UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CARLOS J. GARCIA,

Plaintiff,

v.

BONNIE LEE, et al.,

Defendants.

No. 2:15-cv-1888 MCE CKD P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds against defendant Hogue on the amended complaint filed November 2, 2015, alleging that Hogue was deliberately indifferent to plaintiff's serious medical needs in violation of the Eighth Amendment. (ECF No. 13 ("FAC").) Before the court is defendant's motion for summary judgment on the ground that plaintiff failed to exhaust administrative remedies. (ECF No. 32.) Plaintiff has filed an opposition, and defendant has replied. (ECF Nos. 36 & 37.)

For the reasons set forth below, the undersigned will recommend that defendant's motion be denied.

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II. Legal Standards

A. Summary Judgment

Summary judgment is appropriate when it is demonstrated that 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). A party asserting that a fact cannot be disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. . ." Fed. R. Civ. P. 56(c)(1)(A).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 631. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.

In a summary judgment motion for failure to exhaust administrative remedies, the defendants have the initial burden to prove "that there was an available administrative remedy, and that the prisoner did not exhaust that available remedy." Albino, 747 F.3d at 1172. If the defendants carry that burden, "the burden shifts to the prisoner to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him." Id. The ultimate burden of proof remains with defendants, however. Id. "If material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts." Id. at 1166.

B. Exhaustion Requirement

Section 1997(e)(a) of Title 42 of the United States Code 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. § 1997(e)(a) (also known as

the Prison Litigation Reform Act ("PLRA")). A prisoner must exhaust his administrative remedies before he commences suit. McKinney v. Carey, 311 F.3d 1198, 1199–1201 (9th Cir. 2002). Failure to comply with the PLRA's exhaustion requirement is an affirmative defense that must be raised and proved by the defendant. Jones v. Bock, 549 U.S. 199, 216 (2007). In the Ninth Circuit, a defendant may raise the issue of administrative exhaustion in either (1) a motion to dismiss pursuant to Rule 12(b)(6), in the rare event the failure to exhaust is clear on the face of the complaint, or (2) a motion for summary judgment. Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc). An untimely or otherwise procedurally defective appeal will not satisfy the exhaustion requirement. Woodford v. Ngo, 548 U.S. 81, 84 (2006).

III. Facts

A. The FAC

In a verified complaint, plaintiff alleges that in January 2014, a physician at California Correctional Institute issued him a medical chrono for Boost nutritional supplements.[1] (FAC, ¶ 12.) At the time, plaintiff was 5'11" tall and weighed 124 pounds. (Id., ¶ 14.) Boost is a liquid nutritional supplement containing 240 calories per carton. (Id., ¶ 13.) Plaintiff attaches the chrono, which indicates that plaintiff was to receive "2 cans 2x/daily" through July 28, 2014. (FAC, Ex. A.) Over the next three months, plaintiff's weight increased to 132 pounds. (Id., ¶ 15.)

On June 4, 2014, plaintiff was transferred to High Desert State Prison. (Id., ¶ 17.) When he arrived at HDSP, he was examined by defendant Hogue, a Registered Nurse. (Id., ¶¶ 9, 18.) Plaintiff told Hogue about his chrono for nutritional supplements. (Id., ¶ 19.)

Hogue "failed to properly review plaintiff's . . . Health Care Transfer Information Form … and medical records which stated plaintiff's chrono for liquid nutritional supplements[.]" (Id., ¶ 22.) Plaintiff attaches the transfer form, noting his medical chrono for "2 cans" and signed by defendant Hogue on June 4, 2014. (Id., Ex. B.) Plaintiff attaches a second form, also dated June

[1] Because the court screened in plaintiff's Eighth Amendment claim concerning Hogue's failure to honor a medical chrono for Boost supplements, this summary omits allegations not relevant to that claim. (See ECF No. 15 at 2; ECF No. 19.)

4, 2014 and signed by Hogue, which notes that no medications were ordered or given to plaintiff. (Id., Ex. C.) Plaintiff alleges that Hogue "did not provide or place an order" for plaintiff to receive Boost. (Id., ¶ 22.)

