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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM JAMES HARRIS,  
Plaintiff,  
v.  
CAPTAIN PONGYAN, et al.,  
Defendants.

No. 2: 21-cv-0846 TLN KJN P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendant Pongyan’s motion to dismiss on the grounds that plaintiff failed to exhaust administrative remedies. (ECF No. 30.) For the reasons stated herein, the undersigned recommends that defendant’s motion be denied.

Legal Standard for 12(b)(6) Motion

A complaint may be dismissed for “failure to state a claim upon which relief may be granted.” Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss for failure to state a claim, a plaintiff must allege “enough facts to state a claim for relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has “facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556). The plausibility standard is not akin to a “probability

1 requirement,” but it requires more than a sheer possibility that a defendant has acted unlawfully.  
2 Iqbal, 556 U.S. at 678.

3 Dismissal under Rule 12(b)(6) may be based on either: (1) lack of a cognizable legal  
4 theory; or (2) insufficient facts under a cognizable legal theory. Chubb Custom Ins. Co. v. Space  
5 Sys./Loral, Inc., 710 F.3d 946, 956 (9th Cir. 2013).

6 Pro se pleadings are held to a less-stringent standard than those drafted by lawyers.  
7 Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam). However, the court need not accept as  
8 true unreasonable inferences or conclusory legal allegations cast in the form of factual  
9 allegations. See Iletto v. Glock Inc., 349 F.3d 1191, 1200 (9th Cir. 2003) (citing Western Mining  
10 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)).

11 In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court “may generally  
12 consider only allegations contained in the pleadings, exhibits attached to the complaint, and  
13 matters properly subject to judicial notice.” Outdoor Media Group, Inc. v. City of Beaumont, 506  
14 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). When ruling on a motion to  
15 dismiss, courts accept all factual allegations in the complaint as true and construe the pleadings in  
16 the light most favorable to the nonmoving party. Id. at 901 (citing Knieval v. ESPN, 393 F.3d  
17 1068, 1072 (9th Cir. 2005)).

#### 18 Legal Standard for Administrative Exhaustion

19 Because plaintiff is a prisoner suing over the conditions of his confinement, his claims are  
20 subject to the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). Under the PLRA,  
21 “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or  
22 any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until  
23 such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a); Porter v.  
24 Nussle, 534 U.S. 516, 520 (2002) (“§ 1997e(a)’s exhaustion requirement applies to all prisoners  
25 seeking redress for prison circumstances or occurrences”). “[T]hat language is ‘mandatory’: An  
26 inmate ‘shall’ bring ‘no action’ (or said more conversationally, may not bring any action) absent  
27 exhaustion of available administrative remedies.” Ross v. Blake, 578 U.S. 632, 638 (2016)  
28 (citations omitted). However, “inmates are not required to specially plead or demonstrate

1 exhaustion in their complaints.” Jones v. Bock, 549 U.S. 199, 216 (2007). Instead, “the  
2 defendant in a PLRA case must plead and prove nonexhaustion as an affirmative defense,” and it  
3 is the defendant’s burden “to prove that there was an available administrative remedy, and that  
4 the prisoner did not exhaust that available remedy.” Albino v. Baca, 747 F.3d 1162, 1171-72 (9th  
5 Cir. 2014) (en banc) (citations omitted).

6 An inmate may appeal any “adverse policy, decision, action, condition, or omission by the  
7 Department” and must be submitted within 30 days of discovery. Cal. Code Regs. tit. 15, § 3482.  
8 As of June 1, 2020 administrative remedies available to CDCR inmates for violation of their  
9 constitutional rights consist of a grievance to the local or regional Institutional Office of  
10 Grievances and an appeal to the Office of Appeals. Cal. Code Regs. tit. 15, §§ 3483, 3485.

11 “In the rare event that a failure to exhaust is clear on the face of the complaint, a defendant  
12 may move for dismissal under Rule 12(b)(6).” Albino v. Baca, 747 F.3d at 1169.

### 13 Plaintiff’s Claims

14 This action proceeds on plaintiff’s original complaint filed May 10, 2021, against  
15 defendant Pongyan. Plaintiff alleges that defendant Pongyan retaliated against plaintiff for filing  
16 a grievance against defendant by putting plaintiff up for transfer to R.J. Donovan Correctional  
17 Facility (“RJD”), interfering with plaintiff’s filing of the instant action and causing plaintiff to be  
18 unnecessarily quarantined.

