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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAUL CERVANTES,  
Plaintiff,  
v.  
SERGEANT WILLIAMSON, et al.,  
Defendants.

No. 2:15-cv-02138 DB

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, filed this civil rights action seeking relief under 42 U.S.C. § 1983 alleging excessive force against correctional officers for taking him to the ground during an escort. Pending before the court is defendant Burciaga’s motion for summary judgment for plaintiff’s alleged failure to exhaust his available administrative remedies. (ECF No. 29.) Plaintiff filed an opposition to the motion (ECF No. 34), and defendant filed a reply (ECF No. 37). Neither defendant Burciaga nor plaintiff responded to the court’s order directing them to complete and return the form indicating their consent to jurisdiction of the magistrate judge or request for reassignment to a district judge. Accordingly, the clerk will be directed to randomly assign this case to a district judge.

For the reasons outlined below, the undersigned respectfully recommends that the district court grant defendant’s motion for summary judgment and dismiss this case without prejudice.

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1 **I. Factual Background**

2 Plaintiff is proceeding on his third amended complaint (TAC) against defendant Burciaga.  
3 (ECF No. 13.) Plaintiff alleges that while housed at California State Prison, Sacramento (CSP-  
4 Sac), he was experiencing hallucinations on April 28, 2015. He claims that he requested to see a  
5 doctor and was being escorted by defendant Burciaga. During this escort, plaintiff alleges that  
6 defendant Burciaga threw him to the ground and assaulted him without provocation. Plaintiff  
7 asserts an Eighth Amendment claim for excessive force against defendant Burciaga for this  
8 incident.

9 On June 2, 2015, plaintiff filed an inmate appeal -- which was screened as a medical  
10 request -- demanding to see an eye doctor and medical doctor. (ECF No. 34 at 5-6.) Plaintiff  
11 complained that his vision and hearing were deteriorating and that he could not sleep. (Id. at 5.)  
12 In this appeal, plaintiff recounted an incident from April 28, 2015 where he left his cell due to  
13 hallucinations he was suffering while on a hunger strike to see a nurse. (Id.) The appeal further  
14 alleges that on the way back to his cell plaintiff was hit on the head, thrown to the ground, and  
15 called racial slurs. (Id. at 6.) The appeal does not state who precisely was responsible, but  
16 alludes to defendant Burciaga and another correctional officer. (Id.) The appeal also states that  
17 plaintiff blacked out after the incident for three weeks, and only then found out that he had been  
18 cited for assaulting a correctional officer. (Id.)

19 The appeal does not specifically complain that excessive force was used, nor does it seek  
20 to hold defendant Burciaga or the other correctional officer accountable for the incident. The  
21 only requests made are for further medical treatment and examination, as well as copies of  
22 medical records and the incident report review issued on May 28, 2015. (Id.)

23 Plaintiff filed his initial complaint in this court on October 13, 2015 naming Burciaga and  
24 correctional officer Williamson as defendants. (ECF No. 1.) The original complaint was  
25 screened and dismissed without prejudice with leave to amend by the magistrate judge previously  
26 assigned to this case, Judge Caroline Delaney. (ECF No. 6.) Plaintiff then filed a first amended  
27 complaint and second amended complaint in succession. (ECF Nos. 9; 11.) Judge Delaney  
28 screened and dismissed the second amended -- which named Burciaga as the sole defendant --

1 without prejudice. (ECF No. 12.) Plaintiff then filed the TAC (ECF No. 13), Judge Delaney  
2 screened and ordered by served on defendant Burciaga. (ECF Nos. 14; 18.) Defendant Burciaga  
3 waived service and filed an answer. (ECF Nos. 21; 23.) Defendant Burciaga now moves for  
4 summary judgment on the basis that plaintiff did not exhaust his administrative remedies as  
5 required by law. (ECF No. 29.)

## 6 **II. Legal Standard**

7 By the Prison Litigation Reform Act of 1995 (PLRA), Congress amended 42 U.S.C. §  
8 1997e to provide that “[n]o action shall be brought with respect to prison conditions under section  
9 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other  
10 correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C.  
11 § 1997e(a). The exhaustion requirement “applies to all inmate suits about prison life, whether  
12 they involve general circumstances or particular episodes, and whether they allege excessive  
13 force or some other wrong.” Porter v. Nussle, 534 U.S. 516, 532 (2002).

