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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CARLOS ROMERO BURNETT,
Plaintiff,
v.
MENTAL HEALTH STAFF, et al.,
Defendants.

No. 2:17-cv-1855 DB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action under 42 U.S.C. § 1983. Plaintiff claims defendants have violated his rights under the Eighth and Fourteenth Amendments. Presently before the court is plaintiff's motion to proceed in forma pauperis (ECF No. 2) and his complaint for screening (ECF No. 1). For the reasons set forth below, the court will grant the motion to proceed in forma pauperis and recommend that this action be dismissed without prejudice for failure to exhaust administrative remedies.

IN FORMA PAUPERIS

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct

1 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and plain
2 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
3 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic
4 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
5 However, in order to survive dismissal for failure to state a claim a complaint must contain more
6 that “a formulaic recitation of the elements of a cause of action;” it must contain factual
7 allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic, 550
8 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the
9 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
10 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all
11 doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

12 The Civil Rights Act under which this action was filed provides as follows:

13 Every person who, under color of [state law] . . . subjects, or causes
14 to be subjected, any citizen of the United States . . . to the deprivation
15 of any rights, privileges, or immunities secured by the Constitution .
. . shall be liable to the party injured in an action at law, suit in equity,
or other proper proceeding for redress.

16 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
17 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
18 Monell v. Dept. of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). “A
19 person ‘subjects’ another to the deprivation of a constitutional right, within the meaning of §
20 1983, if he does an affirmative act, participates in another’s affirmative acts or omits to perform
21 an act which he is legally required to do that causes the deprivation of which complaint is made.”
22 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

23 Moreover, supervisory personnel are generally not liable under § 1983 for the actions of
24 their employees under a theory of respondeat superior and, therefore, when a named defendant
25 holds a supervisory position, the causal link between him and the claimed constitutional
26 violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979);
27 Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory allegations

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1 concerning the involvement of official personnel in civil rights violations are not sufficient. See
2 Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

3 **II. Exhaustion of Administrative Remedies**

4 It is well established that the Prison Litigation Reform Act (“PLRA”) requires that a
5 prisoner exhaust his available administrative remedies before bringing a federal civil rights
6 action. See 42 U.S.C. § 1997e(a); Brown v. Valoff, 422 F.3d 926, 934 (9th Cir. 2005); Griffin v.
7 Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009). “[T]he PLRA’s exhaustion requirement applies to
8 all inmate suits about prison life, whether they involve general circumstances or particular
9 episodes, and whether they allege excessive force or some other wrong.” Bennet v. King, 293
10 F.3d 1096, 1098 (9th Cir. 2002) (citation and internal quotation marks omitted); see also
11 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam); Jones v. Bock, 549 U.S.
12 199, 211 (2007) (“There is no question that exhaustion is mandatory under the PLRA and that
13 unexhausted claims cannot be brought in court.”).

14 “Proper exhaustion demands compliance with an agency’s . . . critical procedural rules,”
15 Woodford v. Ngo, 548 U.S. 81, 90 (2006). Thus, “to properly exhaust administrative remedies,
16 prisoners ‘must complete the administrative review process in accordance with the applicable
17 procedural rules,’ [] rules that are defined . . . by the prison grievance process itself.” Jones, 549
18 U.S. at 218 (2007) (quoting Woodford, 548 U.S. at 88).

19 In California, an inmate may appeal “any policy, decision, action, condition, or omission .
20 . . having a material adverse effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit.
21 15, § 3084.1(a). Inmates must complete three levels to exhaust the appeal process: (1) formal
22 written appeal on CDCR Form 602; (2) second-level appeal to the institution head or designee;
23 and (3) third-level appeal to the Director of the CDCR. Id. § 3084.7. The third level constitutes
24 the decision of the Secretary of the CDCR and exhausts a prisoner’s administrative remedies. Id.
25 § 3084.7(d)(3).

26 Plaintiff states that administrative remedies were available at his institution, that he did
27 not request administrative relief, and that he did not exhaust administrative remedies. (See ECF
28 No. 1 at 5, 8, 10.) Because it is clear from the face of the complaint that plaintiff did not exhaust

1 available administrative remedies prior to sending his complaint to this court, this court “must
2 dismiss his suit without prejudice.” Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006)
3 (citing Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) overruled on other grounds by
4 Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014)); McKinney, 311 F.3d at 1200-01.

5 CONCLUSION


6 Accordingly, IT IS HEREBY ORDERED that:

- 7 1. The Clerk of the Court is directed to randomly assign a district judge to this case;
- 8 2. Plaintiff’s motion to proceed in forma pauperis (ECF No. 2) is granted;
- 9 3. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
10 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. §
11 1915(b)(1). All fees shall be collected and paid in accordance with this court’s order
12 to the Director of the California Department of Corrections and Rehabilitation filed
13 concurrently herewith.

14 IT IS HEREBY RECOMMENDED that this action be dismissed without prejudice for
15 failure to exhaust administrative remedies.

16 These findings and recommendations will be submitted to the United States District Judge
17 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, plaintiff may file written objections
19 with the court. The document should be captioned “Objections to Magistrate Judge’s Findings
20 and Recommendations.” Plaintiff is advised that failure to file objections within the specified
21 time may result in waiver of the right to appeal the district court’s order. Martinez v. Ylst, 951
22 F.2d 1153 (9th Cir. 1991).

23 Dated: October 5, 2018

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27 DEBORAH BARNES
28 UNITED STATES MAGISTRATE JUDGE

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