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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARMANDO HERRERA,
Plaintiff,
v.
DIAZ,
Defendants.

No. 2:17-cv-2123 KJN P

ORDER TO SHOW CAUSE

I. Introduction

Plaintiff is a state prisoner, proceeding without counsel. On October 12, 2017, plaintiff filed a civil rights complaint, pursuant to 42 U.S.C. § 1983. Plaintiff alleges that on October 9, 2017, defendant told plaintiff to drop his lawsuits against Diaz’ supervisor, or Diaz would tell corrections staff that plaintiff threatened Diaz and corrections staff would put plaintiff in lock-up. (ECF No. 1 at 3.) Plaintiff seeks money damages. Plaintiff concedes that there is an administrative appeal process at his prison, and did not exhaust his administrative remedies because Diaz allegedly told plaintiff that if he files an appeal, Diaz would tell the appeal staff to put it in the trash can. (ECF No. 1 at 3.)

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1 II. Screening Complaint

2 A. Legal Standards

3 The court is required to screen complaints brought by prisoners seeking relief against a
4 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
5 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
6 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
7 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

8 The Prison Litigation Reform Act of 1995 (“PLRA”) amended 42 U.S.C. § 1997e to
9 provide that “[n]o action shall be brought with respect to prison conditions under [42 U.S.C.
10 § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
11 facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).
12 Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S. 516,
13 524 (2002). Exhaustion is a prerequisite for all prisoner suits regarding conditions of
14 confinement, whether they involve general circumstances or particular episodes, and whether they
15 allege excessive force or some other wrong. Porter, 534 U.S. at 532. In other words, prisoners
16 are required to exhaust available remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211
17 (2007).

18 Proper exhaustion of available remedies is mandatory. Booth v. Churner, 532 U.S. 731,
19 741 (2001). “Proper exhaustion demands compliance with an agency’s deadlines and other
20 critical procedural rules.” Woodford v. Ngo, 548 U.S. 81, 95-96 (2006). The administrative
21 process is exhausted only after the inmate complies with all relevant prison grievance procedures
22 and receives a decision from the third level. Ngo, 548 U.S. at 95-96.

23 B. Administrative Appeal Process

24 The California Department of Corrections and Rehabilitation (“CDCR”) provides inmates
25 the right to appeal administratively “any policy, decision, action, condition, or omission by the
26 department or its staff that the inmate or parolee can demonstrate as having a material adverse
27 effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). Following
28 amendments that took effect January 28, 2011, California prisoners are required to proceed

1 through three levels of appeal to exhaust the administrative appeal process: (1) formal written
2 appeal on a CDC 602 inmate appeal form, (2) second level appeal to the institution head or
3 designee, and (3) third level appeal to the Director of the CDCR. See 15 Cal. Code Regs.
4 § 3084.1-3084.9.¹ A final decision from the Director’s level of review satisfies the exhaustion
5 requirement under 42 U.S.C. § 1997e(a). See Lira v. Herrera, 427 F.3d 1164, 1166-67 (9th Cir.
6 2005); see also Cal. Code Regs. tit. 15, § 3084.7(d)(3) (as amended Dec. 13, 2010). Appeals
7 must be filed within thirty days from the incident.

8 C. Has Plaintiff Exhausted?

9 Plaintiff concedes he did not file an administrative appeal as to his claims against
10 defendant Diaz. Plaintiff claims defendant Diaz threatened to tell appeal staff to put plaintiff’s
11 appeal in the trash if plaintiff filed such appeal.²

12 *Sua sponte* dismissal for failure to exhaust administrative remedies under the PLRA is
13 appropriate if, taking the prisoner’s factual allegations as true, the complaint establishes his
14 failure to exhaust. See Jones, 549 U.S. at 214-15 (exhaustion is an affirmative defense and *sua*
15 *sponte* dismissal for failure to exhaust administrative remedies under the PLRA is only
16 appropriate if, taking the prisoner’s factual allegations as true, the complaint establishes his
17 failure to exhaust); 28 U.S.C. § 1915A(b)(1); Bennett v. King, 293 F.3d 1096, 1098 (9th Cir.
18 2002) (affirming district court’s *sua sponte* dismissal of prisoner’s complaint because he failed to
19 exhaust his administrative remedies).

20 Court records reflect that plaintiff is well aware that he is required to exhaust his
21 administrative remedies before he files a complaint in federal court. Herrera v. Gardner, Lee &
22 Borsch, Case No. 2:10-cv-1744 GEB EFB (E.D. Cal.) (dismissed on May 10, 2012, based on
23 plaintiff’s failure to exhaust administrative remedies prior to filing the action). As plaintiff
24 knows, the CDCR provides an inmate grievance procedure. Plaintiff is reminded that he is

25 ¹ The informal resolution level was eliminated. See Cal. Code Regs. tit. 15, § 3084.7 (as
26 amended Dec. 13, 2010).

27 ² This is not the first time plaintiff has made such an allegation. In Herrera v. Blandion, 2017
28 WL 3840270 (E.D. Cal. Sept. 1, 2017), the court noted plaintiff claimed an officer told plaintiff
that if he filed an appeal, the officer would tell the appeal staff to put it in the trash.” Id. at *3.

1 required to exhaust his administrative remedies before he files a complaint in federal court.
2 Defendant Diaz apparently works in the library, and even if she were to tell appeals staff to put
3 plaintiff's appeal in the trash, it is unclear appeals staff would do so. In any event, plaintiff must
4 first attempt to exhaust his administrative appeals. If appeals staff fail to accept or respond to
5 plaintiff's administrative appeals, plaintiff may then assert that administrative remedies were not
6 available due to circumstances outside his control. But plaintiff may not simply rely on verbal
7 threats³ by non-appeals staff and fail to file an administrative appeal concerning the instant claim.

8 Therefore, because it is clear from the face of plaintiff's complaint that he did not
9 exhaust the administrative grievance procedure, plaintiff shall show cause why this action
10 should not be dismissed without prejudice. In the alternative, plaintiff may file a request to
11 voluntarily dismiss this action. The court will refrain from addressing plaintiff's request to
12 proceed in forma pauperis, and from assessing the court's filing fee, until plaintiff responds to the
13 instant order.

14 Accordingly, IT IS HEREBY ORDERED that within thirty days from the date of this
15 action, plaintiff shall show cause why this action should not be dismissed without prejudice, or, in
16 the alternative, file a request to voluntarily dismiss this action.

17 Dated: November 6, 2017

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19 _____
20 KENDALL J. NEWMAN
21 UNITED STATES MAGISTRATE JUDGE

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26 ³ As plaintiff was advised in Herrera, 2017 WL 3840270 at *3, allegations of mere threats
27 cognizable. See Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (mere threat does not constitute
28 constitutional wrong, nor do allegations that naked threat was for purpose of denying access to
courts compel contrary result).