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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DERWIN REDDIC,  
Plaintiff,  
v.  
M.S. EVANS, et al.,  
Defendants.

No. C-10-1580 SI (PR)  
**ORDER OF DISMISSAL WITH  
PARTIAL LEAVE TO AMEND**

**INTRODUCTION**

In this pro se prisoner's civil rights action under 42 U.S.C. § 1983, Derwin Reddic alleged claims for deliberate indifference to his safety, retaliation, and violation of his right to due process at Salinas Valley State Prison (SVSP). Defendants have moved (a) to dismiss the deliberate indifference and retaliation claims for failure to exhaust administrative remedies, and (b) to dismiss the due process claim for failure to state a claim upon which relief may be granted. Reddic has not filed an opposition to Defendants' motion. For the reasons discussed below, Defendants' motion to dismiss will be granted. The deliberate indifference and retaliation claims will be dismissed without prejudice to Reddic filing a new action. The due process claim will be dismissed with leave to amend.

**BACKGROUND**

In his first amended complaint, Reddic alleged that Defendant Ippolito was deliberately indifferent to his safety by telling other inmates information about Reddic that caused at least one other inmate to engage Reddic in a fight. He further alleged that when he complained, Defendant Ippolito and other SVSP officials retaliated against him for his use of the prison

1 administrative grievance system by finding him guilty at a disciplinary proceeding against him.  
2 Finally, Reddic alleged that his due process rights were violated at the disciplinary hearing  
3 because the hearing officer refused to allow him to present a witness and found him guilty  
4 despite insufficient evidence to support such a finding. The court liberally construed the first  
5 amended complaint and found that it stated cognizable § 1983 claims against Defendants for  
6 deliberate indifference to safety, retaliation, and violation of due process.

7 After Reddic had the altercation with the inmate who allegedly engaged him in a fight due  
8 to defendant Ippolito's alleged dissemination of information about him, Reddic received a CDC-  
9 115 rule violation report charging him battery on an inmate with a weapon. At the disciplinary  
10 hearing, Reddic was found guilty. He alleges that he was assessed a 360-day time credit  
11 forfeiture. See First Amended Complaint, ¶ 28. Reddic alleges that he filed an inmate appeal.  
12 In his original complaint, he alleges that the forfeiture of credits was restored during the inmate  
13 appeal process. See Complaint, p. 2. He does not allege that any other discipline – such as a  
14 SHU term -- was imposed as a result of the disciplinary decision.

15 In their dispositive motion, Defendants seek the dismissal of the deliberate indifference  
16 and retaliation claims for failure to exhaust administrative remedies, and seek the dismissal of  
17 the due process claim for failure to state a claim upon which relief can be granted. Reddic has  
18 not opposed the motion.

19  
20 **DISCUSSION**

21 A. Motion To Dismiss For Non-Exhaustion

22 1. Legal Standard For Motion To Dismiss For Non-Exhaustion

23 "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983],  
24 or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility  
25 until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The  
26 State of California provides its inmates and parolees the right to appeal administratively "any  
27 departmental decision, action, condition or policy perceived by those individuals as adversely  
28 affecting their welfare." See Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust available

1 administrative remedies within this system, a prisoner must proceed through several levels of  
2 appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3)  
3 second level appeal to the institution head or designee, and (4) third level appeal to the Director  
4 of the California Department of Corrections and Rehabilitation. See id. § 3084.5; Woodford v.  
5 Ngo, 548 U.S. 81, 85-86 (2006).

6 Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534  
7 U.S. 516, 524 (2002). All available remedies must be exhausted; those remedies "need not meet  
8 federal standards, nor must they be 'plain, speedy, and effective.'" Id. (citation omitted). Even  
9 when the prisoner seeks relief not available in grievance proceedings, notably money damages,  
10 exhaustion is a prerequisite to suit. Id.; Booth v. Churner, 532 U.S. 731, 741 (2001). The statute  
11 requires "proper exhaustion" of available administrative remedies. See Woodford v. Ngo, 548  
12 U.S. at 93.