"On June 8, 2014, plaintiff submitted a CDC Health Care Services Request Form requesting liquid nutritional supplements . . . as prescribed, to no avail." (Id., ¶ 25.) On June 15, 2014, plaintiff submitted a second Health Care Services Request Form requesting his Boost supplements. (Id., ¶ 26.) On June 23, 2014, still not having received the supplement, plaintiff filed a health care appeal at the first level. (Id., ¶ 30.) Three days later, an HDSP physician interviewed plaintiff about the appeal and placed an order for him to receive four Boost supplements per day. (Id., ¶ 31.) On July 24, 2014, plaintiff's appeal was granted in full at the first level. (Id., ¶ 32.) Between April 28, 2014 and June 27, 2014, plaintiff lost four pounds as a result of not receiving daily supplements. (Id., ¶ 33.)

Plaintiff claims that defendant Hogue was deliberately indifferent to his serious medical needs on June 4, 2014 "by not taking the necessary steps to ensure that plaintiff received nutritional supplements . . . as prescribed." (Id., ¶¶ 93-95.)

B. Undisputed Facts

The following facts are undisputed unless otherwise noted[2]:

During the relevant period, plaintiff was a prisoner within the custody of the California Department of Corrections and Rehabilitation (CDCR) and was incarcerated at HDSP. (DUF 1.) An administrative inmate appeal process was available for plaintiff's use at HDSP. (DUF 2.) Between June 4, 2014 and September 8, 2015, plaintiff submitted five health care appeals that were received by the HDSP Appeals Office. (DUF 3.)

Appeal Number HDSP-HC-1402848 was received for first level review by the HDSP Appeals Office on June 23, 2014. (DUF 4.) Defendant attaches a copy of the appeal, in which plaintiff wrote: "I'm requesting the refill of my migraine medication (Sumatripton) and to receive my Boost Drinks as prescribed to no avail." (Silkwood Decl., Ex. A, ECF No. 32-4 at 7.)

[2] See Def's Statement of Undisputed Facts (ECF No. 32-2); Plff's Response to Def's Statement of Undisputed Facts (ECF No. 36-2).

Plaintiff attached his June 15, 2015 Health Care Services Request Form asking to "receive my Boost drinks as prescribed." (Id. at 9.) The appeal did not mention Hogue and was not categorized or investigated as a staff complaint. (DUF 7.) Hogue was not interviewed regarding the appeal. (Id.)

On June 27, 2014, a Dr. Jeanne Windsor interviewed plaintiff about this appeal. (Silkwood, Decl., Ex. A, ECF No. 32-4 at 5-6.) Plaintiff told Windsor that, on June 4, 2014, "the nurse later identified as defendant J. Hogue" asked plaintiff why he was receiving Boost drinks and informed him that "We don't give Boost drinks to inmates just because they are underweight." (Garcia Decl., ¶ 5, ECF No. 36-1 at 4.) Windsor noted that plaintiff had an order for nutritional supplements, the reviewer granted plaintiff's appeal at the first level. (Silkwood, Decl., Ex. A, ECF No. 32-4 at 5-6.)

Neither party contends that plaintiff's remaining four appeals at HDSP served to exhaust his federal claim against defendant Hogue. (See DUF 9-17.)

IV. Analysis

Defendant argues that Appeal Number HDSP-HC-1402848 did not suffice to exhaust plaintiff's Eighth Amendment claim against defendant Hogue. Plaintiff disagrees.

The Prison Litigation Reform Act of 1995 (PLRA) "attempts to eliminate unwarranted federal-court interference with the administration of prisons, and thus seeks to afford corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." Reyes v. Smith, 810 F.3d 654, 657 (9th Cir. 2016) (internal citations omitted). "Requiring exhaustion provides prison officials a fair opportunity to correct their own errors and creates an administrative record for grievances that eventually become the subject of federal court complaints." Id. (internal citations omitted). Before bringing a federal claim under § 1983, a prisoner must "properly" exhaust administrative remedies. Woodford, 548 U.S. at 93. Proper exhaustion under CDCR's administrative appeals process "demands compliance with [its] deadlines and other procedural rules[.]" Id. at 91. Proper exhaustion also requires a grievance to be factually sufficient to "alert the prison as to the nature of the wrong for which redress is sought." Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). "The grievance process is only

required to 'alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued.'" Reyes, 810 F.3d at 659, quoting Jones, 549 U.S. at 219.

CDCR regulations governing the administrative appeal process require inmates to describe the specific issue under appeal and the relief requested; identify all staff members involved and describe their involvement; and include only one issue or related set of issues per appeal. Cal. Code Regs. tit. 15, § 3084.2(a)(1)-(4). The California Code of Regulations states:

> The inmate or parolee shall list all staff member(s) involved and shall describe their involvement in the issue. To assist in the identification of staff members, the inmate or parolee shall include the staff member's last name, first initial, title or position, if known, and the dates of the staff member's involvement in the issue under appeal. If the inmate or parolee does not have the requested identifying information about the staff member(s), he or she shall provide any other available information that would assist the appeals coordinator in making a reasonable attempt to identify the staff member(s) in question.