19 Plaintiff alleges that on November 10, 2020, the Institutional Classification Committee  
20 (“ICC”) initially recommended that plaintiff be transferred to the California Men’s Colony  
21 (“CMC”). (ECF No. 1 at 3.) However, the ICC finally endorsed plaintiff to RJD. (Id.) The  
22 endorsement stated that plaintiff had a confidential enemy situation at RJD, but plaintiff’s enemy  
23 would not be on plaintiff’s yard at RJD. (Id.)

24 Plaintiff expressed his concerns to his counselor regarding his transfer to RJD. (Id. at 3-  
25 4.) Plaintiff also told his counselor that CMC had every program plaintiff needed to be found  
26 suitable for parole. (Id. at 4.) Plaintiff’s counselor agreed to put plaintiff up for transfer to CMC.  
27 (Id. at 3-4.) At that time, CMC would not be able to accept any transferred inmates for months.  
28 (Id. at 4.)

1 On March 22, 2021, plaintiff noticed that almost no one on the yard, including defendant  
2 Pongyan, wore a mask. (Id. at 5.) At that time, the prison was getting over a severe outbreak of  
3 COVID-19. (Id.) Plaintiff filed a grievance against defendant Pongyan based on his failure to  
4 wear a mask. Plaintiff filed his grievance on March 26, 2021, and still had not received a  
5 response at the time he signed his complaint on May 9, 2021. (Id. at 6.)

6 Plaintiff alleges that the department recently revised its appeal system and “have not given  
7 any instruction on the new procedures and when I’ve asked custody about the procedures I’ve  
8 received different answers.” (Id.) Plaintiff alleges that he received responses to his previous  
9 appeals in less than 30 days. (Id.) Plaintiff alleges that he has no administrative remedies  
10 available because “I am being interfered with constantly.” (Id. at 6-7.)

11 Plaintiff alleges that after he submitted his grievance against defendant Pongyan, plaintiff  
12 was put up for transfer to RJD. (Id. at 6.)

13 Plaintiff refused to take a rapid COVID-19 test required for his transfer to RJD. As a  
14 result, plaintiff was placed on a 21-day quarantine, despite getting a negative result on a different  
15 COVID-19 test two days later. (Id.) Plaintiff asked the nurse why he was still being quarantined  
16 despite the negative test result. (Id.) The nurse told plaintiff that “it had nothing to do with  
17 medical.” (Id.) Plaintiff alleges that defendant Pongyan influenced the medical department to  
18 confine plaintiff in his cell for 21 days in retaliation for plaintiff filing the complaint against him.  
19 (Id.)

20 Plaintiff alleges that on April 25, 2021, he submitted his complaint to be e-filed by the law  
21 librarian. (Id. at 7.) Plaintiff alleges that his complaint did not reach the law librarian. (Id.)  
22 When plaintiff asked about the whereabouts of his complaint, he was told it was lost. (Id.) The  
23 law librarian told plaintiff that defendant Pongyan told her that plaintiff would be on a bus so not  
24 to worry about the lawsuit. (Id.)

## 25 Discussion

### 26 *Defendant’s Arguments*

27 In the motion to dismiss, defendant correctly argues that because the March 26, 2021  
28 grievance forms the basis of plaintiff’s retaliation claim, plaintiff is required to file a second

1 grievance alleging that defendant retaliated against him because of this protected conduct. See  
2 Johnson v. Robinson, 2015 WL 882021, at \*8 (E.D. Cal. March 2, 2021) (“Where a prisoner’s  
3 inmate appeal ‘does not ...challenge the plaintiff’s [classification] based on alleged retaliatory  
4 conduct[,]’ a § 1983 claim is unexhausted.”) (quoting Dixon v. LaRosa, 2011 WL 3875806, at  
5 \*11 (E.D. Cal. Aug. 31, 2011)); see also Goolsby v. Gonzalez, 2014 WL 7272765, at \*13 (E.D.  
6 Cal. Dec. 18, 2014) (If “[p]laintiff’s appeal ... clearly complains about denial of due process rights  
7 but not retaliation,” the claim for retaliation is unexhausted.).

8 Defendant also observes that in the complaint form, plaintiff alleges that he submitted an  
9 administrative grievance regarding his retaliation claims. In the complaint form, plaintiff checked  
10 the box indicating that there were grievances or administrative appeals available at his institution.  
11 (ECF No. 1 at 5.) Plaintiff checked the box indicating that he submitted a request for  
12 administrative relief regarding his retaliation claim. (Id.) Plaintiff checked the box indicating  
13 that he did not submit his grievance regarding his retaliation claim to the highest level. (Id.)  
14 Plaintiff did not complete the section of the complaint form asking him to explain why he failed  
15 to submit his grievance regarding his retaliation claim to the highest level. (Id.)