13 A prisoner's failure to exhaust administrative remedies is a matter in abatement.  
14 Defendants have the burden of raising and proving the absence of exhaustion, and may do so by  
15 way of an unenumerated Rule 12(b) motion. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.  
16 2003). "In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court  
17 may look beyond the pleadings and decide disputed issues of fact." Id. at 1119-20, citing Ritza  
18 v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 368 (9th Cir. 1988). The court  
19 can decide factual issues in a jurisdictional or related type of motion because there is no right  
20 to a jury trial as to that portion of the case, unlike the merits of the case (where there is a right  
21 to a jury trial). See id. Wyatt and Ritza allow this court to resolve factual disputes, but only  
22 with regard to the exhaustion issue.

23  
24 2. Deliberate Indifference Claim

25 Defendants demonstrate that Reddic filed only one inmate appeal that received a  
26 director's level decision, and that appeal concerned only the disciplinary decision. Reddic did  
27 not exhaust the administrative remedies available to him for his claim that Lieutenant Ippolito  
28 was deliberately indifferent to his safety. The inmate appeal Reddic filed did not mention

1 Defendant Ippolito making any comments to other inmates, nor did it raise any alleged  
2 indifference to Reddic’s safety. See Foston Decl., Ex. B.

3 In order to properly exhaust administrative remedies in California, a prisoner must “lodge  
4 his administrative complaint on CDC form 602 and 'describe the problem and action requested.’”  
5 Morton v. Hall, 599 F.3d 942, 946 (9th Cir. 2010) (quoting Cal. Code Regs. tit. 15 § 3084.2(a)).  
6 In light of the absence of any mention in the California regulation about the requisite level of  
7 factual specificity, “‘a grievance suffices if it alerts the prison to the nature of the wrong for  
8 which redress is sought.’” Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009) (quoting  
9 Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)); see, e.g., Morton, 599 F.3d at 946  
10 (grievance that complained of visitation restrictions, and did not mention an assault or theorize  
11 that the visitation restriction imposed was related to the assault, was insufficient to put prison  
12 officials on notice that staff conduct contributed to the assault); O’Guinn v. Lovelock  
13 Correctional Center, 502 F.3d 1056, 1062-63 (9th Cir. 2007) (grievance requesting a lower bunk  
14 due to poor balance resulting from a previous brain injury was not equivalent to, and therefore  
15 did not exhaust administrative remedies for, claims of denial of mental health treatment in  
16 violation of the ADA and Rehabilitation Act). Reddic’s inmate appeal about the disciplinary  
17 proceeding and the punishment imposed did not alert the prison to the nature of the alleged act  
18 of deliberate indifference by Ippolito.

19 Reddic alleged that he wrote a letter to the warden complaining about Defendant  
20 Ippolito’s behavior and stated that a CDC 602 inmate appeal form was enclosed with the letter.  
21 His letter did not exhaust administrative remedies. The statute requires "proper exhaustion" of  
22 available administrative remedies, Woodford v. Ngo, 548 U.S. at 93, and in California that  
23 means pursuing an inmate appeal through to receipt of a director’s level decision. Reddic’s  
24 alleged letter did not follow the mandatory appeal procedure. Defendants have therefore  
25 demonstrated that the CDCR has no record that Reddic ever filed an inmate appeal that (a)  
26 concerned the claim that Lieutenant Ippolito was deliberately indifferent to Reddic’s safety and  
27 (b) received a decision at the director's level before he filed this action.

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1           3.     Retaliation Claim

2           Reddic also did not exhaust the administrative remedies available to him for his claim that  
3 Lieutenant Ippolito and other SVSP officials retaliated against him for his use of the prison  
4 administrative grievance system by finding him guilty at the disciplinary hearing. See First  
5 Amended Complaint, ¶¶ 41-44. The administrative appeal Reddic filed did not mention Defendant  
6 Ippolito or any other SVSP officials basing their disciplinary decisions, or their review of such  
7 decisions, on Reddic’s alleged letter and accompanying grievance to the warden complaining  
8 about Lieutenant Ippolito’s behavior. See Foston Decl., Ex. B. Nor did the grievance address any  
9 CDCR employee harboring any sort of animosity towards Reddic. See id. Instead, the inmate  
10 appeal addressed only the alleged due process violations stemming from the disciplinary  
11 proceeding and the hearing officer’s resulting judgment.

