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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTWONE M. LOVEST, Jr.,
Plaintiff,
v.
S. LAROSA,
DEFENDANT.

Case No. 2:19-cv-01060-TLN-JDP (PC)
FINDINGS AND RECOMMENDATIONS
DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT BE GRANTED AND ALL
OTHER OUTSTANDING MOTIONS BE
DENIED AS MOOT
OBJECTIONS DUE IN 14 DAYS
ECF Nos. 32, 33, 34, 36

Antwone M. Lovest, Jr. alleges that defendant LaRosa used racially derogatory language toward him on February 5, 2019. Defendant has filed a motion for summary judgment that argues that plaintiff failed to exhaust his administrative remedies before filing this action. ECF No. 32. Plaintiff filed a single prison grievance related to the claims in this case, but did not pursue it through the third and final level of administrative review. Accordingly, he did not comply with the requirements of the Prison Litigation Reform Act. Defendant’s motion should be granted, the case dismissed, and all other outstanding motions denied as moot.

Background

Plaintiff alleges that, on February 5, 2019, while he was in the “work/change” area for his prison job, defendant looked at him and asked whether English was his first language. ECF No. 18 at 4. Defendant stated that, if it was not, plaintiff should “take his ass back where [he] came from.” *Id.* Plaintiff states that he is Asian and understood LaRosa’s comments to be racially

1 motivated. *Id.* Based on these allegations, Judge Brennan¹ found that plaintiff had stated
2 potentially cognizable retaliation and equal protection claims. ECF No. 20.

3 **Legal Standards**

4 **I. Exhaustion Generally**

5 Under the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with
6 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
7 confined in any jail, prison, or other correctional facility until such administrative remedies as are
8 available are exhausted.” 42 U.S.C. § 1997e(a). This statutory exhaustion requirement “applies
9 to all inmate suits about prison life,” *Porter v. Nussle*, 534 U.S. 516, 532 (2002), regardless of the
10 relief sought by the prisoner or the relief offered by the process, *Booth v. Churner*, 532 U.S. 731,
11 741 (2001). Unexhausted claims must be dismissed. *See Jones v. Bock*, 549 U.S. 199, 211
12 (2007).

13 A prison’s own grievance process, not the PLRA, determines how detailed a grievance
14 must be to satisfy the PLRA exhaustion requirement. *Id.* at 218. When a prison’s grievance
15 procedures do not specify the requisite level of detail, “a grievance suffices if it alerts the prison
16 to the nature of the wrong for which redress is sought.” *Griffin v. Arpaio*, 557 F.3d 1117, 1120
17 (9th Cir. 2009) (internal quotation marks omitted). “The grievance ‘need not include legal
18 terminology or legal theories,’ because ‘[t]he primary purpose of a grievance is to alert the prison
19 to a problem and facilitate its resolution, not to lay groundwork for litigation.’” *Reyes v. Smith*,
20 810 F.3d 654, 659 (9th Cir. 2016) (quoting *Griffin*, 557 F.3d at 1120).

21 The PLRA recognizes no exception to the exhaustion requirement, and the court may not
22 recognize a new exception, even in “special circumstances.” *Ross v. Blake*, 136 S. Ct. 1850, 1862
23 (2016). The one significant qualifier is that “the remedies must indeed be ‘available’ to the
24 prisoner.” *Id.* at 1856. The Supreme Court has explained when an administrative procedure is
25 unavailable:

26 [A]n administrative procedure is unavailable when (despite what

27 ¹ This case was reassigned to me on October 1, 2020, after Judge Brennan screened the
28 complaint. ECF No. 31.

1 regulations or guidance materials may promise) it operates as a
2 simple dead end—with officers unable or consistently unwilling to
3 provide any relief to aggrieved inmates Next, an
4 administrative scheme might be so opaque that it becomes,
5 practically speaking, incapable of use And finally, the same is
6 true when prison administrators thwart inmates from taking
7 advantage of a grievance process through machination,
8 misrepresentation, or intimidation [S]uch interference with an
9 inmate’s pursuit of relief renders the administrative process
10 unavailable. And then, once again, § 1997e(a) poses no bar.

11 *Id.* at 1859-60 (citations omitted); *see also Andres v. Marshall*, 867 F.3d 1076, 1079 (9th Cir.
12 2017) (“When prison officials improperly fail to process a prisoner’s grievance, the prisoner is
13 deemed to have exhausted available administrative remedies.”).

14 If the court concludes that plaintiff has failed to exhaust available remedies, the proper
15 remedy is dismissal without prejudice of the portions of the complaint barred by § 1997e(a). *See*
16 *Jones*, 549 U.S. at 223-24; *Lira v. Herrera*, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

17 **II. Summary Judgment Motions for Failure to Exhaust**

18 Summary judgment is appropriate when there is “no genuine dispute as to any material
19 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In a
20 summary judgment motion for failure to exhaust, the defendant has the initial burden of
21 establishing “that there was an available administrative remedy, and that the prisoner did not
22 exhaust that available remedy.” *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014). If the
23 defendant carries that burden, “the burden shifts to the prisoner to come forward with evidence
24 showing that there is something in his particular case that made the existing and generally
25 available administrative remedies effectively unavailable to him.” *Id.* The ultimate burden of
26 persuasion remains with the defendant, however. *Id.*

27 **Analysis**

28 The rules of the California Department of Corrections and Rehabilitation state that a
prisoner’s grievance is exhausted only after he pursues it through three levels of administrative
review. Cal. Code Regs. tit. 15, §§ 3084.2, 3084.3(a), 3084.8(b). Defendant argues that plaintiff
filed only one relevant administrative grievance, which was numbered MCSP-19-00713. ECF

1 No. 32-2 at 4; ECF No. 32-4 at 3 ¶ 8. That grievance did not proceed through all three levels of
2 review; it was screened out as untimely at the third level. ECF No. 32-4 at 8. Defendant argues
3 that the case must be dismissed on that basis.