14 The United States Supreme Court has ruled that exhaustion of prison administrative  
15 procedures is mandated regardless of the relief offered through such procedures. See Booth v.  
16 Churner, 532 U.S. 731, 741 (2001). The Supreme Court has also cautioned against reading  
17 futility or other exceptions into the statutory exhaustion requirement. See id. at 741 n. 6.  
18 Moreover, because proper exhaustion is necessary, a prisoner cannot satisfy the PLRA exhaustion  
19 requirement by filing an untimely or otherwise procedurally defective administrative grievance or  
20 appeal. See Woodford v. Ngo, 548 U.S. 81, 90-93 (2006). “[T]o properly exhaust administrative  
21 remedies prisoners ‘must complete the administrative review process in accordance with the  
22 applicable procedural rules,’ [ ] - rules that are defined not by the PLRA, but by the prison  
23 grievance process itself.” Jones v. Bock, 549 U.S. 199, 218 (2007) (quoting Woodford, 548 U.S.  
24 at 88). See also Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (“The California prison  
25 system’s requirements ‘define the boundaries of proper exhaustion.’”).

26 In California, prisoners may appeal “any policy, decision, action, condition, or omission  
27 by the department or its staff that the inmate or parolee can demonstrate as having a material  
28 adverse effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a).

1 Most appeals progress through three levels of review. See id. § 3084.7. The third level of review  
2 constitutes the decision of the Secretary of the California Department of Corrections and  
3 Rehabilitation and exhausts a prisoner’s administrative remedies. See id. § 3084.7(d)(3). A  
4 California prisoner is required to submit an inmate appeal at the appropriate level and proceed to  
5 the highest level of review available to him. Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir.  
6 2005); Bennett v. King, 293 F.3d 1096, 1098 (9th Cir. 2002).

7 A prisoner may be excused from complying with the PLRA’s exhaustion requirement if  
8 he establishes that the existing administrative remedies were effectively unavailable to him. See  
9 Albino v. Baca, 747 F.3d 1162, 1172-73 (9th Cir. 2014). For example, where prison officials  
10 improperly screen out inmate grievances, they can render administrative remedies effectively  
11 unavailable. See Sapp v. Kimbrell, 623 F.3d 813, 823 (9th Cir. 2010). In such a case, “the  
12 inmate cannot pursue the necessary sequence of appeals[.]” Id. See also Nunez v. Duncan, 591  
13 F.3d 1217, 1226 (9th Cir. 2010) (excusing an inmate’s failure to exhaust because he was  
14 precluded from exhausting his administrative remedies by a warden’s mistaken instruction to him  
15 that a particular unavailable document was needed for him to pursue his inmate appeal); Marella,  
16 568 F.3d 1024 (excusing an inmate’s failure to exhaust because he did not have access to the  
17 necessary grievance forms to timely file his grievance).

18 The PLRA exhaustion requirement is not jurisdictional but rather creates an affirmative  
19 defense that defendants must plead and prove. See Jones, 549 U.S. at 216 (“[I]nmates are not  
20 required to specially plead or demonstrate exhaustion in their complaints.”); Albino, 747 F.3d at  
21 1168. A defendant may move for dismissal under Federal Rule of Civil Procedure 12(b)(6) “[i]n  
22 the rare event” that a prisoner’s failure to exhaust is clear on the face of the complaint. Albino,  
23 747 F.3d at 1168 & 1169. More typically, defendants are required to move for summary  
24 judgment under Federal Rule of Civil Procedure 56 and produce probative evidence that proves a  
25 prisoner’s failure to exhaust. See id. at 1166. If the undisputed evidence viewed in the light most  
26 favorable to the prisoner demonstrates a failure to exhaust, the court should grant defendant’s  
27 motion for summary judgment. On the other hand, if there are material facts in dispute, the court  
28 should deny defendant’s motion summary judgment. See id.

1 **III. Legal Analysis**

2 It is uncontested that between the April 28, 2015 incident and the filing of the original  
3 complaint in this court on October 13, 2015, plaintiff filed just one inmate appeal concerning  
4 prison conditions. (ECF No. 29-5 at 3-4, 7.) This single appeal about living conditions at CSP-  
5 Sac concerns the theft of allegedly confidential material from plaintiff. (Id. at 9-14.) This appeal  
6 is unrelated to the present action.

