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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TERRY HILTON (G-41183),	)	
	)	
Plaintiff(s),	)	No. C 09-1867 CRB (PR)
	)	
vs.	)	ORDER OF DISMISSAL
	)	
DEPT OF CORRECTION AND	)	
REHABILITATION, et al.,	)	
	)	
Defendant(s).	)	
_____	)	

Plaintiff, a State of California prisoner, has filed a pro se complaint for damages under 42 U.S.C. § 1983 challenging the conditions of his confinement at San Quentin State Prison. Plaintiff has not exhausted California's prison administrative process, however.

The Prison Litigation Reform Act of 1995 ("PLRA") amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Although once within the discretion of the district court, exhaustion in prisoner cases covered by § 1997e(a) is now mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002). All available remedies must now be exhausted; those remedies "need not meet federal standards, nor must they be 'plain, speedy, and effective.'" Id. (citation

1 omitted). Even when the prisoner seeks relief not available in grievance  
2 proceedings, notably money damages, exhaustion is a prerequisite to suit. Id.;  
3 Booth v. Churner, 532 U.S. 731, 741 (2001). Similarly, exhaustion is a  
4 prerequisite to all prisoner suits about prison life, whether they involve general  
5 circumstances or particular episodes, and whether they allege excessive force or  
6 some other wrong. Porter, 534 U.S. at 532. PLRA's exhaustion requirement  
7 requires "proper exhaustion" of available administrative remedies. Woodford v.  
8 Ngo, 548 U.S. 81, 93 (2006).

9 The State of California provides its prisoners the right to appeal  
10 administratively "any departmental decision, action, condition or policy  
11 perceived by those individuals as adversely affecting their welfare." Cal. Code  
12 Regs. tit. 15, § 3084.1(a). It also provides them the right to file appeals alleging  
13 misconduct by correctional officers/officials. Id. § 3084.1(e). In order to exhaust  
14 available administrative remedies within this system, a prisoner must proceed  
15 through several levels of appeal: (1) informal resolution, (2) formal written  
16 appeal on a CDC 602 inmate appeal form, (3) second level appeal to the  
17 institution head or designee, and (4) third level appeal to the Director of the  
18 California Department of Corrections. Barry v. Ratelle, 985 F. Supp. 1235, 1237  
19 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final decision from  
20 the Director's level of review satisfies the exhaustion requirement under §  
21 1997e(a). Id. at 1237-38.

22 Nonexhaustion under § 1997e(a) is an affirmative defense which should  
23 be brought by defendant(s) in an unenumerated motion to dismiss under Federal  
24 Rule of Civil Procedure 12 (b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.  
25 2003). But a complaint may be dismissed by the court for failure to exhaust if a  
26 prisoner "conce[des] to nonexhaustion" and "no exception to exhaustion applies."  
27

1 Id. at 1120. Here, plaintiff concedes he did not exhaust available administrative  
2 remedies through the Director's level of review before filing suit. He simply  
3 states that when staff told him that they would move him to another cell the next  
4 day, rather than immediately, he "realized [he] should file a suit" rather than  
5 proceed with his administrative grievance. Compl. at 2. This will not do.  
6 Plaintiff has not properly exhausted California's prison administrative process nor  
7 presented any extraordinary circumstances which might compel that he be  
8 excused from doing so. Cf. Booth, 532 U.S. at 741 n.6 (courts should not read  
9 "futility or other exceptions" into § 1997e(a)).

10 Accordingly, the complaint is DISMISSED without prejudice to refileing  
11 after exhausting California's prison administrative process. See McKinney v.  
12 Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (action must be dismissed  
13 without prejudice unless prisoner exhausted available administrative remedies  
14 before he filed suit, even if prisoner fully exhausts while the suit is pending).

15 The clerk shall enter judgment in accordance with this order and close the  
16 file.

17 SO ORDERED.

18 DATED: May 4, 2009

19   
20 CHARLES R. BREYER  
21 United States District Judge