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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DESHONE SMITH,

 Plaintiff,

 v.

PRESCOTI,

 Defendant.

No. 2:15-cv-0421-EFB

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in this action brought pursuant to 42 U.S.C. § 1983. Defendant moves for summary judgment, arguing that plaintiff failed to exhaust his administrative remedies before filing this suit. ECF No. 30. For the following reasons, the motion must be granted.

I. Background

Plaintiff alleges that defendant violated his Eighth Amendment rights on February 13, 2015 when she smashed plaintiff’s finger in the food slot of his cell and then refused to provide him with medical care. ECF No. 22. Plaintiff prepared the complaint in this case on February 18, 2015, the same day he filed a grievance regarding the incident. ECF No. 1 at 19, 21. The complaint was docketed on February 23, 2015. *Id.* at 1.

Defendant’s evidence, which plaintiff does not contest, shows that a three-level grievance system was in place at plaintiff’s institution, Mule Creek State Prison, at the time of the incident.

1 ECF No. 30-4, Decl. of Giovacchini, ¶ 2. Plaintiff’s grievance regarding defendant’s alleged
2 misconduct, Log No. MCSP-15-00356, was being reviewed at the first and second levels when
3 plaintiff filed the complaint. *Id.*, ¶¶ 7-8. The grievance was finally determined at the third level
4 of review on July 30, 2015. ECF No. 30-5, Decl. of Voong, ¶ 8 & Ex. A.

5 **II. The Motion for Summary Judgment**

6 Defendant argues that the undisputed facts show that plaintiff failed to exhaust his
7 available administrative remedy prior to filing suit. For the reasons that follow, the undersigned
8 agrees.

9 **A. The Exhaustion Requirement**

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

22 Prisoners who file grievances must use a form provided by the California Department of
23 Corrections and Rehabilitation (CDCR Form 602), which instructs the inmate to describe the
24 problem and outline the action requested. Title 15 of the California Code of Regulations,
25 § 3084.2 provides further instructions, which include the direction to “list all staff member(s)
26 involved” and “describe their involvement.” Cal. Code Regs. tit. 15, § 3084.2(a)(3). If the
27 prisoner does not know the staff member’s name, first initial, title or position, he must provide

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1 “any other available information that would assist the appeals coordinator in making a reasonable
2 attempt to identify the staff member(s) in question.” *Id.*

3 The grievance process, as defined by the regulations, has three levels of review to address
4 an inmate’s claims, subject to certain exceptions. *See* Cal. Code Regs. tit. 15, § 3084.7.

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

7 Proper exhaustion of available remedies is mandatory, *Booth v. Churner*, 532 U.S. 731,
8 741 (2001), and “[p]roper exhaustion demands compliance with an agency’s deadlines and other
9 critical procedural rules[.]” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). For a remedy to be
10 “available,” there must be the “possibility of some relief” *Booth*, 532 U.S. at 738. Relying
11 on *Booth*, the Ninth Circuit has held:

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

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

15 Failure to exhaust is “an affirmative defense the defendant must plead and prove.” *Jones*,
16 549 U.S. at 216 (2007). To bear this burden:

17 [A] defendant must demonstrate that pertinent relief remained available, whether
18 at unexhausted levels of the grievance process or through awaiting the results of
19 the relief already granted as a result of that process. Relevant evidence in so
20 demonstrating would include statutes, regulations, and other official directives
21 that explain the scope of the administrative review process; documentary or
22 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.”

23 *Brown*, 422 F.3d at 936-37 (citations omitted). Once a defendant shows that the plaintiff did not
24 exhaust available administrative remedies, the burden shifts to the plaintiff “to come forward with
25 evidence showing that there is something in his particular case that made the existing and
26 generally available administrative remedies effectively unavailable to him.” *Albino v. Baca*, 747
27 F.3d 1162, 1172 (9th Cir. 2014) (en banc).

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1 A defendant may move for dismissal under Federal Rule of Civil Procedure 12(b)(6) in
2 the extremely rare event that the plaintiff’s failure to exhaust administrative remedies is clear on
3 the face of the complaint. *Id.* at 1166. “Otherwise, defendants must produce evidence proving
4 failure to exhaust” in a summary judgment motion brought under Rule 56. *Id.* If the court
5 concludes that plaintiff has failed to exhaust administrative remedies, the proper remedy is
6 dismissal without prejudice. *Wyatt v. Terhune*, 315 F.3d 1108, 1120, *overruled on other grounds*
7 *by Albino*, 747 F.3d 1162.

8 **B. Summary Judgment Standards**

9 Summary judgment is appropriate when there is “no genuine dispute as to any material
10 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Summary
11 judgment avoids unnecessary trials in cases in which the parties do not dispute the facts relevant
12 to the determination of the issues in the case, or in which there is insufficient evidence for a jury
13 to determine those facts in favor of the nonmovant. *Crawford-El v. Britton*, 523 U.S. 574, 600
14 (1998); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Nw. Motorcycle Ass’n v.*
15 *U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). At bottom, a summary judgment
16 motion asks whether the evidence presents a sufficient disagreement to require submission to a
17 jury.