4 In his opposition, plaintiff argues that he was not required to complete third-level
5 exhaustion because he received a partial grant at the second level of review. ECF No. 38 at 2. He
6 states that language attached to the second level decision informed him that his requested relief,
7 the defendant's firing, could not be granted. *Id.* at 6. Alternatively, he maintains that the third-
8 level grievance was timely based on the date he received the second-level response. *Id.* at 4-5.
9 Neither argument is persuasive.

10 A partial grant at the second level does not exempt an inmate from his obligation to
11 proceed to the third and final level of review. It is true that the Ninth Circuit has held that “[a]n
12 inmate has no obligation to appeal from a grant of relief, or a partial grant that satisfies him, in
13 order to exhaust his administrative remedies.” *Harvey v. Jordan*, 605 F.3d 681, 685 (9th Cir.
14 2010). However, the Ninth Circuit subsequently explained that the holding in *Harvey* applied to
15 the unique circumstance in which an inmate was induced into abandoning his grievance by an
16 unfulfilled promise of relief. *Benitez v. Cnty. of Maricopa*, 667 F. App'x. 211, 212 (9th Cir.
17 2016). And the Supreme Court has held that exhaustion requires compliance with a prison's
18 grievance regulations, even if the form of relief an inmate seeks is unavailable. *See Booth v.*
19 *Churner*, 532 U.S. 731, 739 (2001); *Woodford v. Ngo*, 548 U.S. 81, 85 (2006). Plaintiff's own
20 response to his second-level decision indicates that he was not satisfied. The second-level
21 response contained a section for plaintiff to express any dissatisfaction with the decision. ECF
22 No. 38 at 21. Plaintiff wrote, “I believe the appeal I submitted should have been fully granted,
23 not granted in part.” *Id.*

24 To the extent plaintiff argues that his third-level grievance was timely, that argument is
25 foreclosed by his failure to challenge the screen-out decision. The decision that cancelled
26 plaintiff's third-level grievance notified him that he could separately appeal the cancellation.
27 ECF No. 32-4 at 8. If that separate appeal was granted, the original grievance would be
28 reinstated. *Id.* There is no indication in the record or in plaintiff's argument that he availed

1 himself of this process. Administrative exhaustion requires an inmate to avail himself of all the
2 steps that the prison offers. *See Woodford*, 548 U.S. at 90 (“[Proper exhaustion] means using all
3 steps that the agency holds out, and doing so properly (so that the agency addresses the issues on
4 the merits).”). Other courts in this circuit have held that an inmate’s failure to use the separate
5 appeal process renders their claims unexhausted. *See, e.g., Wilson v. Zubiante*, No. 14-cv-01032-
6 VC, 2016 U.S. Dist. LEXIS 78951 at * 3 (N.D. Cal. June 8, 2016) (“Under the applicable
7 regulations, this was not the end of the line—instead, [plaintiff] had the opportunity to (and was
8 required to) appeal the cancellation.”); *McCowan v. Hedricks*, No. C 13-3554 RS (PR), 2016 U.S.
9 Dist. LEXIS 78795 at *6 (N.D. Cal. June 16, 2016) (“Although a cancelled appeal may not be
10 submitted for further review, the inmate may separately appeal the cancellation. A cancelled
11 appeal does not exhaust administrative remedies.”) (internal citations omitted); *see also Vaughn*
12 *v. Hood*, 670 F. App’x 962, 963 (9th Cir. 2016) (unpublished) (“The district court properly
13 dismissed Vaughn’s action for failure to state a claim because it is clear from the face of the
14 complaint and its attachments that Vaughn failed to exhaust his available administrative remedies
15 by failing to appeal separately the third-level cancellation decision.”).

16 Accordingly, it is recommended that:

- 17 1. Defendant’s motion for summary judgment, ECF No. 32, be granted, and plaintiff’s
18 claims against defendant LaRosa be dismissed without prejudice for failure to exhaust.
- 19 2. All other pending motions, ECF Nos. 33, 34 & 36, be denied as moot.
- 20 3. The Clerk of Court be directed to close the case.

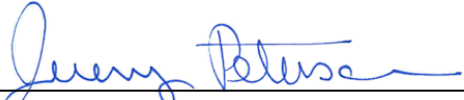
21 I submit these findings and recommendations to the district judge under 28 U.S.C.
22 § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,
23 Eastern District of California. Within 14 days of the service of the findings and
24 recommendations, the parties may file written objections to the findings and recommendations
25 with the court and serve a copy on all parties. That document should be captioned “Objections to
26 Magistrate Judge’s Findings and Recommendations.” The district judge will review the findings
27 and recommendations under 28 U.S.C. § 636(b)(1)(C).

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IT IS SO ORDERED.

Dated: June 4, 2021



JEREMY D. PETERSON
UNITED STATES MAGISTRATE JUDGE