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

LEONARDO DONTE,)	No. C 10-1224 JSW (PR)
)	
Plaintiff,)	ORDER OF DISMISSAL
)	
v.)	(Docket Nos. 2, 4)
)	
E. MONTANO, et al,)	
)	
Defendants.)	
_____)	

Plaintiff, a California prisoner incarcerated at Salinas Valley State Prison, filed this pro se civil rights action under 42 U.S.C § 1983 regarding the conditions of his confinement at the prison. On the complaint, Plaintiff states that he did not exhaust his claims to the highest level of appeal through the inmate grievance procedure. Plaintiff states that he failed to complete the appeals process through the final level of appeal because the third level had to be postponed. Complaint at 1-2.

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See *id.* at § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed. See *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321

1 (1996) (“PLRA”) provides: “No action shall be brought with respect to prison conditions
2 under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,
3 prison, or other correctional facility until such administrative remedies as are available
4 are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and not left to the
5 discretion of the district court. *Woodford v. Ngo*, 126 S. Ct. 2378, 2382 (2006).
6 Exhaustion is a prerequisite to all prisoner lawsuits concerning prison life, whether such
7 actions involve general conditions or particular episodes, whether they allege excessive
8 force or some other wrong, and even if they seek relief not available in grievance
9 proceedings, such as money damages. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The
10 exhaustion requirement requires “proper exhaustion” of all available administrative
11 remedies. *Woodford*, 126 S. Ct. at 2387.

12 The State of California provides its prisoners and parolees the right to appeal
13 administratively “any departmental decision, action, condition or policy perceived by
14 those individuals as adversely affecting their welfare.” Cal. Code Regs. tit. 15,
15 § 3084.1(a). In order to exhaust available administrative remedies within this system, a
16 prisoner must proceed through several levels of appeal: (1) informal review, (2) first
17 formal written appeal on a CDC 602 inmate appeal form, (3) second formal level appeal
18 to the institution head or designee, and (4) third formal level appeal to the Director of the
19 California Department of Corrections and Rehabilitation. *See Barry v Ratelle*, 985 F.
20 Supp 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final
21 decision from the Director’s level of review satisfies the exhaustion requirement under §
22 1997e(a). *See id.* at 1237-38.

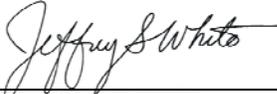
23 Because exhaustion under § 1997e(a) is an affirmative defense, a complaint may
24 be dismissed for failure to exhaust only if failure to exhaust is obvious from the face of
25 the complaint and/or any attached exhibits. *See Wyatt v. Terhune*, 315 F.3d 1108,
26 1119-20 (9th Cir. 2003). The court may dismiss a complaint for failure to exhaust where
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1 the prisoner “conce[des] to nonexhaustion” and “no exception to exhaustion applies.” *Id.*
2 at 1120. Here, Plaintiff concedes in his complaint that he has not exhausted his
3 administrative remedies (Complaint at 2), and no exception to exhaustion is alleged or
4 apparent in the complaint. Section 1997e(a) requires that Plaintiff present his claim to
5 each level of administrative review set forth above, including the Director’s level of
6 review, before raising the claim in a § 1983 complaint in federal court. An action must
7 be dismissed unless the prisoner exhausted his available administrative remedies before
8 he or she filed suit, even if the prisoner fully exhausts while the suit is pending.
9 *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002). As it is clear from the
10 complaint that Plaintiff has not pursued all levels of administrative review available to
11 him, and there is no applicable exception to the exhaustion requirement, dismissal
12 without prejudice is appropriate.

13 Accordingly, the above-titled action is hereby DISMISSED, without prejudice to
14 Plaintiff’s refiling his claim after all available administrative remedies have been
15 exhausted. The Clerk shall close the file and enter judgment in favor of Defendants.

16 IT IS SO ORDERED.

17 DATED: June 21, 2010

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19 _____
20 JEFFREY S. WHITE
21 United States District Judge
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 LEONARDO F. DONTE,
5 Plaintiff,

Case Number: CV10-1224 JSW

6 **CERTIFICATE OF SERVICE**

7 v.

8 E. MONTANO et al,
9 Defendant.

10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
11 Court, Northern District of California.

12 That on June 21, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
13 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
14 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
15 receptacle located in the Clerk's office.

16 Leonardo Donte
17 Salinas Valley State Prison
18 V36182
19 Soledad, CA 93960

20 Dated: June 21, 2010


21 Richard W. Wieking, Clerk
22 By: Jennifer Ottolini, Deputy Clerk
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