12           Reddic’s inmate appeal addressing his concerns regarding the disciplinary proceeding was  
13 insufficient to “alert the prison to the nature of the wrong for which redress is sought” as to his  
14 retaliation claim. See Griffin, 557 F.3d at 1120. Defendants have demonstrated that the CDCR  
15 has no record that Reddic ever filed an inmate appeal that (a) concerned Reddic’s claim that  
16 Lieutenant Ippolito and other SVSP officials retaliated against him for his use of the prison  
17 administrative appeal system and (b) received a decision at the director's level before he filed  
18 this action.

19           Reddic did not exhaust administrative remedies for the deliberate indifference to safety  
20 and retaliation claims because he never received a director's level decision on those claims, as  
21 required for exhaustion of administrative remedies by a California prisoner. Defendants have  
22 carried their burden to prove non-exhaustion of two of the three claims in this action. Due to  
23 the differences between the unexhausted and exhausted claims, the deliberate indifference to  
24 safety and retaliation claims can be dismissed and the due process claim can proceed. That is,  
25 the entire action need not be dismissed based on the non-exhaustion of just two of the claims.  
26 See Jones v. Bock, 549 U.S. 199, 222-24 (2007) (rejecting "total exhaustion-dismissal" rule);  
27 Lira v. Herrera, 427 F.3d 1164, 1175 (9th Cir. 2005). The dismissal is without prejudice to him  
28 pursuing his deliberate indifference to safety and retaliation claims after he properly exhausts

1 administrative remedies for them, if he is still in custody, or filing a new action on those claims  
2 if he is not in custody.<sup>1</sup>

3 B. Motion To Dismiss For Failure To State A Claim Upon Which Relief May Be Granted

4 Federal Rule of Civil Procedure 12(b)(6) permits a defendant to move to dismiss on the  
5 ground that there is a "failure to state a claim upon which relief can be granted." A motion to  
6 dismiss should be granted if a plaintiff fails to proffer "enough facts to state a claim to relief that  
7 is plausible on its face." Bell Atlantic Corp. v. Twombly , 550 U.S. 544, 570 (2007). The court  
8 "must accept as true all of the factual allegations contained in the complaint," Erickson v.  
9 Pardus, 551 U.S. 89, 94 (2007), and must construe pro se pleadings liberally, Hebbe v. Pliler ,  
10 611 F.3d 1202, 1205 (9th Cir. 2010). The court need not accept as true allegations that are legal  
11 conclusions, unwarranted deductions of fact, or unreasonable inferences. See Sprewell v. Golden  
12 State Warriors , 266 F.3d 979, 988, amended , 275 F.3d 1187 (9th Cir. 2001).

13 Prisoners retain their Fourteenth Amendment right to due process subject to the  
14 restrictions imposed by the nature of the penal system. See Wolff v. McDonnell, 418 U.S. 539,  
15 556 (1974). Although prison disciplinary proceedings do not afford a prisoner the full panoply  
16 of rights due to a defendant in a criminal proceeding, where serious rules violations are alleged  
17 and the sanctions to be applied implicate state statutes or regulations which narrowly restrict the  
18 power of prison officials to impose the sanctions and the sanctions are severe, the Due Process  
19 Clause requires certain minimum procedural protections. See id. at 556-57, 571-72 n.19.

20 Interests that are procedurally protected by the Due Process Clause may arise from two  
21 sources--the Due Process Clause itself and laws of the states. See Meachum v. Fano, 427 U.S.  
22 215, 223-27 (1976). In the prison context, these interests are generally ones pertaining to liberty.