16 In the pending motion, defendant argues that because plaintiff’s failure to exhaust  
17 administrative remedies is clear from the face of the complaint, a motion to dismiss is  
18 appropriate. Albino v. Baca, 747 F.3d at 1169.

19 *Plaintiff’s Opposition*

20 In his opposition, plaintiff raises three arguments excusing his failure to exhaust  
21 administrative remedies regarding his retaliation claim. First, plaintiff argues that on June 1,  
22 2020, the California Department of Corrections and Rehabilitation (“CDCR”) changed its 602  
23 appeals process without any guidance, procedure or rules explaining the changes. (ECF No. 35 at  
24 3.) Second, plaintiff alleges that he submitted a grievance on April 15, 2021, concerning “this  
25 claim.” (Id. at 4.) Plaintiff alleges that he did not receive a log number for this grievance or a  
26 response from prison officials. (Id.) Third, plaintiff contends that he was scared to file a  
27 grievance regarding his retaliation claims because defendant put his life in danger in retaliation  
28 for filing the March 26, 2021 grievance. (Id.)

1            *Discussion*

2            “If undisputed evidence viewed in the light most favorable to the prisoner shows a failure  
3 to exhaust, a defendant is entitled to summary judgment” under Federal Rule of Civil Procedure  
4 56. Albino v. Baca, 747 F.3d at 1166. However, “in the rare event that a failure to exhaust is  
5 clear on the face of the complaint, a defendant may move for dismissal under Rule 12(b)(6).” Id.  
6 To be clear on the face of the complaint, the court must find that the complaint shows not only  
7 that the plaintiff failed to exhaust his administrative remedies but also that those remedies were  
8 effectively available at the time. Berrera v. Sivyver, 2017 WL 3783105, at \*4 (E.D. Cal. Aug. 31,  
9 2017), report and recommendation adopted, 2017 WL 4310498 (E.D. Cal. Sept. 28, 2017) (citing  
10 Sapp v. Kimbrell, 623 F.3d 813, 822–23 (9th Cir. 2010)).

11            Plaintiff’s complaint contains somewhat contradictory allegations regarding whether he  
12 exhausted administrative remedies as to his retaliation claim. On the one hand, plaintiff checked  
13 the boxes in the complaint form indicating that he submitted a grievance regarding his retaliation  
14 claim but not to the highest level of review. On the other hand, plaintiff alleged that  
15 administrative remedies were not available to him because “I am being interfered with  
16 constantly.” This allegation suggests that plaintiff did not file a grievance regarding his  
17 retaliation claim because he feared further retaliation. The threat of retaliation may make the  
18 prison grievance system effectively unavailable, such that a failure to exhaust would not bar the  
19 complaint from being heard in federal court. McBride v. Lopez, 807 F.3d 982, 986-87 (9th Cir.  
20 2015).

21            The undersigned also observes that the only grievance discussed in the complaint is the  
22 March 26, 2021 grievance addressing defendant’s alleged failure to wear a mask. Thus, it is  
23 possible that the boxes checked in the complaint form refer to the March 26, 2021 grievance  
24 rather than a grievance regarding the alleged retaliation.

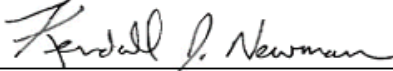
25            For the reasons discussed above, the undersigned cannot find that it is clear from the face  
26 of plaintiff’s complaint that he failed to exhaust administrative remedies. Accordingly,  
27 defendant’s motion to dismiss should be denied. The issue of plaintiff’s exhaustion of  
28 administrative remedies should be raised in a summary judgment motion.

1 The undersigned acknowledges that in his opposition, plaintiff raises allegations that may  
2 contradict the allegations in the complaint regarding administrative exhaustion. For example, in  
3 the opposition plaintiff alleges that he filed a grievance on April 15, 2021, regarding his  
4 retaliation claim. However, the undersigned cannot consider plaintiff's allegations regarding the  
5 April 15, 2021 grievance in the context of this motion to dismiss as they are raised outside of his  
6 complaint.

7 Accordingly, IT IS HEREBY RECOMMENDED that defendant's motion to dismiss  
8 (ECF No. 30) be denied.

9 These findings and recommendations are submitted to the United States District Judge  
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
11 after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
14 objections shall be filed and served within fourteen days after service of the objections. The  
15 parties are advised that failure to file objections within the specified time may waive the right to  
16 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 Dated: December 6, 2021

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20 KENDALL J. NEWMAN  
21 UNITED STATES MAGISTRATE JUDGE

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