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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

No. 2:15-cv-2138 KJM DB

ORDER

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. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On February 28, 2017, the magistrate judge filed findings and recommendations, which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within seven days. (ECF No. 45.) Plaintiff has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court declines to adopt the findings and recommendations and refers the matter back to the assigned magistrate judge for further proceedings.

1 This action is proceeding on plaintiff's third amended complaint (TAC), which raises an  
2 Eighth Amendment excessive force claim against defendant Burciaga based on an alleged  
3 incident on April 28, 2015. ECF No. 45 at 2. Defendant Burciaga has moved for summary  
4 judgment based on failure to exhaust administrative remedies, ECF No. 29, and the magistrate  
5 judge recommends the motion be granted, ECF No. 45. In support of the motion, defendant  
6 presents evidence that the Appeals Coordinator at California State Prison-Sacramento only  
7 accepted one inmate grievance from plaintiff for review between April 28, 2015, when the  
8 incident occurred, and October 13, 2015, when this action was filed. *See* ECF No. 29-2 and  
9 evidence cited therein. In opposition to the motion, plaintiff submitted evidence that he had filed  
10 another inmate appeal on June 2, 2015. ECF No. 34 at 5. Plaintiff styled the appeal as an  
11 "Emergency Appeal"; at the top, on June 17, 2015, someone other than plaintiff wrote: "Non-  
12 emergency, in CTC 1 on suicide precaution." *Id.* Plaintiff contends he was granted all the relief  
13 requested at this level of appeal and therefore was not required to pursue administrative remedies  
14 further. ECF No. 34 at 3. The magistrate judge finds this grievance did not "specifically  
15 complain that excessive force was used, nor does it seek to hold defendant Burciaga or the other  
16 correctional officer accountable for the incident." ECF No. 45 at 2.

17 The grievance appended by plaintiff to his opposition reads as follows:

18 On 4/28/15 I had 18 days on a hunger strike against I.E.X and  
19 before I went out of my cell A-3-204 at the time I reported to  
20 Burciaga and Rickman the [sic] I wanted to speak to a prison psych  
21 before I come out of the cell, for I was having serious hallucinations  
22 and hearing voices and the I=Cerriantes [illegible] was a threat to  
23 people he say after Burciago C/O you go for your hunger strike  
24 check up, so I went. Nurse Balbasqua RN took my vitals, weight it  
25 me, and when I was coming back to the Bld=through 4 close dining  
26 door something hit me on my head, and I hear somebody saying  
27 and calling me wet back, and I knew I was been a victim of racial  
28 discrimination, so I start kicking deffensing [sic] myself, next thing  
I remember I was on front of the house with a cut on my head 2  
inches or one and I hear Sgt. Williamson say throw him back in his  
cell he is one of those hungry strike rebels with a head injury. I  
support to have further med examination 2 days later I black out  
and I just come back from hospital CTC Bld # 8 Seat B-213 I spent  
almost 3 weeks and I just got my copy of 115 saying the I assaulted  
[sic] an officer, I was the one who got assaulted a handicap.

1 ECF No. 34 at 5-6. Plaintiff requested the following relief:

2 I request further medication examination and X Rays for my back  
3 my neck. My state appointed attorney and get copies of medical  
4 psych report is this inmate was psychotic at the time of the incident.  
I.S.U. Sgt. K. Steele and Lt. R. Sparks Incident Report Review My  
28, 2015 My attorney already have copies of these documents.

5 *Id.* at 6.

6 In his objections, plaintiff states “when I file my complaint against Officer Burciaga on  
7 4/28/15 I clearly explain the one grievance against Officer Burciaga it was addressed to custody  
8 not medical; but custody send it to medical and I was placed in suicidal [sic] watch every time I  
9 try to complaint [sic] about racial mistreatment or other prison condition the Department of  
10 Correction prison staff send me to a mental hospital . . . When before I file my 602 J Cervantes  
11 sent a 22 form is inmate request to see Sgt. Williamson; up to this day no response then I send  
12 another 602 to Captain Canary supervicing [sic] the whole yard never got no interview or never  
13 response. . . .” ECF No. 46 at 1.

14 Review of the record shows that the 115 referred to in the inmate appeal attached to  
15 plaintiff’s opposition is appended to plaintiff’s original complaint. ECF No. 1 at 6-7. That rules  
16 violation report is written by defendant Burciaga, and states that as Burciaga was escorting  
17 plaintiff from a medical examination plaintiff “became very aggressive by yelling, screaming and  
18 kicking and moving in an aggressive manner during the escort, in an attempt to break free of my  
19 grasp. I utilized immediate force to overcome the resistance and to stop the threat of  
20 CERVANTES kicking me or other Staff members. Specifically, I maintained my grasp of  
21 CERVANTES’s upper left arm grasping the jumpsuit I spun CERVANTES to my left causing  
22 him to lose his balance and fall to the floor laying on his stomach. . . .” *Id.* at 6. Plaintiff pleaded  
23 guilty to the rules violation and told the hearing officer that he “was most likely defending  
24 [him]self.” *Id.* at 7. Plaintiff also appended to the original complaint a screening form for Inmate  
25 Appeal Log Number: SAC-P-15-02951, rejecting the appeal as incomplete. *Id.* at 10. This is a  
26 different appeal log number from either the grievance submitted by defendant in support of the  
27 motion for summary judgment or the appeal appended to plaintiff’s opposition. *See* ECF No. 29-  
28 2 at 2; ECF No. 45 at 5. That grievance includes an allegation that plaintiff “was hit by staff

1 member, C/O Burciaga, and was forced to defend [sic] myself.” ECF No. 1 at 14. Also  
2 appended to the original complaint is a mental health assessment of plaintiff performed in  
3 connection with the rules violation report, that includes a finding that plaintiff “was psychotic at  
4 the time of this incident.” *Id.* at 20.

5 The foregoing shows that there have been more administrative proceedings in connection  
6 with the April 28, 2015 incident than were presented to the court by defendant in support of his  
7 motion for summary judgment. In particular, defendant did not present the court with Inmate  
8 Appeal Log Number: SAC-P-15-02951, even though that appeal was received and rejected  
9 during the same time frame as the other grievance filed by defendant with his motion for  
10 summary judgment. In addition, plaintiff contends in his objections that his mental health  
11 hospitalizations have interfered with his ability to pursue administrative remedies. ECF No. 46 at  
12 1. As the magistrate judge correctly noted, defendant is required to plead and prove that plaintiff  
13 failed to exhaust administrative remedies, and the exhaustion requirement may be excused if an  
14 inmate “establishes that the existing administrative remedies were unavailable to him.” ECF No.  
15 45 at 4.

16 After *de novo* review of the record in this action, the court concludes that defendant has  
17 failed to meet his burden of proving that plaintiff failed to exhaust administrative remedies.  
18 Further, the court concludes that, while the record is not clear, there is at least some evidence to  
19 suggest the exhaustion requirement might be excused in this case. For these reasons, defendant’s  
20 motion for summary judgment will be denied without prejudice.

21 Accordingly, IT IS HEREBY ORDERED that:

- 22 1. The findings and recommendations filed February 28, 2017 (ECF No. 45) are not  
23 adopted;
- 24 2. Defendant Burciaga’s motion for summary judgment for failure to exhaust  
25 administrative remedies is denied without prejudice; and
- 26 3. This matter is referred back to the assigned magistrate judge for further  
27 proceedings.

28 DATED: March 30, 2017