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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

QUINTIN R. CROSS,
Plaintiff,
v.
GAVIN NEWSOM, et al.,
Defendants.

No. 2:19-cv-02462-WBS-CKD P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se in this federal civil rights action filed pursuant to 42 U.S.C. § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Following a review of plaintiff’s motion to proceed in forma pauperis, plaintiff was advised that he failed to demonstrate his indigency in order to be permitted to proceed in forma pauperis. ECF No. 5. As a result, plaintiff was denied in forma pauperis status, but was granted an extension of time in order to pay the filing fees for this action. ECF No. 5 at 2.

In the same order, plaintiff was advised that the complaint appears subject to dismissal for failing to exhaust his administrative remedies. See 42 U.S.C. § 1997e(a); see also Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006) (under 42 U.S.C. § 1997e(a), a prisoner “may initiate litigation in federal court only after the administrative process ends and leaves his grievances unredressed.”). Despite this notice, plaintiff paid the filing fee for this action on June

1 16, 2020. The court now proceeds to screen plaintiff's complaint.

2 **I. Screening Standard**

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 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
9 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
10 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
11 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
12 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
13 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
14 Cir. 1989); Franklin, 745 F.2d at 1227.

15 In order to avoid dismissal for failure to state a claim a complaint must contain more than
16 "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause
17 of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words,
18 "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
19 statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore, a claim
20 upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. "A
21 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
22 the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S.
23 at 678. When considering whether a complaint states a claim upon which relief can be granted,
24 the court must accept the allegations as true, Erickson v. Pardus, 551 U.S. 89, 93-94 (2007), and
25 construe the complaint in the light most favorable to the plaintiff, see Scheuer v. Rhodes, 416
26 U.S. 232, 236 (1974).

27 **II. Allegations in the Complaint**

28 At all times relevant to the allegations in the complaint, plaintiff was an inmate at Mule

1 Creek State Prison. In his complaint he alleges that the water supply is contaminated with
2 industrial and human waste. ECF No. 1 at 6. In claim one, plaintiff raises an Eighth Amendment
3 challenge to these conditions of his confinement. Id. Claim two presents a Fourteenth
4 Amendment Equal Protection violation based on the same allegations. ECF No. 1 at 12. In his
5 last claim for relief, plaintiff asserts that defendants' conduct violates the Eleventh Amendment.
6 Id. at 14. Plaintiff names fourteen individual and municipal entities as defendants in this action.
7 By way of relief, plaintiff seeks compensatory and punitive damages as well as a pardon or
8 commutation of his sentence. Id. at 17. Plaintiff also seeks injunctive relief by requiring all
9 prisons with contaminated water to be brought up to health and safety standards. Id.

10 With respect to each of his three claims for relief, plaintiff indicates that he has not
11 exhausted his administrative remedies. ECF No. 1 at 6, 12, 14. To explain why he has not
12 submitted any appeal or request for administrative relief, plaintiff refers to The Whistleblower
13 Protection Act.¹ Id.

14 **III. Analysis**

15 “No action shall be brought with respect to prison conditions under section 1983 of this
16 title,... until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997(e)(a).
17 At the time that plaintiff filed this complaint on December 10, 2019, prisoners were permitted to
18 “appeal any policy, decision, action, condition, or omission by the [Department of Corrections
19 and Rehabilitation] or its staff that the inmate... can demonstrate as having a material adverse
20 effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a) (repealed
21 effective June 1, 2020). Administrative grievances filed by prisoners during this time period are
22 generally deemed exhausted once the third level of review has been completed by the Secretary of
23 the California Department of Corrections and Rehabilitation. See Cal. Code Regs. tit. 15, §
24 3084.7 (repealed effective June 1, 2020).

25 In Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc), the Ninth Circuit Court
26 of Appeal described when dismissal of a complaint for failure to exhaust administrative remedies

27 ¹ Plaintiff is informed that the Whistleblower Act does not relieve him of his responsibility to
28 exhaust his administrative remedies prior to filing suit.

1 is appropriate under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a
2 claim upon which relief can be granted. Specifically, the court found that dismissal is only
3 appropriate when failure to exhaust is “clear from the face of the complaint” and that “such cases
4 will be rare because a plaintiff is not required to say anything about exhaustion in his complaint.”
5 In this instance, however, plaintiff’s admission on the face of his complaint that he never pursued
6 administrative remedies requires dismissal. Accordingly, the court will recommend that
7 plaintiff’s complaint be dismissed without prejudice for failing to exhaust his administrative
8 remedies. The undersigned has considered the content of the complaint and the lack of any
9 whistleblower exception to the exhaustion requirement and determined that leave to amend the
10 complaint would be futile. See Akhtar v. Mesa, 698 F.3d 1202, 1210 (9th Cir. 2012) (“a prisoner
11 does not comply with [the exhaustion] requirement by exhausting available remedies during the
12 course of the litigation.”).

13 **IV. Plain Language Summary for Pro Se Party**

14 The following information is meant to explain this order in plain English and is not
15 intended as legal advice.

16 The court has reviewed the complaint which indicates that you have not filed any
17 administrative grievance concerning the allegations of water contamination at Mule Creek State
18 Prison. According to federal law, you must give the prison a chance to fix the problem before
19 filing suit in federal court. Based on this defect in your complaint that is not fixable, the
20 undersigned is recommending that your complaint be dismissed without prejudice.

21 In accordance with the above, IT IS HEREBY RECOMMENDED that plaintiff’s
22 complaint (ECF No. 1) be dismissed without prejudice for failing to exhaust his administrative
23 remedies.

24 These findings and recommendations are submitted to the United States District Judge
25 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
26 after being served with these findings and recommendations, any party may file written
27 objections with the court and serve a copy on all parties. Such a document should be captioned
28 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the

1 objections shall be served and filed within fourteen days after service of the objections. The
2 parties are advised that failure to file objections within the specified time may waive the right to
3 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 Dated: November 13, 2020



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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