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

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1 present specific facts that show there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Anderson*,
2 477 U.S. at 248; *Auvil v. CBS “60 Minutes”*, 67 F.3d 816, 819 (9th Cir. 1995).

3 A clear focus on where the burden of proof lies as to the factual issue in question is crucial
4 to summary judgment procedures. Depending on which party bears that burden, the party seeking
5 summary judgment does not necessarily need to submit any evidence of its own. When the
6 opposing party would have the burden of proof on a dispositive issue at trial, the moving party
7 need not produce evidence which negates the opponent’s claim. *See, e.g., Lujan v. National*
8 *Wildlife Fed’n*, 497 U.S. 871, 885 (1990). Rather, the moving party need only point to matters
9 which demonstrate the absence of a genuine material factual issue. *See Celotex*, 477 U.S. at 323-
10 24 (“[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a
11 summary judgment motion may properly be made in reliance solely on the ‘pleadings,
12 depositions, answers to interrogatories, and admissions on file.’”). Indeed, summary judgment
13 should be entered, after adequate time for discovery and upon motion, against a party who fails to
14 make a showing sufficient to establish the existence of an element essential to that party’s case,
15 and on which that party will bear the burden of proof at trial. *See id.* at 322. In such a
16 circumstance, summary judgment must be granted, “so long as whatever is before the district
17 court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is
18 satisfied.” *Id.* at 323.

19 To defeat summary judgment the opposing party must establish a genuine dispute as to a
20 material issue of fact. This entails two requirements. First, the dispute must be over a fact(s) that
21 is material, i.e., one that makes a difference in the outcome of the case. *Anderson*, 477 U.S. at
22 248 (“Only disputes over facts that might affect the outcome of the suit under the governing law
23 will properly preclude the entry of summary judgment.”). Whether a factual dispute is material is
24 determined by the substantive law applicable for the claim in question. *Id.* If the opposing party
25 is unable to produce evidence sufficient to establish a required element of its claim that party fails
26 in opposing summary judgment. “[A] complete failure of proof concerning an essential element
27 of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S.
28 at 322.

1 Second, the dispute must be genuine. In determining whether a factual dispute is genuine
2 the court must again focus on which party bears the burden of proof on the factual issue in
3 question. Where the party opposing summary judgment would bear the burden of proof at trial on
4 the factual issue in dispute, that party must produce evidence sufficient to support its factual
5 claim. Conclusory allegations, unsupported by evidence are insufficient to defeat the motion.
6 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, the opposing party must, by affidavit
7 or as otherwise provided by Rule 56, designate specific facts that show there is a genuine issue
8 for trial. *Anderson*, 477 U.S. at 249; *Devereaux*, 263 F.3d at 1076. More significantly, to
9 demonstrate a genuine factual dispute, the evidence relied on by the opposing party must be such
10 that a fair-minded jury “could return a verdict for [him] on the evidence presented.” *Anderson*,
11 477 U.S. at 248, 252. Absent any such evidence there simply is no reason for trial.

12 The court does not determine witness credibility. It believes the opposing party’s
13 evidence, and draws inferences most favorably for the opposing party. *See id.* at 249, 255;
14 *Matsushita*, 475 U.S. at 587. Inferences, however, are not drawn out of “thin air,” and the
15 proponent must adduce evidence of a factual predicate from which to draw inferences. *Am. Int’l*
16 *Group, Inc. v. Am. Int’l Bank*, 926 F.2d 829, 836 (9th Cir. 1991) (Kozinski, J., dissenting) (citing
17 *Celotex*, 477 U.S. at 322). If reasonable minds could differ on material facts at issue, summary
18 judgment is inappropriate. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). On
19 the other hand, the opposing party “must do more than simply show that there is some
20 metaphysical doubt as to the material facts Where the record taken as a whole could not lead
21 a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’”
22 *Matsushita*, 475 U.S. at 587 (citation omitted). In that case, the court must grant summary
23 judgment.

24 Concurrent with the motion for summary judgment, defendant advised plaintiff of the
25 requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure.
26 ECF No. 30-1; *see Woods v. Carey*, 684 F.3d 934 (9th Cir. 2012); *Rand v. Rowland*, 154 F.3d
27 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999); *Klinge v. Eikenberry*,
28 849 F.2d 409 (9th Cir. 1988).

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C. Analysis

Defendant has provided evidence that plaintiff did not exhaust his available administrative remedy before filing this action, as the PLRA requires. *McKinney v. Carey*, 311 F.3d 1198, 1200-01 (9th Cir. 2002) (holding that a prisoner does not comply with the PLRA by exhausting during the litigation but must instead exhaust prior to filing). Plaintiff has not contested this evidence or responded with any argument as to why he should be excused from the exhaustion requirement. Accordingly, the case must be dismissed without prejudice. *Id.* (noting that the proper remedy for failure to complete exhaustion prior to filing is dismissal without prejudice).

III. Order and Recommendation

Accordingly, it is hereby ORDERED that the Clerk of the Court randomly assign a United States District Judge to this case.

Because the undisputed evidence shows that plaintiff did not complete exhaustion of his administrative remedy before filing this action, it is further RECOMMENDED that defendant’s January 18, 2017 motion for summary judgment (ECF No. 30) be granted and the 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)(1). 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.” 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: September 27, 2017.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE