *Id.* The brief reference to his "supervisor" and his attempt on or around February 23, 2009 to obtain "proper medical treatment" does not meet the specificity required by the revised regulations. Here, plaintiff's second amended complaint alleges that defendant was indifferent to his serious medical needs by making plaintiff "work and suffer under a chronically painful condition" and failing to summon appropriate medical treatment. SAC at 3.

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Plaintiff's appeal, on the other hand, involves his dissatisfaction with the medical treatment he received from Dr. Hawkins and the Facility B yard medical clinic at Mule Creek ("the clinic"). In fact, the crux of plaintiff's grievance takes issue with treatment he received between May 27, 2011 and March 27, 2012, more than two years after plaintiff's alleged interactions with defendant Osterlie. Finally, nothing in plaintiff's grievance filed at any level indicates plaintiff's dissatisfaction with prison staff prior to his receiving medical treatment.

The court finds that the April 2012 grievance failed to apprise prison officials of any allegations against defendant Osterlie, or any prison staff members for that matter, regarding medical indifference for failure to summons appropriate medical treatment or requiring him to work. The officials responding to plaintiff's grievance reasonably concluded that he was alleging deliberate indifference on the part of Dr. Hawkins and the clinic for not conducting an MRI. Thus, prison officials were only made aware of plaintiff's allegations involving medical treatment he received from the clinic. Without more, the appeals office officials would have been unable to diligently address plaintiff's concerns regarding defendant's alleged failure to summon appropriate medical treatment. *Griffin*, 557 F.3d at 1121 (in order to properly exhaust, an inmate must "'provide enough information . . . to allow prison officials to take appropriate responsive measures'") (citing *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004) (alterations original)).

Despite having been granted an opportunity to do so, plaintiff has failed to explain why he did not file a grievance addressing defendant's alleged indifference to his serious medical needs. Instead, plaintiff argues that his "chrono" establishes that defendant was indifferent to his serious medical needs and the court should deny defendant's motion on this ground. However, whether or not defendant was indifferent is not the issue on this motion. Before a prisoner can bring a suit in federal court challenging prison conditions, he must properly exhaust all available administrative remedies. *Porter*, 534 U.S. at 532 (exhaustion is a prerequisite for all prisoner suits regarding conditions of confinement); *Woodford*, 548 U.S. at 93 ((("The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons,[] and thus seeks to 'affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.'") (quoting *Porter v. Nussle*, 534 U.S. 516, 525

(2002) (second alteration original)). In this case, it is undisputed that plaintiff has failed to do so.

Because there is no genuine dispute that plaintiff failed to comply with the proper exhaustion procedure, or that there is no established basis on which his failure to exhaust should be excused, defendant's motion must be granted. *See McKinney v. Carey*, 311 F.3d 1198, 1200 (9th Cir. 2002) ("Congress could have written a statute making exhaustion a precondition to judgment, but it did not. The actual statue makes exhaustion a precondition to suit."); *Vaden v. Summerhill*, 449 F.3d 1047, 1051 (9th Cir. 2006) (prisoner brings an action for purposes of 42 U.S.C. § 1997e when he submits his complaint to the court).

VI. Conclusion

Although plaintiff filed a written consent to jurisdiction of a magistrate judge on January 3, 2013, ECF No. 4, defendant did not respond to the court's Order Re Consent or Request For Reassignment entered on October 23, 2013, ECF No. 25. Accordingly, the Clerk is directed to randomly assign a district judge to this case.

Further, IT IS HEREBY RECOMMENDED that defendant's December 27, 2013 motion to dismiss for failure to exhaust administrative remedies (ECF No. 29), construed as a motion for summary judgment, be granted, and that this case be dismissed, without prejudice.

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)(l). Within fourteen 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 cautioned that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: July 3, 2014.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE