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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANIEL ALEM,  
  
Plaintiff,  
  
v.  
  
M. CURRY, et al.,  
  
Defendants.

No. 2:17-CV-0343-KJM-DMC-P  
  
ORDER

Plaintiff, a prisoner proceeding pro se, brings this civil rights action under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided by Eastern District of California local rules.

On May 6, 2020, the magistrate judge filed findings and recommendations, which were served on the parties and which contained notice that the parties may file objections within the time specified therein. Plaintiff filed timely 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 reviewed the file, for the reasons explained below, the court adopts the findings relevant to the contention of defendants Ojo and Arnold that plaintiff failed to exhaust administrative remedies as to his claim against those defendants and therefore dismisses those claims as required by *McKinney v. Carey*, 311 F.3d 1198 (9th Cir. 2002). The court declines to adopt the findings in section V.B. and C. and refers the matter back to the assigned magistrate judge for further proceedings consistent with this order.

1 By this action, plaintiff claims that defendants Curry, Ojo and Arnold violated his  
2 rights under the Equal Protection Clause of the Fourteenth Amendment to the United States  
3 Constitution. Findings and Recommendations, ECF No. 41, at 2 (citing Compl., ECF No. 1).  
4 Specifically, plaintiff alleges that defendant Curry improperly rehoused plaintiff with an inmate  
5 of the same race as plaintiff and, when plaintiff complained the new cell-mate was “an ‘active  
6 prison gang member’” denied plaintiff’s request to be housed with an inmate of a different race  
7 and charged plaintiff with violating prison rules by refusing the housing order. *Id.* at 1-2.  
8 Defendant Ojo interviewed plaintiff and ultimately found plaintiff guilty of the charge of refusing  
9 the order, and defendant Arnold denied plaintiff’s grievance at the second level of administrative  
10 review. *Id.* at 2.

11 Defendants Ojo and Arnold

12 The findings and recommendations set out correctly the facts and legal principles  
13 applicable to defendants’ contention that plaintiff failed to exhaust administrative remedies with  
14 respect to his claim against defendants Ojo and Arnold, and correctly conclude that plaintiff failed  
15 to exhaust administrative remedies as to either defendant. Given this finding, however, and the  
16 threshold nature of exhaustion requirements, the proper disposition is dismissal without prejudice  
17 of plaintiff’s claim as to these two defendants. *See McKinney*, 311 F.3d at 1200; *see also Lira v.*  
18 *Herrera*, 427 F.3d 1164, 1173 (9th Cir. 2005). The court therefore declines to adopt sections  
19 V.B.2, V.B.3, or V.C. at 23:10-25 of the findings and recommendations and will instead dismiss  
20 plaintiff’s claim against defendants Ojo and Arnold without prejudice for failure to exhaust  
21 administrative remedies.

22 Defendant Curry

23 The magistrate judge recommends summary judgment for defendant Curry both on  
24 the merits of plaintiff’s claim and on the grounds of qualified immunity. *See* ECF No. 41 at 16-  
25 18, 21-24. The magistrate judge finds defendants have presented evidence that defendant  
26 Curry’s housing order was “made to free up cell space and . . . in accordance with non-  
27 discriminatory CDCR procedure” and that “plaintiff’s assertion that Curry’s actions were racially  
28 motivated are entirely conclusory and unsupported by any other document submitted to the court

1 for review.” ECF No. 41 at 17–18. Plaintiff objects to the magistrate judge’s finding that  
2 plaintiff has failed to present evidence sufficient to establish a triable issue of material fact that  
3 Curry’s decision to rehouse plaintiff was racially motivated. ECF No. 44 at 7–10. Plaintiff’s  
4 objection is well-taken.

5           The findings and recommendations correctly set out the legal standards that apply  
6 to plaintiff’s Equal Protection claim, ECF No. 41 at 16; those standards are adopted in full. As  
7 noted, in order to prevail on his claim plaintiff must prove that defendant Curry’s housing order  
8 was based on racially motivated discriminatory intent. *Id.* In his opposition to the motion for  
9 summary judgment, ECF No. 37 at 3, and in his objections, ECF No. 44 at 7-10, plaintiff points  
10 to defendant Curry’s description of his purpose in ordering plaintiff rehoused, which defendant  
11 Curry provided in the Rules Violation Report against plaintiff; defendant Curry wrote that he  
12 “attempted to move [plaintiff] out of his cell for purposes of compaction with another inmate  
13 within his Ethnicity (Other).” ECF No. 1 at 26. This statement in the Rules Violation Report  
14 gives rise to a reasonable inference that defendant Curry’s rehousing order was racially motivated  
15 and is sufficient to create a triable issue of material fact on plaintiff’s claim against defendant  
16 Curry. For this reason, the court declines to adopt section V.B.1 of the findings and  
17 recommendations from 17:13-18:27.

18           The magistrate judge also concludes that defendant Curry is entitled to qualified  
19 immunity based on the magistrate judge’s interpretation of the state of the evidence on the merits  
20 of plaintiff’s claim. The legal principles applicable to plaintiff’s Equal Protection claim set out  
21 by the magistrate judge and adopted in full by this order are clearly established law for purposes  
22 of a qualified immunity analysis. *See* ECF No. 41 at 21-24. Defendant Curry sought qualified  
23 immunity on the basis of an assertion that the facts were undisputed. *See* ECF No. 34-1 at 18–19.  
24 However, as explained, there is a disputed issue of material fact as to whether defendant Curry’s  
25 housing order was racially motivated. On this record, then, this disputed fact precludes summary  
26 judgment for defendant Curry on the merits of plaintiff’s claim. The court therefore declines to  
27 grant summary judgment for defendant Curry on the ground of qualified immunity as presented in  
28 his motion for summary judgment.

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In accordance with the above, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed May 6, 2020, are adopted to the extent consistent with this order;
2. Defendants' motion for summary judgement (ECF No. 34) is GRANTED in part and DENIED in part;
3. Plaintiff's claim against defendants Ojo and Arnold is DISMISSED without prejudice for failure to exhaust administrative remedies;
4. Defendants' motion for summary judgment is DENIED as to defendant Curry; and
5. This matter is referred back to the assigned magistrate judge for further proceedings consistent with this order.

DATED: August 12, 2021.

  
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CHIEF UNITED STATES DISTRICT JUDGE