7 As noted above, however, plaintiff also filed a medical appeal in which he references the  
8 incident in his complaint. (See ECF Nos. 29-5 at 7; 34 at 5-6.) This medical appeal, log number  
9 SAC-H-15-01724, was filed on June 2, 2015. (ECF No. 34 at 5-6.) Defendant Burciaga contends  
10 that this medical appeal is insufficient to satisfy the PLRA because it is not an appeal concerning  
11 living conditions and it does not assert that excessive force was used. (ECF No. 37 at 2.) The  
12 undersigned agrees.

13 Inmate grievances must be sufficient to notify prison personnel of a problem for  
14 exhaustion purposes. Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009). To be sure, SAC-  
15 H-15-01724 infers that correctional officers used force against plaintiff, causing him to bleed and  
16 black out from a head injury. (ECF No. 34 at 5-6.) However, the grievance does not assert  
17 excessive force or allege misconduct by the named correctional officers; rather it seeks access to  
18 medical treatment. (Id.) Specifically, plaintiff seeks access to an eye doctor and medical doctor.  
19 (Id.) Furthermore, the medical issues for which this grievance seeks treatment do not appear to  
20 be tied to this use of force. Rather, plaintiff alleges that he is losing his hearing and vision, as  
21 well as suffers from headaches that interrupt his sleep. (Id. at 5.)

22 While SAC-H-15-01724 refers to the incident in the present case, it is apparent on the face  
23 of the grievance that it does not seek relief for this grievance. A court may excuse a prisoner  
24 from complying with the exhaustion requirement when prison officials render administrative  
25 remedies effectively unavailable even if prison officials did not act in bad faith. See Sapp, 623  
26 F.3d at 822; Nunez, 591 F.3d at 1224. The Ninth Circuit has cited with approval a Seventh  
27 Circuit Court of Appeals decision for the proposition that “prison officials’ failure to respond to a  
28 properly filed grievance makes remedies ‘unavailable’ and therefore excuses a failure to exhaust.”

1 Sapp, 623 F.3d at 822-23 (citing Dole v. Chandler, 438 F.3d 804 (7th Cir. 2006)). To consider  
2 the current situation within this exception would go beyond the express purpose of the exemption,  
3 which is to provide prisoners with a remedy when **prison officials** are at fault for rendering  
4 administrative remedies unavailable.

5 Plaintiff does not contend that prison officials rendered administrative remedies  
6 unavailable to him. Rather, he simply asserts that through the filing of a medical grievance  
7 requesting wholly different relief than that requested in the current action, prison personnel were  
8 on notice about the alleged violation of his Eighth Amendment rights. Were the court to agree  
9 however, it would exceed the very limited authority it has to excuse noncompliance with the  
10 PLRA. The undisputed facts establish that plaintiff did not file a prison grievance complying  
11 with PLRA standards alleging misconduct by defendant Burciaga or seeking relief because of any  
12 actions -- legal or illegal, justified or unjustified -- undertaken by defendant Burciaga. (See ECF  
13 Nos. 29-5 at 3-4, 7; 34 at 5-6.)

14 For the foregoing reasons, the undersigned respectfully recommends that defendant  
15 Burciaga's motion for summary judgment be granted and plaintiff's TAC be dismissed without  
16 prejudice with leave to refile after exhausting administrative remedies.

17 **IV. Conclusion**

18 As noted above, neither of the parties have consented to magistrate judge jurisdiction,  
19 therefore IT IS HEREBY ORDERED that the clerk's office randomly assign a district judge to  
20 this case so that these recommendations may be ruled upon. Furthermore, IT IS HEREBY  
21 RECOMMENDED that:

22 1. Defendant Burciaga's motion for summary judgment for failure to exhaust  
23 administrative remedies be granted; and


24 2. Plaintiff's TAC be dismissed without prejudice with leave to refile after  
25 exhausting administrative remedies pursuant to the PLRA.

26 These findings and recommendations are submitted to the United States District Judge  
27 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
28 after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned  
2 “Objections to Magistrate Judge’s Findings and Recommendations.”

3 Any reply to the objections shall be served and filed within fourteen days after service of  
4 the objections. Failure to file objections within the specified time may waive the right to appeal  
5 the District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst,  
6 951 F.2d 1153 (9th Cir. 1991).

7 Dated: February 27, 2017

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11 DEBORAH BARNES  
12 UNITED STATES MAGISTRATE JUDGE

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