Cal. Code Regs. tit. 15, § 3084.2(a)(3). Administrative remedies shall not be considered exhausted relative to any new issue, information, or person later named by appellant that was not included in the originally submitted appeal form, and addressed through all levels of administrative review. Cal. Code Regs. tit., 15, § 3084.1(b).

To exhaust the administrative grievance process, prisoners must ordinarily proceed through several levels of review: a first formal level; a second formal level; and a third formal level, also known as the Director's Level. Cal. Code Regs. tit. 15, § 3084.5(a)-(d). Generally, a prisoner must obtain a decision or final adjudication at the third formal level of review in order to exhaust his administrative remedies for the claims underlying his complaint before he can submit them to the district court. Rhodes v. Robinson, 621 F.3d 1002, 1005 (9th Cir. 2010). However, in the Ninth Circuit, "a prisoner need not press on to exhaust further levels of review once he has either received all 'available' remedies at an intermediate level of review or been reliably informed by an administrator that no remedies are available." Brown v. Valoff, 422 F.3d 926, 940 (9th Cir. 2005).

Plaintiff declares that, though he did not identify Hogue in his written appeal, he informed Dr. Windsor in the first-level interview that he requested his prescribed supplements from Hogue,

who told him: "We don't give Boost drinks to inmates just because they are underweight." (ECF No. 36-1 at 4.) Thus, plaintiff argues, the appeal process sufficiently put prison officials on notice of his claim that Hogue was deliberately indifferent to his serious medical needs. See Wakefield v. Thompson, 177 F.3d 1160, 1165 (9th Cir. 1999) (deliberate indifference may be shown when prison officials ignore express orders from a prisoner's treating physician).

The Ninth Circuit recently held that a prisoner exhausts available administrative remedies "despite failing to comply with a procedural rule if prison officials ignore the procedural problem and render a decision on the merits of the grievance at each available step of the administrative process." Reyes, 810 F.3d at 658. However, "this does not mean that a claim decided on the merits must be deemed exhausted as to all possible defendants." Evans v. Muniz, 2016 WL 1559707, *3 (N.D. Cal. April 18, 2016).

In Reyes, the Ninth Circuit held that an inmate exhausted his federal claims, alleging that defendant prison doctors denied him pain medication, when prison officials knew the doctors were members of the committee that decided plaintiff should not receive the medication, and this decision was cited by prison officials in denying Reyes' grievance. On this record, the Ninth Circuit held, "the state defendants cannot argue that prison officials were unaware of the involvement of" the doctors in the events alleged. Id. at 659. Thus, even though Reyes did not name the physicians in his grievance in violation of Cal. Code Regs. tit. 15 § 3084.2, the Ninth Circuit concluded that the grievance sufficiently put prison officials on notice of the wrongs alleged so as to exhaust his federal claims. Id.

Defendants argue that the instant case is distinguishable from Reyes, as "plaintiff did not raise the issue of deliberate indifference in his appeal so prison officials were unaware of his claim" that Hogue had been deliberately indifferent to his serious medical needs. (ECF No. 37 at 4-5.) This argument has some merit, as plaintiff could have simply explained in his written grievance, per prison regulations, that on June 4, 2014, Hogue knew of and ignored his medical chrono for Boost supplements," thus putting officials on notice of the gravamen of his federal complaint.

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Instead, plaintiff requested to "receive my Boost Drinks as prescribed to no avail": a written grievance that did not alert officials to Hogue's involvement. However, given plaintiff's declaration that he verbally informed Dr. Windsor of Hogue's involvement in the first-level interview, and in light of the Ninth Circuit's holding in Reyes, the undersigned concludes that defendant is not entitled to summary judgment on the basis of plaintiff's failure to exhaust administrative remedies. Rather, drawing all inferences in plaintiff's favor, a finder of fact could determine that prison officials were made aware of Hogue's disregard of plaintiff's medical chrono in the course of the inmate grievance process. Moreover, as plaintiff's grievance was granted at the first level, he was not required to pursue further administrative remedies.

Accordingly, IT IS HEREBY RECOMMENDED that defendant's motion for summary judgment (ECF No. 32) be denied.

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." 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: January 5, 2017

CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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