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24 <sup>1</sup>Reddic sent in a change of address notice stating he had been released from prison. If he is not  
25 in custody at the time he files a new action, the exhaustion requirement will not apply to him when he  
26 files that new action because the exhaustion statute applies only to an action brought "by a prisoner  
27 confined in any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(a). Reddic should note  
28 that, based on California Code of Civil Procedure 352.1(a), filing a new complaint on these charges  
would be timely for two years after the date he was released from custody. The fact that the exhaustion  
requirement will not apply if he files the action when he is out of custody does not excuse  
noncompliance with that requirement in this action which was filed while he was in prison. Cf. Vaden  
v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006); McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir.  
2002).

1 Changes in conditions so severe as to affect the sentence imposed in an unexpected manner  
2 implicate the Due Process Clause itself, whether or not they are authorized by state law. See  
3 Sandin v. Conner, 515 U.S. 472, 484 (1995) (citing Vitek v. Jones, 445 U.S. 480, 493 (1980)  
4 (transfer to mental hospital), and Washington v. Harper, 494 U.S. 210, 221-22 (1990)  
5 (involuntary administration of psychotropic drugs)). Deprivations that are less severe or more  
6 closely related to the expected terms of confinement may also amount to deprivations of a  
7 procedurally protected liberty interest, provided that the liberty in question is one of "real  
8 substance." See Sandin, 515 U.S. at 477-87.<sup>2</sup> An interest of "real substance" will generally be  
9 limited to freedom from restraint that imposes "atypical and significant hardship on the inmate  
10 in relation to the ordinary incidents of prison life" or "will inevitably affect the duration of [a]  
11 sentence." Id. at 484, 487.

12 In determining whether a restraint is an "atypical and significant hardship," three  
13 guideposts have been identified to frame the inquiry: whether the challenged condition mirrored  
14 the conditions imposed on inmates in administrative segregation and protective custody; the  
15 duration of the condition and degree of restraint imposed; and whether the discipline will  
16 invariably affect the duration of the prisoner's sentence. See Serrano v. Francis, 345 F.3d 1071,  
17 1078 (9th Cir. 2003); Ramirez v. Galaza, 334 F.3d 850, 861 (9th Cir. 2003). These factors need  
18 not all be present for there to be an atypical and significant hardship. Cf. Serrano, 345 F.3d at  
19 1078 ("Rather than invoking a single standard for determining whether a prison hardship is  
20 atypical and significant, we rely on a 'condition or combination of conditions or factors'").

21 The issue presented by Defendants' motion to dismiss is whether any process was due in  
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23 <sup>2</sup>There is some uncertainty as to whether, in addition to a liberty interest of real substance, there  
24 also must be state statutes or regulations that narrowly restrict the power of prison officials to impose  
25 the deprivation in order for a procedurally protected liberty interest to be found. Compare Sandin, 515  
26 U.S. at 483-84 ("we recognize that States may under certain circumstances create liberty interests which  
27 are protected by the Due Process Clause"), and id. at 486 ("We hold that Conner's discipline in  
28 segregated confinement did not present the type of atypical, significant deprivation *in which a State*  
*might conceivably create a liberty interest*"), with Wilkinson v. Austin, 545 U.S. 209, 223 (2005)  
("After Sandin, it is clear that the touchstone of the inquiry into the existence of a protected, state-  
created liberty interest in avoiding restrictive conditions of confinement is not the language of  
regulations regarding those conditions but the nature of those conditions themselves 'in relation to the  
ordinary incidents of prison life'). The court need not decide that question because Defendants do not  
assert that as a ground for dismissal.

1 light of the punishment imposed. As mentioned earlier, Reddic alleged in his first amended  
2 complaint that his due process rights were violated in the disciplinary proceedings when he was  
3 denied a requested witness and when he was found guilty on insufficient evidence. Defendants  
4 argue that Reddic has not alleged that the disciplinary decision resulted in the deprivation of a  
5 constitutionally protected liberty interest, and therefore the Due Process Clause did not  
6 command that any procedural protections be provided to the inmate. Defendants argue that  
7 Sandin requires dismissal of Reddic's due process claim because Reddic does not allege facts  
8 showing that he was subjected to a restraint that amounted to an atypical and significant hardship  
9 or that the decision inevitably affected the length of his sentence. A 360-day credit forfeiture  
10 was the original discipline imposed on Reddic, but those forfeited time credits later were  
11 restored. See Complaint, p. 2 (alleging "forfeiture of credits restored" after inmate appeal).  
12 With the restoration of the credits, it appears that the length of Reddic's sentence was unaffected.  
13 Reddic also has not alleged any other specific harm that resulted from the disciplinary decision.  
14 His allegation that he suffered "actual injuries, mental/emotional pain, humiliation and fear,"  
15 First Amended Complaint, ¶ 40, does not suffice to plead an atypical and significant hardship.  
16 Defendants' motion to dismiss the due process claim will be granted because Reddic has failed  
17 to state a claim upon which relief may be granted for a due process violation.

18 The complaint will be dismissed with leave to amend the due process claim. In his  
19 second amended complaint, Reddic must allege facts which show that the disciplinary decision  
20 subjected him to an atypical and significant hardship in relation to the ordinary incidents of  
21 prison life or affected the duration of his confinement.

22 Finally, the court makes two observations about the due process claim. Reddic admits  
23 that he engaged in mutual combat with another inmate but alleges that he should not have been  
24 found guilty of battery on an inmate with a weapon (i.e., a knife). See First Amended  
25 Complaint, ¶¶ 16, 23. First, Reddic has come very close to pleading himself out of a claim about  
26 the sufficiency of the evidence. He alleges that the evidence was insufficient to support the  
27 finding of battery on an inmate with a weapon. However, he intimated that a knife had been  
28 found somewhere near the fighting inmates, as he alleged that he asked to have it fingerprinted,



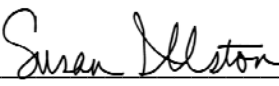
1 see Complaint, p. 5 and First Amended Complaint, ¶ 24. Also, he originally alleged that the  
2 other inmate had "active bleeding from a cut/laceration or slash on the back of his hand,"  
3 Complaint, p. 4, which would appear consistent with that inmate having been stabbed or slashed  
4 with a knife. Because he did not repeat that wound allegation in his first amended complaint,  
5 and because the court must liberally construe pro se pleadings, the court is constrained to allow  
6 the challenge to the sufficiency of the evidence to proceed (assuming that plaintiff is able to  
7 amend to allege facts showing the deprivation of a constitutionally protected liberty interest).  
8 Second, Reddic alleges that he was not allowed to call inmate Bonds as a witness. However, he  
9 alleges that the hearing officer "stipulat[ed] that my inmate witness ("Bonds") would say that I  
10 didn't batter inmate T. Wilson with a weapon." First Amended Complaint, ¶ 28. Reddic does  
11 not allege what additional testimony he would have obtained from inmate Bonds if Bonds had  
12 been called as a witness. If Bonds should have been called but had nothing more helpful to say  
13 than that to which the hearing officer stipulated, it would appear that Reddic only would be  
14 entitled to nominal damages (i.e., one dollar) for such a violation.

### 16 CONCLUSION

17 For the foregoing reasons, Defendants' motion to dismiss is GRANTED. (Docket #17.)  
18 The alleged deliberate indifference and retaliation claims are dismissed without prejudice to  
19 Reddic filing a new action in compliance with any exhaustion requirement. The due process  
20 claim is dismissed with leave to amend to cure the deficiency identified in this order no later  
21 than **July 1, 2011**. Failure to amend will result in dismissal of the action.

22 IT IS SO ORDERED.

23 Dated: June 3, 2011

24   
25 \_\_\_\_\_  
26 SUSAN ILLSTON  
27 United States District Judge  
28